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FORMS
OF
JUDGMENTS AND ORDERS

IN THE
HIGH COURT OF JUSTICE
AND
COURT OF APPEAL,
HAVING ESPECIAL REFERENCE TO THE CHANCERY DIVISION,
WITH
PRACTICAL NOTES,

BY THE LATE
HON. SIR H. W. SETON,
SOMETIME ONE OF THE JUDGES OF THE SUPREME COURT OF CALCUTTA.

THE SIXTH EDITION

BY
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CHAPTER XLV.

SETTLEMENT.

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SECTION IV.—TENANT FOR LIFE AND REMAINDERMAN.

(I.) TIMBER—REPAIRS—POSSESSION AND MANAGEMENT.

FORMS:—1. Inquiry as to timber cut by tenant for life or trustees. 2. Inquiry as to timber, in suit by tenant for life impeachable for waste. 3. Declaration of rights of equitable tenant for life as to timber, and application of proceeds. 4. Investment of proceeds of timber cut in due course of management by tenant for life impeachable for waste—payment of income—application of capital. 5. Application of proceeds of a larch plantation which has been devastated by a storm, in replanting and keeping up the plantation. 6. Order in Chambers for sale of timber by auction—security—payment of proceeds into Court. 7. Declaration that tenant for life of leaseholds not liable to repair. 8. Inquiries as to plate, furniture, &c., and letting mansion, renewing leases, repairs, keeping up roads, and felling timber. 9. Rents to be applied as a whole in keeping down annual charges. 10. Female tenant for life let into possession on terms. 11. Tenant for life let into possession on terms, he giving security—Settled Land Act, 1882, sects. 2 (5), (7), 53, 58 (1) (vi), (ix). 12. Equitable tenant for life let into possession on terms. 13. Another order—clause as to mining leases. 14. Declaration as to construction of “outgoings.” 15. Successive tenants for life of minerals—right to royalties on working—compensation for stoppage of working. 16. Tenant for life let into possession on giving security—delivery of specific effects. 17. Leave for tenant for life to occupy mansion—notice to quit. 18. Trustee ordered to deliver title deeds of the settled property to the tenant for life. 19. Trustees of settlement authorized to raise a sum by mortgage for the purpose of rebuilding the mansion-house. 20. Trustees authorized to sell building lease by auction, and reversion by auction or privately. 21. Trustees of settlement authorized to advance sum to tenant for life on his bond and undertaking. 22. Life estate declared not forfeited—costs charged on life estate - - - 1750—1763

NOTES:—Tenant for life and remainderman—Rights and liabilities—Waste—Mines—Repair and permanent improvements—Interest—Possession—Title deeds—Apportionment—Capital and income 1764—1770

(II.) IMPROVEMENT OF LAND AND LIMITED OWNERS' RESIDENCES ACTS, 1864, 1870, 1871, 1899 (27 & 28 V. c. 114; 33 & 34 V. c. 56; 34 & 35 V. c. 84; 62 & 63 V. c. 46); BOARD OF AGRICULTURE ACT, 1889 (52 & 53 V. c. 30).

FORMS :—1. Order under these Acts authorizing the Board of Agriculture to proceed. 2. The like - - - - Pages 1770, 1771

NOTES - - - - - 1771, 1772

(III.) RENEWING LEASES—ADMISSION TO COPYHOLDS—CONTRIBUTION.

FORMS :—1. Inquiries as to leaseholds, renewals, and receipt of rents. 2. Inquiry as to future management of leasehold estate. 3. Inquiry as to leases renewed—tenant for life to contribute—security. 4. Liability of tenant for life's estate for loss occasioned by not keeping the leasehold and copyhold estates renewed. 5. Payment of fine on renewal by tenant for life—period of ascertaining proportion repayable. 6. Apportionment of expenses of renewal paid by deceased tenant for life—compound and simple interest. 7. Tenant for life to procure admission to copyholds—fines—costs of appointing new trustees, &c. to be raised out of *corpus* by sale or mortgage—tenant for life to contribute and give security. 8. Ecclesiastical lease no longer renewable—application of renewal fund and proceeds of sale—income only given to tenant for life—23 & 24 V. c. 124. 9. The like—renewal fund to be returned to tenant for life—leave to sell leasehold interest in the tithe, and purchase reversion in fee of the glebe from the Ecclesiastical Commrs. 10. Enfranchisement of a rectorial manor, glebe, and demesne, held by testator on lease for lives - - - - - 1772—1779

NOTES :—Obligation to renew—Expenses of renewal—Ecclesiastical leases—23 & 24 V. c. 124 - - - - - 1780—1782

(IV.) PRODUCTION OF CESTUI QUE VIE—6 ANNE, c. 18.

FORMS :—1. Order to produce *c. g. v.* at church porch—6 Anne, c. 18. 2. To produce before Commrs, or the Court. 3. Final order—*c. g. v.* not being produced in Court - - - - 1782, 1783

NOTES :—Production of *c. g. v.* under 6 Anne, c. 18 - - - - 1783, 1784

(V.) DISENTAILING UNDER FINES AND RECOVERIES ACT, 3 & 4 W. IV. c. 74.

FORMS :—1. Consent by Court as protector in case of felony and limited to letting in mortgage—ss. 33, 48, 49. 2. Inquiry as to legal estate—infant—protector—beneficiaries—ss. 33, 48. 3. Order without previous inquiry—infant—money—land—s. 71. 4. Inquiry who is entitled, and as to charge. 5. Further order. 6. Declaration of title, under disentailing deed, to past and future rents, and personal estate to be invested, &c.—s. 71. 7. Point of law—declaration that estate tail under shifting limitation barred - - - - 1784—1786

NOTES - - - - - 1786—1788

SECTION V.—SETTLED ESTATES ACT, 1877 (40 & 41 V. c. 18).

(I.) PRELIMINARY ORDERS AND PROCEEDINGS.

FORMS :—1. Order on summons appointing guardian to infant to make or consent to an application—ss. 49—Settled Estates Act Orders, 1878, 5, 6, 8, 9, 10, 12. 2. Order on summons appointing guardian to infant to be served with notice, or to make a notification under ss. 26, 49. 3. Order on summons authorising committee on behalf of lunatic tenant in tail to make or consent to application, or notify his

assent, dissent, or submission—s. 49. 4. Order for service of notice on person of unsound mind, or *ex jur.*—s. 26. 5. Order dispensing with service of notice. 6. Order for leave to appear after advertisement of the application—s. 31. 7. Order on *ex parte* summons for examination of a married woman—ss. 50, 51 - Pages 1788—1791

(II.) LEASING POWERS.

FORMS:—1. Order vesting powers of granting building, agricultural, or occupation leases. 2. Reservation of rights of class of absent persons on vesting leasing powers—s. 29. 3. Order vesting power to grant mining leases—ss. 4—15. 4. Direction to appoint trustees to exercise leasing powers, or receive rents reserved—ss. 13, 34. 5. Order approving preliminary contract for building leases and vesting powers. 6. Contract for a particular lease approved—ss. 5, 10, 12. 7. Order varied by omitting the direction for settlement of the leases in Chambers—s. 15. 8. New lease to be granted on surrender of the old lease, on terms and conditions set forth in petition - - - - - 1791—1799

(III.) SALES AND RE-INVESTMENTS.

FORMS:—1. Order for sale of estates—s. 16. 2. Direction to appoint trustees for the purpose of receiving proceeds of sale. 3. Minerals excepted from sale—ss. 16, 19. 4. Minerals to be sold separately from surface—ss. 16, 19. 5. Sale of minerals apart from surface. 6. Sale of shares included in settlements and sub-settlements, either separately, or with shares not settled, and with or without minerals—ss. 16, 19. 7. Saving interests of persons not served—s. 29. 8. Contract for sale approved, and to be carried into effect. 9. Inquiry whether sale of timber proper, and if so, leave to apply in Chambers for such sale. 10. Interim investment on mortgage. 11. Order approving agreements for sale of lands, and purchase of ground rents—inquiry as to title—set-off of purchase-moneys—mutual conveyances. 12. Order for sale of estate of infants contingently entitled. 13. Sale of copyholds under Settled Estates Act, 1877, by trustees appointed under Settled Land Act, 1882
1799—1806

(IV.) PROCEEDINGS FOR PROTECTION OF PROPERTY.

FORMS:—1. Order sanctioning proceedings. 2. Inquiry as to Parliamentary opposition - - - - - 1806, 1807

(V.) LAYING OUT FOR STREETS, ROADS, AND OTHER WORKS—DEDICATION.

FORMS:—1. Laying out streets, roads, &c.—ss. 20—22. 2. Laying out part in roads—ss. 20, 21. 3. Laying out parts according to surveyor's report—costs and expenses. 4. The like—trustees to concur with other part owners—acts necessary for dedication—rights of way - - - - - 1807—1810

NOTES:—Jurisdiction—Procedure—Lease—Authorising sales—costs of proceedings for protection of property - - - 1810—1812

SECTION VI.—SETTLED LAND ACTS.

(I.) PRELIMINARY.

FORM:—Titles of orders under Settled Land Acts, 1882 to 1890—formal part of orders under Settled Land Act, 1882 - - 1812, 1813

NOTES:—Settled Land Acts—Settlement—Settled land—Powers of Court—Procedure—Costs under the Acts - - - 1813—1816

(II.) TENANT FOR LIFE.

FORMS:—1. Person appointed to exercise powers of tenant for life under Settled Land Act, 1882, s. 60. 2. The like—on behalf of infant, for purpose of particular contract under ss. 3—5, and 16—20, 31. 3. The like form under ss. 6—13, 16—20, 59—infant tenant in fee simple. 4. The like, infant entitled to undivided moieties—Power to grant building leases—ss. 6—30, 31. 5. The like—general powers within specified limits—ss. 55—60. 6. Tenant for life restrained from mortgaging so as to create a first charge—Settled Land Act, 1882, s. 53—Settled Land Act, 1890, s. 11. 7. Trustees' costs to be paid by tenant for life, or, if not, out of capital - Pages 1816—1819

NOTES:—Tenant for life—Persons having powers of a tenant for life—Infant—Lunatic—Dealings between tenant for life and the estate—Powers of tenant for life—Notice to trustees - - - 1819—1824

(III.) TRUSTEES UNDER THE ACTS.

FORMS:—1. Appointment of trustees for the purposes of the Settled Land Act, 1882, s. 38. 2. The like, on behalf of infant, for purposes of particular sale—ss. 3—13, and 16—20 - - - 1825

NOTES:—Trustees for the purposes of the Act—Appointment by the Court - - - - - 1825—1827

(IV.) LEASES.

FORMS:—1. Order to grant particular lease where no contract has been entered into—ss. 10 or 15. 2. Order to grant particular lease where tenant for life has entered into a contract—ss. 10 or 15. 3. Liberty to grant leases—Settled Land Act, 1882, s. 10. 4. Grants for building purposes pending action in Chancery Division—s. 10. 5. Mining lease—variation according to circumstances of the district—appointment of trustees—infant—concurrence by tenant for life under separate settlements of undivided shares—ss. 6, 10, 38. 6. Order for payment into Court by lessee under a mining lease—s. 11. 7. Lease of mansion-house—s. 15—Act of 1890, s. 10. 8. Applicant declared to be tenant for life—leave to exercise powers of accepting surrenders and making new leases—Settled Land Act, 1882, ss. 6—13, 63, and Act of 1884, s. 7 - - - 1827—1831

NOTES:—Leases - - - - - 1831—1833

(V.) SALES, CONTRACTS, AND OTHER DISPOSITIONS.

FORMS:—1. Order for sale out of Court of mansion-house, or of timber or chattels—ss. 15, 35, or 37—Act of 1890, s. 10. 2. Order for sale by the Court of the mansion-house, &c., or of timber or chattels—ss. 15, 35, or 37—Act of 1890, s. 10. 3. Contracts for sale of mansion-house, &c. confirmed. 4. Leave to tenant for life to sell specific heirlooms—s. 37. 5. Leave to sell specified heirlooms, pending decision of question as to re-investment of proceeds. 6. Declaration as to application of proceeds of heirlooms in discharge of incumbrances. 7. Declaration on sale by tenant for life of settled land that tenant for life has right to convey discharged from jointures—Settled Land Act, 1882, ss. 2 (1), 20 (1) (2), 50, and 58 (1) (iv). 8. Costs incurred by separate solicitors of several persons constituting tenant for life paid out of proceeds of sale. 9. Application of proceeds of sale of heirlooms for repair of unsold heirlooms—salvage—Settled Land Act, 1882, s. 37 (2). 10. Costs of abortive sale charged on settled land—ss. 4, 21 (10), 46 (6), 47, 55 (3). 11. Enforcing contract, &c.—s. 31. 12. Order for payment into Court by purchaser of purchase-money of settled land, timber, or chattels—s. 22 - - - - - 1833—1838

NOTES:—Sales—Mansion-house—Heirlooms—Timber—Contracts—Universities and Colleges Estates Act, 1898 - - - 1838—1840

(VI.) APPLICATION OF MONEY UNDER THE ACTS.

FORMS:—1. Investment—s. 22 (3). 2. Order for application of money paid for a lease or reversion—s. 34 - - - Pages 1840, 1841

NOTES:—Capital money—Payment of capital money into Court—Application of capital money—Investment—Money arising from limited interest - - - - - 1841—1845

(VII.) IMPROVEMENTS AND MANAGEMENT.

FORMS:—1. Scheme for improvement—appointment of surveyor—application of capital money—s. 26. 2. Adopting scheme for improvements under s. 26 to be paid for out of compensation money for land taken by a railway company. 3. Order for leave to apply capital money in improvements—s. 26 (2) (iii). 4. Adopting scheme for improvements to be paid for out of capital money upon the certificate of an architect, to be approved at Chambers—ss. 26, 63. 5. Approval of proceedings before the House of Lords—s. 36. 6. Application of capital money—improvements—mansion-house—alterations and additions with a view to letting—Settled Land Act, 1882, s. 25—Settled Land Act, 1890, s. 13 (ii) - - - - - 1845—1848

NOTES:—Improvements—Scheme—proceedings for protection of land 1848—1851

(VIII.) SETTLEMENT BY WAY OF TRUST FOR SALE - - - 1851, 1852

CHAPTER XLVI.

PARTITION AND SALE.

SECTION I.—ORDERS UNDER THE PARTITION ACTS, 1868, 1876 (31 & 32 V. c. 40; 39 & 40 V. c. 17).

FORMS:—1. Sale at request of persons entitled to less than a moiety—
inquiries whether sale or partition preferable—31 & 32 V. c. 40, s. 3.
2. Sale at request of persons entitled to less than a moiety—31 &
32 V. c. 40, s. 3. 3. The like form—incumbrances. 4. Sale at
request of persons, when ascertained, interested in a moiety or upwards;
s. 4. 5. The like, with inquiry as to incumbrances. 6. Similar
form to last, but with inquiries as to receipt of rents and profits, and
as to particular incumbrancer. 7. Declaration of title—liberty to
bid. 8. The like—substituted service by post of judgment for sale.
9. Inquiries as to shares settled. 10. Account and inquiry as to
permanent improvements by tenant in common. 11. Accounts of
rents and profits, and as to repairs and outgoings. 12. Inquiry as to
rents received, and as to occupation rent. 13. Inquiry whether
contract beneficial, and if not, direction for sale—31 & 32 V. c. 40,
s. 3. 14. Sale (out of Court) instead of partition—share of infant
plt requesting sale to be earmarked as real estate—Partition Act,
1876, s. 6—S. C. F. R. 21—judgment—order on summons in
Chambers—order on further consideration. 15. Sale instead of par-
tition—infant plts entitled to one undivided third—defts to remaining
two-thirds—inquiries in such case—infant plts declared trustees for
purchaser—Partition Act, 1868, s. 4. 16. Undertaking to purchase
infant's share—valuation—31 & 32 V. c. 40, s. 5. 17. Liberty to
bid, and to set off purchase-money—31 & 32 V. c. 40. 18. Liberty
to purchase and bid at sale. 19. Time fixed for distribution of
proceeds of sale, and advertisements directed—39 & 40 V. c. 17, s. 4.
20. Sale of property of a botanic garden company after advertise-

ments for claimants. 21. Order dispensing with service of notice of judgment, and directing advertisements. 22. Subsequent order for sale. 23. Judgment for sale out of Court in partition action under O. LI, 1A, where circumstances special. 24. Sale out of Court in partition action at request of plt and all the defts *sui juris* beneficially interested, with consequent directions—31 & 32 V. c. 40, s. 8. 25. The like, by trustees—costs—distribution of proceeds—31 & 32 V. c. 40, s. 8. 26. Sale of part and partition of part, on further consideration. 27. Alternative order for sale, or for partition on result of inquiries. 28. Short form of judgment where plts admit that all persons interested are not parties to action—Partition Act, 1868, s. 4. 29. Costs of action to recover title deeds - - - - Pages 1853—1872

NOTES:—Right to partition—Title—Partition Acts, 1868, 1876 (31 & 32 V. c. 40; 39 & 40 V. c. 17)—Sale in lieu of partition—request for sale—Sale out of Court—Parties to actions for partition—service—further consideration—Account of rents—Costs - - - - 1872—1881

SECTION II.—PARTITION.

FORMS:—1. Partition in Chambers subject to inquiries directed. 2. Partition in Chambers on further consideration, with directions as to deeds and costs where infant interested. 3. Partition by commissioners named of lands in a colony subject to rent-charges. 4. Special inquiries as to shares—occupation rents—timber cut, and stone, &c. quarried—repairs—accounts—commission of partition to issue. 5. Partition in accordance with agreement—allowance for equality of partition. 6. Partition of advowson—presentation to be alternate—persons under whom debt claimed having presented, plt to have next turn. 7. Next presentation to be by lot, and after presentation advowson to be sold. 8. Costs payable by parties under disability charged on their shares - - - - 1882—1889

NOTES:—Partition by commission, or in Chambers—Conveyances—parties under disability—Title deeds—Partition under the Inclosure Acts, 1845—1876—Partition under Settled Land Acts - - 1889—1892

SECTION III.—ASCERTAINING BOUNDARIES.

FORM:—Ascertaining boundaries of land at suit of grantee of rent-charge - - - - - 1892, 1893

NOTES - - - - - 1893, 1894

FORMS OF JUDGMENTS AND ORDERS.

CHAPTER XXXVII.

MARRIED WOMEN.

SECTION I.—MARRIED WOMAN PLAINTIFF OR DEFENDANT.

1. *Judgment against a Married Woman Deft.*

THE Deft B. [*the married woman*], not having &c., It is adjudged that the Plt do recover against the Deft B. £— and costs, to be taxed, such sum and costs to be payable out of her separate property, as hereinafter mentioned, and not otherwise. And Let execution hereon against the Deft B. be limited to her separate property not subject to any restraint against anticipation, unless by virtue of sect. 19 of the Married Women's Property Act, 1882, such property shall be liable to execution notwithstanding such restraint.—*Scott v. Morley*, 20 Q. B. D. 120, C. A.

2. *Judgment against Woman married after 1870, and before 1883, in respect of an Ante-nuptial Debt—Married Women's Property Act, 1870 (33 & 34 V. c. 93), s. 12.*

It is adjudged that the Plt do recover the sum of £— and costs, to be taxed, against the Deft [*the married woman*], such sum and costs to be payable out of her separate property, whether subject to any restriction against anticipation or not, and not otherwise.—*Axford v. Reid*, 22 Q. B. D. 548, at p. 553, C. A.

3. *Judgment against a Married Woman Plt—Costs—Married Women's Property Act, 1893 (56 & 57 V. c. 63), s. 2.*

THIS action coming on for trial &c., This Court doth order and adjudge that this action do stand dismissed out of this Court, with costs to be taxed by the taxing master and paid by the Plt J. D., the wife of E. D., to the Defts the T. B. Co., Ltd., out of her separate property as hereinafter mentioned, and not otherwise. And that execution thereon against the Plt J. D. be limited to the separate property of the said Plt not subject to any restraint against anticipation, unless by reason of sect. 19 of the Married Women's Property Act, 1882, such property shall be liable to execution notwithstanding such restraint. And It is ordered that the Defts the T. B. Co., Ltd., be at liberty to apply as to enforcing payment of the said costs when taxed out of any property of the Plt which is subject to restraint on anticipation, and otherwise as they may be advised.—*Davies v. The Treharris Brewery Co., Ltd.*, Chitty, J., 21 Nov. 1894, A. 0492; W. N. (94) 128; 13 R. 219.

4. *Another Order against a Married Woman Plt.*

LET the Plt L. A. E. P. (wife of the Deft G. C. S. P.) suing in respect of her separate estate pay to the Deft G. C. S. P. his costs occasioned by this appeal (such costs to be taxed by the taxing master and to be payable out of the Plt's separate property, and not otherwise). And the Deft is to be at liberty to apply for payment of the said costs out of any property of the Plt which is subject to a restraint on anticipation.—*Paget v. P.*, C. A., 24 March, 1893, B. 1089; (1898) 1 Ch. 470, C. A.

5. *Interest of Married Woman Plt charged with Trustees' Costs notwithstanding Restraint.*

UPON motion &c. by counsel for the Defts [*trustees of will and settlement*], and upon hearing the Plt [*married woman*] in person, and upon reading &c., And this Court being of opinion that it has jurisdiction to make an order under sect. 2 of the Married Women's Property Act, 1893, and that it is a proper case to make such order, This Court doth order that it be referred to the taxing master to tax the costs of the Defts of this motion. And It is ordered that the Defts be at liberty notwithstanding the restraint from anticipation imposed by the will of the above-named D. G., deceased, the testator, and the above-mentioned indenture, dated &c., to apply one half of the income accrued, and as it accrues, due of the Plt's settled shares under the said will and indenture in payment of the sum of £—, the amount of their taxed costs of this action and of their said costs of this motion to be taxed as aforesaid.—*Re Godfrey, Thorne George v. G.*, Romer, J., 31 Oct. 1894, A. 0330; 71 L. T. 568; 72 L. T. 8; 43 W. R. 244.

6. *Receiver appointed after Judgment against a Married Woman Plt*
—*Judicature Act, 1873 (36 & 37 V. c. 66), s. 25.*

UPON motion &c. by counsel for the Defts, And upon hearing counsel for the Plt, And upon reading the judgment dated &c., This Court doth appoint the Defts W. H. H. and H. W. without security or salary to receive the share of the Plt up to the value of £270 in the trust property, held upon the trusts of the will of S. A. E., deceased, and all moneys up to the said amount payable in respect of the said share, but this appointment is to be without prejudice to the rights of any prior incumbrancers upon the said share. And it is ordered that the said Defts W. H. H. and H. W. do on the 15th day of November, 1899, and the same day in each succeeding year, leave at the Chambers of the Judge their account as such receivers, and do, within fourteen days after the date of the Master's certificate of the allowance of each account, pay the balance that shall be certified to be due from them on such account in or towards payment of what shall for the time being be due in respect of the said judgment. And it is ordered that the Plt E. C. pay to the Defts their costs of this application, such costs to be taxed by the taxing master, and to be payable out of her separate property, and not otherwise, and the Defts are to be at liberty to apply as to enforcing payment of such costs (following Form 3, *supra*).—See *Cummins v. Perkins*, Kekewich, J., 28 Oct. 1898, A. 3850; (1899) 1 Ch. 16, C. A.

7. *Judgment against a Widow on a Contract made during Coverture*
after the Married Women's Property Act, 1882, and before the
Married Women's Property Act, 1893.

ORDER that the Plt be at liberty to sign judgment for the amount endorsed on the writ with interest and costs, and that as regards the Deft L. P. W. [*the widow*], such sum and costs should be payable out of her separate property as hereinafter mentioned, and not otherwise, And that execution hereon against the Deft L. P. W. be limited to such property as during her coverture was the Deft's separate property not subject to any restraint against anticipation, unless by virtue of sect. 19 of the Married Women's Property Act, 1882, such property shall be liable to execution notwithstanding such restraint.—See *Soflaw v. Welch*, (1899) 2 Q. B. 419, C. A.

NOTES.

By the Married Women's Property Act, 1882 (45 & 46 V. c. 75), s. 1, sub-s. (2), "a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as Plt or Deft, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs

recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise"; and see sect. 1 of M. W. P. Act, 1893, *inf.* p. 889.

By O. XVI, 16, married women may sue and be sued, as provided by the Married Women's Property Act, 1882.

Under O. XVII, 1, a cause or matter shall not become abated by the marriage, &c. of any of the parties if the cause of action survive or continue. By r. 2, in case of the marriage, &c. of any party to a cause or matter, the Court or a Judge may, if it be deemed necessary for the complete settlement of all questions involved in the action, order that the husband, &c. be made a party or be served with notice in manner thereafter prescribed; and r. 4 provides that where by reason of marriage, &c. occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, it becomes necessary or desirable that any person not already a party should be made a party, an order that the proceedings shall be carried on between the continuing parties and such new parties may be obtained *ex parte* on application to the Court or Judge.

An application under r. 4 need not be made in Court, but an order may be obtained as of course: *Roffey v. Miller*, 24 W. R. 109; *Darcy v. Whittaker*, 33 L. T. 778; 24 W. R. 244; *sup.* Vol. I. p. 117.

MARRIED WOMAN PLAINTIFF.

By the Married Women's Property Act, 1882, s. 12, "every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies . . . for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*; but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

A married woman may sue without her husband in respect of a tort committed before the Act, and damages recovered by her so suing belong to her as her separate property under sect. 1, sub-sect. 2: *Weldon v. Winslow*, 13 Q. B. D. 784, C. A.; *Weldon v. De Bathe*, 14 Q. B. D. 339, C. A.; *James v. Barraud*, 49 L. T. 300; 31 W. R. 786; and, *semble*, that sub-section, notwithstanding the use of the words "such action," is not necessarily confined to actions by the wife solely, but will apply though the husband is joined: *Beasley v. Rooney*, (1891) 1 Q. B. 509; but see *Weldon v. Winslow*, 13 Q. B. D. 784, 788, C. A.

Where two married women presented a petition for appointment of new trustees, the husbands being joined as co-petitioners, the petition was amended by striking out the names of the husbands: *Re Outwin*, 27 Sol. J. 276.

A female Plt should be described in the writ as "spinster," "widow," or "married woman"; and so in an originating summons: *Re Poinons, Sutton v. Martin*, W. N. (91) 139.

As to the right of a married woman to sue in respect of her interest in a partnership of which she is a member, see *Eddowes v. Argentine Loan Co.*, 62 L. T. 603; 63 L. T. 364.

The sole undertaking of a married woman as to damages is sufficient where she as sole Plt is entitled to an injunction: *Re Prynn*, 53 L. T. 465; W. N. (85) 144; and see *Pike v. Cave*, 62 L. J. Ch. 937; 68 L. T. 650.

A married woman was held to become "discovert" within the Statute of Limitations (21 Jac. 1, c. 16), s. 7, at the date of the Married Women's Property Act, 1882, so that time ran against her as from that date: *Lowe v. Fox*, 15 Q. B. D. 667, C. A.; *Weldon v. Neal*, 51 L. T. 289; 32 W. R. 828, C. A.

A married woman suing alone cannot be required to give security for costs though she has no separate property available for execution: *Re Isaac, Jacob v. I.*, 30 Ch. D. 418; 12 App. Ca. 206; *Threlfall v. Wilson*, 8 P. D. 18; *secus*, where she is appealing without a next friend: *Whittaker v. Kershaw*, 44 Ch. D. 296, C. A.; or if she chooses to sue by a next friend, because then he alone is liable to the Deft for costs: *Re Thompson, Stevens v. T.*, 38 Ch. D. 317, C. A.

An application by a husband against his wife for damages under an undertaking given by her on an injunction subsequently dissolved, is not in the nature of an action of tort within sect. 12: *Hunt v. H.*, W. N. (86) 243; 54 L. J. Ch. 289.

Money recovered by a married woman in an action under the Act can be attached to answer a judgment against her: *Holtby v. Hodgson*, 24 Q. B. D. 103, C. A.; but money awarded as damages to the wife in an action by her and her husband in respect of personal injuries to her cannot be attached in the hands of their solicitor to answer a judgment debt of the husband: *Beasley v. Rooney*, (1891) 1 Q. B. 509.

Where a married woman, suing under the Act of 1882, is ordered to pay costs, separate property, bound by a restraint on anticipation when the action was commenced, but becoming free before the order is made, can be made available to answer the costs: *Cox v. Bennett*, (1891) 1 Ch. 617, C. A.; and *v. inf.* p. 894; *Re Andrews, Edwards v. Dewar*, 30 Ch. D. 159; *secus*, where she sues by a next friend: *Re Glanvill, Ellis v. Johnson*, 31 Ch. D. 532, C. A.

Next Friend.

The effect of the recent Act and O. XVI, 16, is to render the former practice, under which a married woman sued as Plt by a next friend (as to which see Seton, 4th ed. pp. 657 *et seq.*), in most cases obsolete; but *quære* whether she should not in some cases still sue by a next friend: *Re Jordan, Kino v. Picard*, W. N. (86) 6; 55 L. J. Ch. 330; 54 L. T. 127; 34 W. R. 270.

An action by a married woman suing by a next friend will be dismissed with costs if the next friend does not, when challenged, produce his authority to commence the action: *Schjott v. S.*, 19 Ch. D. 94, C. A.

As sect. 1, sub-sect. 2, is limited to actions relating to the married woman personally, it does not remove her incapacity to act as next friend or guardian *ad litem*: *Re D. of Somerset, Thynne v. St. Maur*, 34 Ch. D. 465.

Where a married woman sued by a next friend, and the action was dismissed because he made default in giving security for costs, a second action by another next friend against the same Defts for the same objects was stayed until their taxed costs of the first action were paid: *Re Payne, Randle v. Payne*, 23 Ch. D. 288, C. A.; and it is the duty of a married woman to select a next friend who is able to pay costs, if necessary: *S. C.*

The Court has now judicial discretion to direct a next friend to give security for costs at any time: *Martano v. Mann*, 14 Ch. D. 419, C. A.

The next friend of a married woman Plt, although she might have sued without a next friend, is liable for the Plt's costs so long as his name is on the record: *Re Glanvill, Ellis v. Johnson*, 31 Ch. D. 541, C. A.

Costs of Married Woman Plaintiff.

By the Married Women's Property Act, 1893 (56 & 57 V. c. 63), s. 2, "in any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

The section applies to an action commenced prior to, and pending, at the date of the passing of the Act (Dec. 5, 1893): *Re Godfrey, Thorne George v. Godfrey*, 43 W. R. 244; 72 L. T. 8; W. N. (95) 12; 63 L. J. Ch. 854, C. A.; but not to an order for payment of costs made before the Act came into operation: *Re Lumley, Exp. Hood-Barre*, (1894) 3 Ch. 135, C. A.

The words "action or proceeding instituted" mean some action initiated by a woman as Plt, and do not include any motion made or step taken by a Deft, *e.g.*, an appeal by a married woman Deft in an action which has been dismissed with costs: *Hood-Barre v. Cathcart*, (1894) 3 Ch. 376, C. A.; approved in *Hood-Barre v. Heriot*, (1897) A. C. 177, H. L.; or the entry of a caveat by a married woman against a will which resulted in an executor's probate action to which she was made a Deft: *Moran v. Place*, (1896) P. 214,

O. A.; or a petition presented by a married woman Deft: *Hollington v. Dear*, W. N. (95) 35; or a written claim to goods in interpleader: *Nunn v. Tyson*, (1901) 2 K. B. 487; but a counterclaim by a married woman Deft being in the nature of a cross-action is a "proceeding instituted" within the meaning of the section: *Hood-Barrs v. Cathcart*, (1895) 1 Q. B. 873.

A married woman who had unsuccessfully brought an action against the trustees of a settlement and will alleging breaches of trust was ordered to pay their costs as between solr and client, the restraint on anticipation of her interest being removed so far as was necessary to enable her to do so: *Re Godfrey, Thorne George v. Godfrey*, 71 L. T. 86; 63 L. J. Ch. 854; W. N. (95) 12; one half of the income being applied yearly by the trustees towards the payment of the taxed costs until the whole sum was repaid: *Re Godfrey, Thorne George v. Godfrey*, 71 L. T. 568; 72 L. T. 8; 43 W. R. 244; see Form 5, *sup.* p. 886.

Where an action by a married woman is dismissed with costs, the words "with liberty to apply for payment out of any property which is subject to a restraint on anticipation" should be added to the order: *Davies v. Treharris Brewery Co.*, W. N. (94) 198; Form 3, *sup.* p. 886.

Where an order has been made dismissing an application by the Deft a married woman with costs, the Court or a Judge has power in a subsequent order appointing a receiver to direct that those costs should be paid out of property subject to a restraint on anticipation: *Hood-Barrs v. Cathcart*, (1895) 1 Q. B. 873.

Under Married Women's Property Act, 1870.

By the Married Women's Property Act, 1870, s. 11 (re-enacted in substance by sects. 1 and 5 of the Act of 1882), a married woman might maintain an action in her own name for the recovery of any wages, earnings, money, and property, by that Act declared to be her separate property, or of any property belonging to her before marriage and which her husband should, by writing under his hand, have agreed with her should belong to her after marriage as her separate property, and was to have in her own name the same remedies against all persons whatsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman. Under this section a married woman could maintain an action in her own name against a wrongdoer for her expulsion from a beerhouse in which she carried on business separately from her husband, and for loss of profits, stock in trade, and fixtures which she had purchased with her separate earnings: *Moore v. Robinson*, 48 L. J. Q. B. 156.

MARRIED WOMAN DEFENDANT—LIABILITY TO BE SUED.

Under Married Women's Property Act, 1882.

The liability of the married woman, under sect. 1, sub-sect. 2, of the Act of 1882 (*v. sup.* p. 887), to be sued otherwise than in contract is general: *Whittaker v. Kershaw*, 45 Ch. D. 320, O. A.; but, independently of the Act of 1893 (*v. inf.* p. 891), her liability under the sub-section to be sued in contract depends upon the possession by her of separate property, free from any restraint on anticipation (see sect. 19) at the time of entering into the contract: *Stogdon v. Lee*, (1891) 1 Q. B. 661, C. A.; *Palliser v. Gurney*, 19 Q. B. D. 519; *Re Shakespear, Deakin v. Lakin*, 30 Ch. D. 169; *Pelton v. Harrison*, (1891) 2 Q. B. 422, C. A.; *Braunstein v. Lewis*, 64 L. T. 265; *Everett v. Paxton*, 65 L. T. 383; *Softlaw v. Welch*, (1899) 2 Q. B. 419, C. A.; Form 7, *sup.* p. 887; therefore, Plt suing her on a contract entered into before the Act of 1893, must prove that she had at the time of entering into the contract free separate property, as to which she might reasonably be deemed to have contracted: *S. CC.*; *Leak v. Driffeld*, 24 Q. B. D. 98 (not, *e.g.*, the clothes of herself and children, *S. C.*); *secus*, where the action is not grounded on contract, *e.g.*, to enforce a liability on her part to refund to or indemnify exors or trustees: *Whittaker v. Kershaw*, *sup.*; and his statement of claim must contain an allegation that she has separate property: *Tetley v. Griffith*, W. N. (87) 218; 36 W. R. 96; 57 L. T. 673.

As the Act refers to future contracts, it does not enlarge the liability of the married woman to be sued in respect of engagements or contracts entered into previously to the Act: *Re Roper, R. v. Doncaster*, 39 Ch. D. 482, 487; *Conolan v. Leyland*, 27 Ch. D. 632; *Re March, Mander v. Harrie*, 27 Ch. D. 166, C. A.; *Turnbull v. Forman*, 15 Q. B. D. 234, C. A.

A wife is liable to be sued by her husband for money lent by him to her after their marriage, or paid by him for her after their marriage at her request made before or after the marriage: *Butler v. B.*, 16 Q. B. D. 374, C. A.; but not for money lent to her or paid for her before their marriage, as the Act of 1882 has not destroyed the common law doctrine of unity of person: *S. C.*, 14 Q. B. D. 831.

Under Married Women's Property Act, 1893.

By the Married Women's Property Act, 1893 (56 & 57 V. c. 63), s. 1, "every contract hereafter entered into by a married woman, otherwise than as agent,—(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not, in fact, possessed of or entitled to any separate property at the time when she enters into such contract; (b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and (c) shall also be enforceable by process of law against all property which she may thereafter, while discoverd, be possessed of or entitled to; provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating." The proviso applies to all the preceding clauses, and therefore has been held to protect income, subject to a restraint on anticipation, which has accrued due after the divorce of the *feme*: *Barnett v. Howard*, (1900) 2 Q. B. 784, C. A.

Generally.

The trustees of the separate property are not necessary parties: *Pike v. Fitzgibbon*, 17 Ch. D. 454, C. A.; *Re Peace and Waller*, 24 Ch. D. 405, 407, C. A.; *Picard v. Hine*, 5 Ch. 274; *Davies v. Jenkins*, 6 Ch. D. 728; *Flower v. Buller*, 15 Ch. D. 665; *Durrant v. Ricketts*, 8 Q. B. D. 177; but any order made in their absence must be without prejudice to any claims they may have against the trust estate: *Collett v. Dickenson*, 11 Ch. D. 687, Form 6, *inf. p.* 898, *Re Peace and Waller, sup.*

The Court will not grant an injunction to restrain the married woman from dealing with her separate estate until the Plt has established his right by obtaining judgment: *Robinson v. Pickering*, 16 Ch. D. 660, C. A.; *Nat. Prov. Bank v. Thomas*, 24 W. R. 1013.

It has now been decided (notwithstanding authority to the contrary, see *Hodgson v. Williamson*, 15 Ch. D. 87; *Vaughan v. Walker*, 6 Ir. Ch. Rep. 471; 8 Ir. Ch. Rep. 458; *Norton v. Turvill*, 2 P. W. 144) that the defence of the Statute of Limitations is available in respect of a claim against the separate estate of a married woman: *Re Lady Hastings, Hallet v. Hastings*, 35 Ch. D. 94, C. A.; and see *Re Roper, R. v. Doncaster*, 39 Ch. D. 482, 489.

A divorced wife should be sued in her maiden name: see *Evans v. Carrington*, 6 Jur. N. S. 268; 7 Jur. N. S. 197; 29 L. J. Ch. 330; 1 L. T. 229; 8 W. R. 113; *Hamer v. Tilsley*, 8 W. R. 20; 1 Johns. 486; 29 L. J. Ch. 32; 5 Jur. N. S. 1344.

Ante-nuptial Debts.

By the Married Women's Property Act, 1882, s. 13, "A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint-stock cos; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof or for any costs relating thereto shall be payable out of her separate property; and as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily

liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed, or otherwise, if this Act had not passed."

A judgment debt recovered against a married woman during a former coverture is a debt contracted before her marriage within this section: *Jay v. Robinson*, 25 Q. B. D. 467, C. A.; *Pelton v. Harrison*, (1891) 2 Q. B. 422, C. A.

By s. 15, the husband and wife may be jointly sued for the ante-nuptial debts or liabilities, but if it appears that the husband is not liable (as to which *v. inf.* p. 919) he is to have judgment for his costs of defence whatever may be the result of the action against the wife; and if it appears that he is liable for the debt or damages recovered or any part thereof the judgment to the extent of the amount for which the husband is liable is to be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue a separate judgment against the wife as to her separate property only.

As to the liability of the separate property in respect of ante-nuptial debts, *v. inf.* pp. 903, 918.

JUDGMENT AGAINST MARRIED WOMAN.

Form.

Under the Act of 1882, judgment against a married woman, having regard to sect. 1, sub-sect. 2, and sect. 19, must expressly state that execution is to be limited to her separate property not subject to any restraint on anticipation, unless by reason of sect. 19 of the Act the property be liable to execution notwithstanding such restraint: *Scott v. Morley*, 20 Q. B. D. 120, 132; see Form 1, *sup.* p. 885; and see *Bursill v. Tanner*, 13 Q. B. D. 691; *Nicholls v. Morgan*, 16 L. R. Ir. 409; *Johnstone v. Browne*, 18 L. R. Ir. 428.

Where the action is grounded on the contract of a married woman, who has subsequently become discover, entered into by her during coverture after the passing of the M. W. P. Act, 1882, and before the passing of the M. W. P. Act, 1893 (*v. sup.* p. 891), the judgment must be according to the form in *Scott v. Morley*, with such verbal alterations as are necessary to adapt that form to a judgment against a widow: *Softlaw v. Welch*, (1899) 2 Q. B. 419, C. A.; Form 7, *sup.* p. 887; see *Pelton v. Harrison*, (1891) 2 Q. B. 422, C. A.; *Stogdon v. Lee*, (1891) 1 Q. B. 661, C. A.; *Palliser v. Gurney*, 19 Q. B. D. 519; *Re Shakespear*, *Deakin v. Lakin*, 30 Ch. D. 169; *Re Wheeler's Settlement*, *Briggs v. Ryan*, (1899) 2 Ch. 717, C. A.

As to the form of judgment where the husband and wife are jointly sued for an ante-nuptial debt or liability, see *Married Women's Property Act*, 1882, s. 15, *sup.*

In respect of an ante-nuptial debt the liability of the wife at common law is unaffected by the M. W. P. Act, and a personal judgment may go against her: *Robinson & Co. v. Lynes*, (1894) 2 Q. B. 577; *Axford v. Reid*, 22 Q. B. D. 548, 553, C. A.; *sup.* Form 2, p. 885 (explaining *Downe v. Fletcher*, 21 Q. B. D. 11); *London and Provincial Bank v. Bogle*, 7 Ch. D. 773; *Re Hedgeley*, *Small v. H.*, 34 Ch. D. 379.

Where a married woman administratrix is ordered to pay into Court a sum of money belonging to the estate of the intestate, and shown by her account of the intestate's personal estate to be in her possession, and there is no evidence that she has committed a devastavit, the order should be in the common form, and if she fails to comply with the order the Court has jurisdiction to make an order for attachment against her: *In re Turnbull*, (1900) 1 Ch. 180. But *semble*, if the object of the order were not to secure the fund, but to compel her to make good loss by her devastavit, the order must be in the form prescribed in *Scott v. Morley*, *sup.* p. 885, and no attachment for non-compliance with it could go: *S. C.*

A judgment recovered against the separate estate of a married woman in

respect of an engagement not within the Act of 1882 binds only so much of the separate estate as the married woman was entitled to at the time when the engagement was entered into, and as remains undisposed of at the time of the judgment, and does not affect separate estate acquired subsequently to the engagement: *Pike v. Fitzgibbon*, 17 Ch. D. 454, C. A. (reversing *S. C.*, 14 Ch. D. 837, and *Flower v. Buller*, 15 Ch. D. 665); *Chapman v. Biggs*, 11 Q. B. D. 27; and, therefore, the proper inquiry to be inserted in the judgment is, what was the separate estate which the married woman had at the time of contracting the debt or engagement, and whether that separate estate or any part of it still remains capable of being reached by the judgment and execution of the Court: *Pike v. Fitzgibbon*, 17 Ch. D. 454, C. A.; see Form 4, *inf.* p. 897; and see *Durrant v. Ricketts*, 8 Q. B. D. 177; *Gloucestershire Banking Co. v. Phillips*, 12 Q. B. D. 533; *Gallagher v. Nugent*, 8 L. R. Ir. 353; *Re Roper, R. v. Doncaster*, 39 Ch. D. 482, 491; *Lewin*, 946—948.

Property settled on a *feme sole* for her separate use, with restraint on anticipation during coverture, will not, on her marriage subsequently to the Act of 1882, be protected against her ante-nuptial creditors: *Kirk v. Murphy*, 30 L. R. Ir. 508.

Judgment by Default.

When application is made for judgment against a married woman in default of appearance, inasmuch as the execution will, by the judgment be limited in the manner directed in *Scott v. Morley*, *sup.* p. 885, it will not be necessary in any case to require an allegation to be inserted in the statement of claim that the married woman was entitled to separate estate at the time the contract was entered into: *P. M. R.* 17.

Effect of Judgment.

Judgment in the form in *Scott v. Morley*, *sup.* p. 885, is not a judgment against the married woman personally, and therefore does not constitute a "debt due from her" within sect. 5 of the Debtors Act, 1869, capable of being enforced by committal: *Scott v. Morley*, *sup.*; *Meager v. Pellew*, 14 Q. B. D. 973, C. A.; *Draycott v. Harrison*, 17 Q. B. D. 147; *Jay v. Robinson*, 25 Q. B. D. 467, 474, C. A.; or upon which (apart from sect. 1, sub-sect. 5 of the Act of 1882) bankruptcy proceedings can be grounded against her: *Re Gardiner, Exp. Coulson*, 20 Q. B. D. 249; *Exp. Jones, Re Grissell*, 12 Ch. D. 484, C. A.; *Re Elliott* (1900), 2 I. R. 439; though she is trading separately from her husband under a firm name: *Re Frances Handford & Co.*, (1899) 1 Q. B. 566, C. A.; or has become discover by the death of her husband after the judgment: *Re Hewett, Exp. Levene*, (1895) 1 Q. B. 328; but it is a "judgment" within O. XLV, 1, enforceable by garnishee proceedings: *Holby v. Hodgson*, 24 Q. B. D. 103, C. A.; and see *Softlaw v. Welch*, (1899) 2 Q. B. 419, C. A.

And as the execution is (in conformity with sect. 1, sub-sect. 2 of the Act, *sup.* p. 887) limited to the free separate property of the *feme* at the time when judgment is recovered, money, subject to a restraint on anticipation, which accrues due to her after the judgment cannot be affected by any kind of process (receiver, sequestration, charging order or otherwise): *Hood-Barrs v. Cathcart*, (1894) 2 Q. B. 559, C. A.; *Whiteley v. Edwards*, (1896) 2 Q. B. 48, C. A.; *Galmoye v. Cowan*, 58 L. J. Ch. 769; and see *Chapman v. Biggs*, 11 Q. B. D. 27; *Cox v. Bennett*, (1891) 1 Ch. 617, C. A.; but income, subject to a restraint on anticipation, and accrued due at or before the date of the judgment is for this purpose free separate property: *Hood-Barrs v. Heriot*, (1896) A. C. 174, reversing C. A., (1895) 2 Q. B. 212, and overruling the reasoning in *Hood-Barrs v. Cathcart*, (1894) 2 Q. B. 559, 570, C. A.

If she has no separate property, she cannot be imprisoned for non-payment of the costs of the action: *Re Walker*, 55 J. P. 551.

The rule of *King v. Hoare*, 13 M. & W. 494, and *Kendall v. Hamilton*, 4 App. Ca. 504, whereby judgment recovered against one of two joint contractors is a bar to an action against the other, applies to the case of a married woman contractor, in respect of her separate property: *Hoare v. Niblett*, (1891) 2 Q. B. 781, C. A.; but judgment against her is no bar to a judgment

against her husband, as his is not a joint liability within the rule: *Beck v. Pierce*, 23 Q. B. D. 316, C. A.

Execution.

The remedy against the property of the married woman vested in trustees for her for her separate use has been in the nature of equitable execution, by the appointment of a receiver (who does not interfere with the possession of the trustees, but receives from them what they would otherwise pay to the *feme*: *Re Peace and Waller*, 24 Ch. D. 405, C. A.), or by a direction to the trustees to pay; and if any proceedings are pending between the married woman and her creditor, the order may be obtained in such proceedings without instituting a fresh action: *Re Peace and Waller*, *sup.*; *M'Gurry v. White*, 18 L. R. Ir. 322; and this mode of execution is available, though the interest of the wife is reversionary only: *Fuggle v. Bland*, 11 Q. B. D. 711; and the Plt, who had obtained judgment against husband and wife, was, upon his *ex parte* application, appointed receiver of the income of such interest, if any: *S. C.* (followed in *Tyrrell v. Painton*, (1895) 1 Q. B. 202, C. A.).

A direction that an inquiry is to be held as to the estate of a married woman against whom judgment has been obtained, with a view to ascertain if she has separate property free from restraint on anticipation, does not authorize the examination of any person other than the judgment debtor: *Hood-Barrs v. Heriot*; *Exp. Blyth*, (1896) 2 Q. B. 338, C. A.; and as to the jurisdiction of the Court to enforce by attachment a judgment against her in respect of money proved to have come into her hands as admix, see *Re Turnbull*, (1900) 1 Ch. 180, *sup.* p. 892.

An order for payment of costs by a married woman, suing without a next friend under the Act of 1882, may be enforced against any separate property to which she is entitled, free from restraint on anticipation, at the time when the order is made: *Cox v. Bennett*, (1891) 1 Ch. 617, C. A.; and if the order is for payment to the trustees in whose hands the arrears are, they may retain the money in discharge of the costs: *Ibid.*

Costs payable to a widow may be set off against costs given against her during coverture in a previous action by her: *Pelton v. Harrison* (No. 2), (1892) 1 Q. B. 118, C. A.

ACTION AGAINST HUSBAND.

By the Married Women's Property Act, 1882, s. 14, a husband is to be liable for the debts of his wife contracted, and for all contracts entered into, and wrongs committed by her, before marriage (including her liability as a contributory under the Acts relating to joint stock cos), "to the extent of all property whatsoever belonging to his wife, which he shall have acquired, or become entitled to, from or through his wife, after deducting any sums for which judgment may have been *bond fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any Court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property. Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act, for or in respect of any such debt or other liability of his wife as aforesaid."

The Act does not abolish the general liability of a husband for the wrongful act of his wife which is not in the nature of a breach of trust or devastavit (*v. s. 24, inf. p. 924*): *Seroka v. Kattenburg*, 17 Q. B. D. 117; nor the means of effecting a contract by her, but committed independently of it: *Earle v. Kingscote*, (1900) 1 Ch. 203; (1900) 2 Ch. 585, C. A.; *Liverpool Adelphi Loan Association v. Fairhurst*, 9 Ex. 422; *Wright v. Leonard*, 11 C. B. N. S. 258.

The husband cannot be made liable under the Act on a cause of action which is barred as against the wife by the Statute of Limitations, nor will acknowledgment or part payment by her keep such cause of action alive as against him : *Beck v. Pierce*, 23 Q. B. D. 316.

As to service on husband and wife, *v. sup.* Vol. I. p. 10.

By the Married Women's Property Act, 1870, s. 12, a husband was not to be liable by reason of any marriage after the Act for the debts of his wife contracted before marriage. By the Amendment Act of 1874 (37 & 38 V. c. 50) his liability was restored, but confined to the extent of the property of the wife, as enumerated in s. 5, received or which ought to have been received by him ; but if he did not claim the limit to his liability, he was liable as at the common law. If, therefore, he relied on the Act, he was put to claim the benefit of it in his defence : *Matthews v. Whittle*, 13 Ch. D. 811. This liability of the husband ceased on the death of his wife : *Bell v. Stocker*, 10 Q. B. D. 129 ; and he was not liable for a debt contracted by the wife before the marriage in Jersey, although by the law of that island a husband is liable to the ante-nuptial debts of his wife : *De Greuchy v. Wills*, 4 C. P. D. 362 ; and as to the effect of the section, see *Fear v. Castle*, 8 Q. B. D. 380.

Notwithstanding the Act of 1874, a husband was held liable in full, as contributory under sect. 78 of the Companies Act, 1862, in respect of shares held by his wife : *Re W. of England Bk., Exp. Hatcher*, 12 Ch. D. 284 ; but see *Buckley*, 234 ; and see now sect. 14 of the Act of 1882, *sup.* p. 894.

SUMMARY DECISION OF QUESTIONS BETWEEN HUSBAND AND WIFE AS TO PROPERTY.

By the Married Women's Property Act, 1882, s. 17, "in any question between husband and wife, as to the title to or possession of property, either party, or any bank, corporation, company, public body, or society, in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any Judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant, irrespectively of the value of the property in dispute) in England to the Judge of the County Court of the district . . . and the Judge of the High Court of Justice, or of the County Court . . . (as the case may be), may make such order with respect to the property in dispute, and as to the costs of and consequent on the application, as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a Judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same Judge in a suit pending, or on an equitable plaint in the said Court would be ; and any order of a County . . . Court, under the provisions of this section, shall be subject to appeal in the same way as any other order made by the same Court would be, and all proceedings in a County Court . . . under this section, in which, by reason of the value of the property in dispute, such Court would not have had jurisdiction if this Act, or the Married Women's Property Act, 1870, had not passed, may, at the option of the Deft or respondent to such proceedings, be removed as of right into the High Court of Justice . . . by writ of certiorari or otherwise, as may be prescribed by any rule of such High Court ; but any order made, or act done in the course of such proceedings, prior to such removal, shall be valid, unless order shall be made to the contrary by such High Court : Provided also, that the Judge of the High Court of Justice, or of the County Court, . . . if either party so require, may hear any such application in his private room : Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only."

For form of application under the section, see D. C. F. 1244.

SECTION II.—SEPARATE ESTATE.

(1.) SEPARATE ESTATE INDEPENDENT OF STATUTE.

1. *Judgment establishing and directing Payment of a Claim by a Creditor against a Married Woman's Separate Estate.*

"DECLARE that Deft M. is justly and truly indebted to Plt in the sum of £146 19s. 8d., the amount of the bill of exchange in the pleadings mentioned, and interest thereon, and in the sum of £80, the amount of the cheque therein mentioned; And Let the following &c.:

1. An account of what is due in respect of the said sums and interest;
2. An account of the separate estate of Deft M.; And Let what on the first-mentioned account shall be certified to be due be paid out of the separate estate of Deft M. to the Plt together with his costs of action, such costs to be taxed, &c."—Liberty to apply as to payment, and generally as advised.—*McHenry v. Davies*, M. R., 8 March, 1870, B. 1210; S. C., 10 Eq. 88.

But as to the proper form of the inquiry as to separate estate, see *Pike v. Fitzgibbon*, *inf.* Form 4, and p. 899.

For declaration as to the liability of a wife's separate estate under and by virtue of her guaranty for her husband's debt, with account and inquiry, and liberty to Plt to apply as to raising the amount certified to be due, and taxed costs, by sale or mortgage of the separate estate, see *Morrell v. Cowan*, 1877, B. 1286; 25 W. R. 808; reversed, 7 Ch. D. 151, C. A.

2. *Judgment charging a Married Woman's Interest after her Husband's Bankruptcy with her Debts incurred before Marriage.*

"DECLARE that the said W. Banking Co. are entitled to a charge upon all the interest of the Deft M. S. under the indenture of settlement &c. during the joint lives of the Defts H. S., and M. S. his wife, for the sums due to the said Banking Co. in respect of the bills of exchange and promissory notes in the bill [*statement of claim*] mentioned, including the Plt's [*the registered public officer*] costs of this action, and that Deft H. [*trustee*] is entitled to take any costs incurred by him in this action separately from the other Defts out of the life interest of the Deft M. S. under the said settlement in priority to the Plt's charge."—Account of what is due to the Banking Co. in respect of the said bills of exchange and promissory notes according to the said declaration, and for Plt's costs of this action, to be taxed; And Let the Deft H., the trustee of the said settlement, after retaining his said costs (if any) to be taxed by the taxing master, pay and apply the said life interest in payment and satisfaction of what shall be certified to be due to the Plt on taking the said account.—No costs allowed to Defts H. S. and wife.—See *Chubb v. Stretch*, V.-C. J., 18 Feb. 1870, A. 524; 9 Eq. 555.

For a declaration that, under the circumstances of the case, E. I. stock, separate property of a married woman, vested in the trustee of her marriage settlement, was to be considered as the property of a *feme sole*, and as such

liable in equity to make to Plt satisfaction for so much of the debt contracted by her while a *feme sole* as he has not been able to recover by means of the outlawry of her husband; with an account of what remained due to Plt, taxation of costs and payment of debt and costs by a sale of the stock standing in the names of the married woman and her trustee, see *Biscoe v. Kennedy*, 1 Bro. C. C. 17, n.; followed in *Chubb v. Stretch*, *sup.* p. 896.

For declaration in a suit to administer the husband's estate, that the business (continued after marriage with the husband's permission as a separate business), stock-in-trade, and utensils, as such existed on the day of the marriage, and all accumulations since that time, belong to the widow in her own right, see *Ashworth v. Outram*, V.-C. M., 13 March, 1877, A. 659; affirmed, C. A. 17 May, 1877, A. 979; 5 Ch. D. 923, C. A.

3. *Separate Estate charged with Debt.*

DECLARE that such of the separate property of the Deft F. as was immediately before the death on &c. of her husband K., and at this present date is vested in her or in any other person or persons in trust for her, excluding any separate property which during coverture she was restrained from anticipating, is chargeable with the payment of the amount now due to the Plts under the covenants contained in the indentures dated &c., and with the Plts' costs of this action. And Let the same stand charged therewith accordingly.—*Pike v. Fitzgibbon*, V.-C. M., as varied by the Court of Appeal, 5 May, 1880, B. 1326; 28 March, 1881, B. 603; 17 Ch. D. 454, C. A.

The appeal in this case was from so much only of the judgment of the V.-C. as declared that the separate estate which, during coverture, the married woman was restrained from anticipating was chargeable, and the Court of Appeal varied the judgment of the V.-C. by substituting the word "excluding" for "including."

As to the effect, since M. W. P. Act, 1882, of the death of the husband in removing the restraint, see *Re Wheeler's Settlement*, (1899) 2 Ch. 717.

4. *Inquiry as to Separate Estate.*

INQUIRE what separate estate the said [married woman] had at the time of contracting the debt or engagement in question, and whether that separate estate, or any part of it, still remains capable of being reached by the judgment and execution of the Court.—See Report of *Pike v. Fitzgibbon*, 17 Ch. D. at p. 461, C. A.

5. *Judgment charging against her Separate Estate a Debt incurred by a Married Woman.*

DECLARE that the separate property of the Deft S. H., at the date of the agreement of &c., vested in her, or in any other person in trust for her, is chargeable with the payment of the £— mentioned in the said agreement of the — &c., with interest at the rate £4 p. c. per ann. from &c., and the costs hereafter directed to be paid; And Let the same stand charged therewith accordingly:—1. Account of what is due to the Plt for principal and interest as aforesaid under the said agreement,

and for his costs of this action (including the costs of this appeal), such costs, so far as not already taxed, to be taxed &c., and the total amount due for such principal and interest and costs to be certified; 2. Inquiry of what the Deft S. H.'s separate property consisted at the date of the said agreement, and in whom it is now vested; 3. Inquiry whether any and what sum is due in respect of rates or taxes on the leasehold house and premises in the pleadings mentioned, and for which Defts S. H. and F. H. [*husband*], or either of them, are or is liable, or by the non-payment of which they, or either of them, may be damnified.—Such sum (if any) to be retained and satisfied out of what shall be certified to be due on taking the account firstly hereinbefore directed.—Deft F. [*trustee*] to be at liberty to retain his costs of this action to be taxed as between solr and client out of any trust funds (being the said separate property of the said S. H.) that may be in his hands.—Adjourn further consideration, and the costs of F. so far as they shall not be retained by him out of the said separate estate as aforesaid &c.—Adapted from *Picard v. Hine*, L. C. and L. J. G., 6 Dec. 1869, B. 3203; 5 Ch. 274.

As to the meaning and effect of this judgment, see observations in *Pike v. Fitzgibbon*, 17 Ch. D. 460, C. A.

6. *Amount of Debt and Costs recovered in an Action against a Married Woman, declared a Charge upon her Separate Property, without Prejudice to any Rights of her Trustee not made a Party.*

Tax the costs of the Plt, including the costs of this application, and declare that such costs, and also the sum of £— [*the amount recovered by the Plt in his action for debt for goods supplied to Deft C. D., a married woman, living separate from her husband, with an annuity settled in trust for her separate use*], with interest on the said sum at 4 p. c. per ann. from the date of this order, are a charge upon the annuity payable to the Deft C. D., the wife of B. D., by the Deft E. [*trustee*], under the trusts of the deed of separation dated &c.; but this order is to be without prejudice to any rights (claims) of the said E. (against the said annuity).—Plt C. to pay the taxed costs of the husband B. D., and add them to his own.—*Collett v. Dickinson*, Fry, J., 9 April, 1879, A. 1202; 11 Ch. D. 687.

For decree enforcing against a married woman's separate estate, settled with restraint on anticipation, a judgment for her ante-nuptial debt and costs, and costs paid to the husband under the Married Women's Property Act, 1874, s. 3, see *London Prov. Bank v. Bogle*, V.-C. B., 25 Jan. 1878, B. 400; 7 Ch. D. 773.

7. *Declaration of Charge on Married Woman's Separate Estate, with Account and Inquiry.*

DECLARE that the separate estate of the Deft M. T., which was on the 28th July, 1875, and which is now vested in her or in any other

person in trust for her, was chargeable with the payment of the balance remaining due to the Plts as the holders of the bill of exchange for £— in the pleadings mentioned, for principal and interest and expenses as therein mentioned; And Let the said separate estate of the said Deft stand charged with the payment to the Plts of such balance accordingly; And Let the following &c.: 1. An account of what is due to the Plts as holders of the said bill of exchange for principal and interest and expenses as aforesaid; 2. An inquiry of what the separate estate of the Deft M. T. consisted on the said 28th July, 1875, and on the date of this judgment, and in whom it was vested at that date, and whether any and what disposition thereof or dealing therewith by the said Deft M. T. has been made since the aforesaid dates.—Adjourn &c.—Liberty to apply.—*Lancashire and Yorkshire Bank, Ltd. v. Tee*, V.-C. H., 22 Nov. 1875, B. 1985.

For order on further consideration directing taxation of the costs of the trustee of the settlement under which the Deft M. T. was entitled to separate estate, and declaring them a charge upon so much of the separate estate as she was entitled to without restraint on anticipation, in priority to the costs of the Plts, and to the amount found due to them, see *S. C.*, V.-C. Hall, 30 Nov. 1876, B. 1925.

For decree enforcing, after the death of a married woman, her bond, in which she had joined with her husband as a surety, against her separate estate, which was declared jointly and severally liable with the estates of the principal debtor and her husband to pay the amount, with an account of her separate estate against her exors, see *Heatley v. Thomas*, M. B., 25 Mar. 1809, A. 805; 15 Ves. 596, 604.

NOTES.

TRUST FOR SEPARATE USE.

No particular form of words is necessary to give a wife separate estate in property, provided the intention of excluding the marital right is clearly indicated: *Massey v. Rowen*, L. R. 4 H. L. 288; *Green v. Britten*, 1 D. J. & S. 649; *Stanton v. Hall*, 2 Russ. & M. 180; *Hartford v. Power*, I. R. 2 Eq. 204; *Edwards v. Jones*, 14 W. R. 815; *Exp. Killick*, 3 Mont. D. & D. 480.

The word "sole" has no fixed technical meaning in a will, and when used the whole instrument must be looked to for its interpretation: *Massey v. Rowen*, L. R. 4 H. L. 297; *Gilbert v. Lewis*, 1 D. J. & S. 38; *Lewis v. Mathews*, 2 Eq. 177, in which cases gifts "for her sole use," "for her sole use and benefit," "for her sole and absolute use and benefit," were not held to create separate estate: and see *Farrow v. Smith*, W. N. (77) 21; *Re Amies' Estate*, W. N. (80) 61.

On the other hand, in particular cases, the following expressions:—

- "sole use and benefit": *Hartford v. Power*, I. R. 2 Eq. 204; *Exp. Killick*, 3 Mont. D. & D. 480;
- "sole use and benefit absolutely": *Re Tarsey's Trusts*, 1 Eq. 561;
- "sole use and disposal": *Bland v. Dawes*, 17 Ch. D. 794; and see *Baker v. Ker*, 11 L. R. Ir. 3;
- "sole benefit": *Green v. Britten*, 1 D. J. & S. 649;
- "her receipt (for a legacy) to be a sufficient discharge to the exors": *Lee v. Prieaux*, 3 Bro. C. C. 381; *Cooper v. Wells*, 11 Jur. N. S. 293; 13 L. T. 319; *Surman v. Wharton*, (1891) 1 Q. B. 491, 493;
- "the sole and separate receipt of A. (after her husband's death) to be a complete and only discharge (for each payment of a jointure rent-charge)": *Re Molyneux's Estate*, I. R. 6 Eq. 411;

— “for the benefit and use of E. (then unmarried), the rents or profits of which estate she shall receive from the tenants herself while she lives, whether married or single”: *Gould v. Camm*, 1 D. F. & J. 146;

have been held to create separate use.

Thus, a discretion in trustees to “pay, apply, and dispose of” the trust funds for the benefit of A.’s widow in such manner as they should think proper, was held to justify payments to her during second marriage for her separate use: *Austin v. A.*, 4 Ch. D. 233. But a bequest by a testator to his widow of income “to be expended by her as she might think fit and proper, and agreeable to her free will and pleasure,” did not give her a separate use in the same: *Re Graham’s Trusts*, 20 W. R. 289.

As between the widow of a clerk in the East India Co.’s service and her second husband, her pension from the “Regular Widows’ Fund” was held to be for her separate use: *Re Peacock’s Trusts*, 10 Ch. D. 490.

Where the gift was not to be subject to the debts of any “future” husband, it was held that the separate use could not arise until after the death of the existing husband: *King v. Lucas*, 23 Ch. D. 712, C. A.; and conversely where an annuity during the joint lives of husband and wife was secured to the wife for her separate use by a deed of separation, the separate use was confined to the existing coverture: *Stogdon v. Lee*, (1891) 1 Q. B. 661, C. A.

A trust for separate use during the “joint lives” of husband and wife is not determined by the dissolution of their marriage by decree of the Court: *Hamilton v. H.*, (1892) 1 Ch. 396; and see *Re Tredwell, Jeffray v. T.*, (1891) 2 Ch. 640.

The unauthorized insertion of the words “for her separate use” in a decree directing a sum of stock to be set apart to answer a life annuity given to a married woman when single, was held, in the absence of declaration to that effect, not to give her an estate to her separate use, and was disregarded: *Moore v. Walter*, 11 W. R. 713; 8 L. T. 448.

When attached to a gift to daughters of certain shares, followed by a contingent gift over to the survivors of the daughters, the separate use attaches to the contingent as well as to the original shares: *Re Jarman’s Trusts*, 1 Eq. 71.

In a marriage settlement the word “sole” will, it seems, be more readily construed as excluding the marital right: see *Massey v. Rowen*, L. R. 4 H. L. 288, 297; *Exp. Ray*, 1 Madd. 199.

And see cases collected, Theobald, Wills, 435, 436; 1 L. C. Eq. 6th ed. 544; 7th ed. 654; Lewin, 922 *et seq.*; Dav. Conv. vol. iii. p. 87.

The husband may, during the coverture, give any specific property to the wife for her separate use, without the intervention of any trustee: *Exp. Whitehead*, 14 Q. B. D. 419, C. A.; *Walter v. Hodge*, 2 Sw. 92; *Lucas v. L.*, 1 Atk. 270; *Lady Cowper’s Case*, cited in *Graham v. Londonderry*, 3 Atk. 393; and if the husband permit the wife to carry on a business separately for her own benefit, it becomes her separate property: *Ashworth v. Outram*, 5 Ch. D. 923, C. A.; *Exp. Whitehead, sup.*; *Slanning v. Style*, *Calmady v. C.*, 3 P. W. 334, 338; *Pearse v. P.*, W. N. (77) 120.

As to gifts by strangers to the separate use of a married woman, and the distinction between property so given and the paraphernalia of the wife, see *Macqueen, Husband and Wife*, 3rd ed. p. 115; *Crawley, Husband and Wife*, p. 60. And that the general law as to gifts of paraphernalia has not been abolished by the Married Women’s Property Act, 1882, see *Tasker v. T. and Lowe*, (1895) P. 1.

Communication to a married woman of an intention to give her 10,000*l.*, “to be settled as might be most agreeable to herself and her husband,” followed by payment of the money to her separate account at a bank, was held to make the money her separate property, notwithstanding it was afterwards, without advice, transferred from her account to that of her husband: *Carnegie v. C.*, 22 W. R. 595, 783; 30 L. T. 460; 31 L. T. 7.

The effect of a gift for the sole and separate use of a married woman, where no restraint on anticipation is imposed, is to vest the property in her for all purposes as fully as if she were a *feme sole*, or as in the case of the like gift to a man: *London Chartered Bank, &c. v. Lemprière*, L. R. 4 P. C. 572, 595; *Taylor v. Meads*, 4 D. J. & S. 597; Lewin, 943, 953, 954.

Property settled on the marriage of a woman in trust as she should during coverture by deed or will appoint, and subject thereto for her separate use for life, and absolutely if she survived her husband, is her separate property so as to be bound by her general engagements: *Mayd v. Field*, 3 Ch. D. 587.

RIGHTS AND LIABILITIES IN RESPECT OF SEPARATE ESTATE.

A *feme covert* acting with respect to her separate estate is competent to act in all respects as if she were a *feme sole*: see *Hulme v. Tenant*, 1 Bro. C. O. 16; 1 L. C. Eq. 544; 7th ed. 654; *Peacock v. Monk*, 2 Vez. 190; *London Chartered Bank, &c. v. Lemprière*, L. R. 4 P. C. 572; *Skinner v. Todd*, 30 W. R. 267; *Barber v. Gregson*, 49 L. J. Exch. 731; 43 L. T. 428, C. A.

And although the Court will not make a decree against her *in personam* (see *Murray v. Barlee*, 3 M. & K. 220; *Aylett v. Ashton*, 1 M. & Cr. 111; *Warne v. Routledge*, 18 Eq. 497; *National Prov. Bank v. Thomas*, 24 W. R. 1013), debts incurred by her on the credit of, or with intent to charge, her separate estate would always (independently of the recent Acts) bind and be enforced against such separate property: *Hulme v. Tenant*, *sup.*; *Picard v. Hine*, 5 Ch. 275; *McHenry v. Davies*, 10 Eq. 88; *sup.* Forms 1, 5; *Dowling v. Maguire*, Ll. & Goo. t. Plunk. 1, 19; as also her guaranty of her husband's debt: *Morrell v. Cowan*, 6 Ch. D. 166 (reversed on other grounds, 7 Ch. D. 151, C. A.); and with costs of enforcing the charge: *S. C.* As to the liability of a married woman with separate estate to costs in the Probate Division, see *Morris v. Freeman*, 3 P. D. 65.

General Engagements.

A married woman would, previously to the Acts, be compelled to fulfil her obligations when she had separate property which could be made available for the purpose; and not only special engagements, as bonds, bills, and promissory notes, but also her general engagements would bind her separate estate if shown to have been made with reference to and upon the faith and credit of that estate: *Johnson v. Gallagher*, 3 D. F. & J. 494, 514, 515; *Vaughan v. Vanderstegen*, 2 Drew. 363; *Bolden v. Nicholas*, 3 Jur. N. S. 884; *Owens v. Dickinson*, Cr. & Ph. 48; *Davies v. Jenkins*, 6 Ch. D. 728; *London Chartered Bank of Australia v. Lemprière*, L. R. 4 P. O. 572, 593; and see *Pollock*, Contr. 65; but a married woman did not, before the Acts, by having separate estate, acquire an equitable status of capacity to contract debts, so as to enable her to bind separate estate to which she might afterwards become entitled: *Pike v. Fitzgibbon*, 17 Ch. D. 454, C. A.; *sup.* Forms 3, 4; *King v. Lucas*, 23 Ch. D. 712; *Myles v. Burton*, 14 L. R. Ir. 258; and see *Re Roper*, *R. v. Doncaster*, 39 Ch. D. 482, 488.

Whether such obligations and engagements had been so contracted depended upon the circumstances of each particular case: see *Mrs. Matthewman's Case*, 3 Eq. 781; *Hartford v. Power*, 1 R. 3 Eq. 602; and see *Gordon v. Silber*, 25 Q. B. D. 491, where hotel-keepers were held entitled to a lien on the separate property of the wife staying with her husband at the hotel.

The intention to charge her separate estate might be implied, *e.g.*, where she was living separate from her husband: *Johnson v. Gallagher*, 3 D. F. & J. 494; *Tullett v. Armstrong*, 4 Beav. 319; *Murray v. Barlee*, 3 M. & K. 220; but not in general when she was living with her husband: *Re Bromley*, 21 W. R. 155; 27 L. T. 478; and the intention to bind the separate estate would be inferred when by her next friend she obtained the common order to tax her solicitor's bill: *Re Peace and Waller*, 24 Ch. D. 405, C. A.

A confirmation by a *feme* after majority of a covenant to settle property entered into by her when an infant is absolutely binding, and it is not competent for her to elect, from time to time during coverture as property falls in, whether or not she will affirm it: *Viditz v. O'Hagan*, (1899) 2 Ch. 569, per Cozens-Hardy, J. (reversed on other grounds in C. A., (1900) 2 Ch. 87), following *Edwards v. Carter*, (1893) A. C. 360, H. L., and not following *Smith v. Lucas*, 18 Ch. D. 531; and see *Buckmaster v. B.*, 35 Ch. D. 21, C. A.; *S. C.*, *nom. Seaton v. S.*, 13 App. Ca. 61; *Duncan v. Dixon*, 44 Ch. D. 211; *Greenhill v. North British, &c. Ins. Co.*, (1893) 3 Ch. 474; *Harle v. Jarman*, (1895) 2 Ch. 419.

The Statute of Limitations is applicable by analogy to an action against a married woman in respect of her separate estate: *Re Lady Hastings, Hallett v. Hastings*, 35 Ch. D. 94, C. A.; *Re Roper, R. v. Doncaster*, 39 Ch. D. 482, 489.

Being liable to make good her contracts out of her separate estate, she is also entitled to their benefit, and to enforce them by specific performance when willing to pay the consideration out of her separate estate: *Dowling v. Maguire*, L.L. & Goo. t. Plunk. 1.

The liability of a married woman's separate estate for her general engagements did not, however, give the creditors any charge upon the property; and pending an action to obtain payment of a debt she would not be restrained from alienating her separate property: *Nat. Prov. Bank v. Thomas*, 24 W. R. 1013; *Robinson v. Pickering*, 16 Ch. D. 660, C. A.

Where a married woman who had been ordered to pay costs "out of her separate property" was entitled to a share coming to her under a will, and had no other separate property, the Court, in order to protect the persons entitled to the costs, on the principle of *Kearns v. Leaf*, 1 H. & M. 681, appointed a receiver of the fund: *Cummins v. Perkins*, (1899) 1 Ch. 16, C. A.; Form 6, *sup.* p. 887.

Misrepresentation.

She will not be allowed to disappoint a mortgagee who has advanced money on the faith of misrepresentations in which she has concurred: *Sharpe v. Foy*, 4 Ch. 35; *Vaughan v. Vanderstegen*, 2 Drew. 363; and as against a purchaser her equity to a settlement might have been barred by her concurrence in a fraudulent representation, even though made under marital coercion: *Re Lush's Trusts*, 4 Ch. 591. And she has been held bound in equity to make good a representation made on her behalf to the Court while she was an infant, and on the faith of which a marriage and settlement had been sanctioned: *Mills v. Fox*, 37 Ch. D. 153.

If by false representation that she has power to charge her reversionary interest, she has induced the person advancing the money not to inquire into the truth of her statement, her separate estate is liable to make good the fraud: *Green v. Lyon*, 21 W. R. 695; and so if she executes an unacknowledged deed for value, concealing the fact of her marriage and describing herself as a *feme sole*: *Re McIntyre's Tr.*, 21 L. R. Ir. 42; and see *Barrow v. Manning*, W. N. (78) 122; though if the mortgage deed recites the settlement by which she is restrained from anticipation, the mortgagee is put upon inquiry, and her separate estate is, it seems, not liable: *Arnold v. Woodhams*, 16 Eq. 29; *Hobday v. Peters*, 28 Beav. 354.

She will not be allowed, by the exercise of a general power of appointment, to disappoint creditors in whose favour she has charged her separate estate: *London Chartered Bank v. Lemprière*, L. R. 4 P. C. 572; following *Johnson v. Gallagher*, 3 D. F. & J. 494, and disapproving the decision in *Shattock v. S.*, 2 Eq. 188, that property settled to the separate use of a married woman for life, with power to appoint the reversion, is not, having been appointed by will, liable after her death for payment of her debts; and see *Blatchford v. Woolley*, 2 Dr. & Sm. 204.

So also where she has contracted to take shares in her own name, her separate estate is liable for calls: *Mrs. Matthewman's Case*, 3 Eq. 781; and to indemnify her trustee who, on the faith of her representations, has obtained an allotment of new shares, against calls and liabilities incurred on her behalf: *Buller v. Cumpston*, 7 Eq. 16; and damages may be recovered for breach of a covenant by her to exercise a general power of appointment in a particular way, the fund appointed by her in another way being assets available for that purpose: *Re Parkin, Hill v. Schwarz*, (1892) 3 Ch. 510.

Where she has joined her husband in securing a loan upon her separate estate and effected a policy of assurance as a collateral security, she cannot, after her husband's death, obtain the policy-money without paying off the mortgage: *Winter v. Easum*, 12 W. R. 784, 1018; 33 L. J. Ch. 665; 10 Jur. N. S. 759.

Torts or Breaches of Trust.

But although a wife's separate property is liable for contracts made expressly or inferentially with intent to charge it; and also for frauds

relating to the separate estate; and, where not restrained from anticipation, for an actual appropriation of a portion of the estate settled to her separate use (*Clive v. Curew*, 1 J. & H. 199); and, where restrained from anticipation, to the extent of the arrears of income already due (*Pemberton v. McGill*, 1 Dr. & Sm. 266), her separate estate was not (previously to the Married Women's Property Act, 1882, *v. inf.* pp. 915 *et seq.*) liable for her general torts or breaches of trust, the liability for which attached to her husband: *Wainford v. Heyl*, 20 Eq. 321; *Arnold v. Woodhams*, 16 Eq. 29; *Keays v. Lane*, 1 R. 3 Eq. 1; *Re Smith's Estate*, 40 L. T. 389; *Davies v. Stanford*, 61 L. T. 234; and *v. sup.* p. 894; and the interest of a married woman *c. q. t.* would not be impounded to answer a breach of trust if she did not take an active part in it, but merely acquiesced or approved: *Sawyer v. S.*, 28 Ch. D. 595, C. A.; but see now the Trustee Act, 1893, *inf.* p. 910, and *Lewin, Trusts*, 1121.

Ante-nuptial Debts.

The principle that debts incurred by a married woman might be enforced against her separate estate extended to her debts incurred before marriage, which could not be recovered from the husband by reason of his bankruptcy; *Chubb v. Stretch*, 9 Eq. 555; *sup.* p. 896, Form 2.

Bankruptcy.

Though she had separate property, she could not be made a bankrupt: *Exp. Holland*, 9 Ch. 307; *Exp. Jones, Re Grissell*, 12 Ch. D. 484, C. A.; *Exp. Coulson, Re Gardiner*, 20 Q. B. D. 249; and see *Day v. Freund*, 35 L. T. 551; 25 W. R. 222.

A married woman trading separately from her husband by the custom of London might be made bankrupt in respect of debts contracted in such trading: *Lavie v. Phillips*, 3 Burr. 1776; *Exp. Carrington*, 1 Atk. 206.

A husband's right to administer to his wife's estate will not vest in his trustee in bankruptcy: *In the goods of Turner*, 12 P. D. 18; and the rule that the husband is trustee of the separate property when none other is appointed applies though the property becomes separate by virtue of a marriage contract entered into in a foreign country: *Exp. Sibeth, Re S.*, 14 Q. B. D. 417, C. A.; so that such property will not pass to his trustee in bankruptcy: *S. C.*; see *Exp. Whitehead, Re W.*, 14 Q. B. D. 419, C. A.

And see further, p. 916, *inf.*

Power of Disposition.

A married woman, where not restrained from alienation, has, as incident to her separate estate, the same power of disposition of the equitable fee by deed *inter vivos* or by will as if she were a *feme sole*: *Taylor v. Meads*, 4 D. J. & S. 597; *Hall v. Waterhouse*, 5 Giff. 64; *Pride v. Bubb*, 7 Ch. 64; provided that the equitable fee, and not a mere life estate, has been settled for her separate use: *Troutbeck v. Boughey*, 2 Eq. 534.

By the Fines and Recoveries Act, 1833 (3 & 4 W. IV. c. 74), a married woman, with the concurrence of her husband, was enabled, by deed acknowledged, to convey her real estate and bind her interest therein, though not herself personally: *Crofts v. Middleton*, 8 D. M. & G. 192; *Avery v. Griffin*, 6 Eq. 606; *Cahill v. C.*, 8 App. Ca. 420.

A declaration of trust of copyholds is a "disposition" within the Act, and if made by deed acknowledged will bind her customary heir: *Carter v. C.*, (1896) 1 Ch. 62; and in a case not falling within 20 & 21 V. c. 57, her equitable reversionary life interest in a sum of money, properly invested by trustees upon a mortgage of land, is an interest in land within the Act, so that she can dispose thereof by deed acknowledged and with her husband's concurrence: *Miller v. Collins*, (1896) 1 Ch. 573, C. A., overruling *Re Newton's Tr.*, 23 Ch. D. 181; and see *Lewin*, 914, 1168.

Her concurrence in a sale without a deed acknowledged was inoperative: *Franks v. Bollans*, 3 Ch. 717; and the acknowledgment would not be supplied: *Lassence v. Tierney*, 1 Mac. & G. 551.

It has been held that since the Act of 1882 the husband's concurrence and the acknowledgment are no longer necessary in order to enable her to convey the legal estate: *Re Drummond and Davie*, (1891) 1 Ch. 524, at p. 531,

e.g., in the character of mortgagee of real estate to secure her separate moneys: *Re Brooke and Fremlin*, (1898) 1 Ch. 647; and under sect. 52 of the Conveyancing Act, 1881 (44 & 45 V. c. 41), she may now by deed acknowledged release her power over any property whether real or personal and whether in possession or reversion, and whether she is restrained from anticipation or not: *Re Chisholm's Settlement*, (1901) 2 Ch. 82; Farwell, Pow. 2nd ed., 18; but as trustee of real estate, notwithstanding the M. W. P. Acts, she cannot convey otherwise than with the concurrence of her husband and by deed acknowledged: *Re Harkness and Allsopp*, (1896) 2 Ch. 358; Form 2, *inf.* p. 912.

By the V. & P. Act, 1874 (37 & 38 V. c. 78), s. 6, land vested in her as a bare trustee may be conveyed by her as if she were a *feme sole*.

Election by Married Woman.

On the ground that she shall not avail herself of her fraud (*Savage v. Foster*, 9 Mod. 35), it has been held that she may elect so as to affect her interest in real estate without deed acknowledged, and that effect will be given to her election: *Barrow v. B.*, 4 K. & J. 409; *Willoughby v. Middleton*, 2 J. & H. 344; *Crawley*, 79, 131.

But see *Nicholl v. Jones*, 3 Eq. 696, where an agreement to compromise proceedings in the Probate Court affecting her interest in real estate was held not binding, and could not be enforced against her in the absence of deed acknowledged, although the agreement had been acted upon and property enjoyed by her under it: *Turner v. T.*, 2 D. M. & G. 28.

She may also elect so as to affect her interest in personality: *Griggs v. Gibson*, 1 Eq. 685; where not restrained from anticipation: *Re Vardon's Trusts*, 31 Ch. D. 275, C. A.; *Hamilton v. H.*, (1892) 1 Ch. 396; *Lady Bateman v. Faber*, (1897) 2 Ch. 223; (1898) 1 Ch. 144; *Haynes v. Foster*, (1901) 1 Ch. 361; *Lewin on Trusts*, 10th ed., 964, 965; and *v. inf.* p. 909; but unless the case falls within Sir B. Malins' Act (20 & 21 V. c. 57) (see *inf.* p. 934), she cannot resort to the doctrine of election in order to dispose of her reversionary interest in personality: *Williams v. Mayne*, I. R. 1 Eq. 519 (not following *Wall v. W.*, 15 Sim. 513); and as she has an absolute power of disposition over property settled to her separate use, she can elect to take it as land or money as if she were *sui juris*: *Re Davidson*, *Martin v. Trimmer*, 11 Ch. D. 341, C. A.; and as to her power to elect during coverture to confirm a marriage settlement made during her infancy, see *Smith v. Lucas*, 18 Ch. D. 531; *Wilder v. Pigott*, 22 Ch. D. 263; *Hamilton v. H.*, (1892) 1 Ch. 396; *Greenhill v. North British and Mercantile Ins. Co.*, (1893) 3 Ch. 474; *Harle v. Jarman*, (1895) 2 Ch. 419; *Lewin on Trusts*, 10th ed., 933, 934; *Viditz v. O'Hagan*, (1899) 2 Ch. 569; (1900) 2 Ch. 87, C. A., *sup.* p. 901; and that the mere appointment of a new trustee of a settlement is not equivalent to a confirmation, see *Haywood v. Tidy*, 63 L. T. 679.

Savings.

The savings of a wife's separate estate, like the income, become her separate estate with the same incidents: *Gore v. Knight*, 2 Vern. 535; *Muggeridge v. Stanton*, 1 D. F. & J. 107; *Brooke v. B.*, 25 Beav. 342; *Duncan v. Cashin*, L. R. 10 O. P. 554; *Re Smith*, 4 Jur. N. S. 1193; *Lewin*, 874; and subject to the same liability in respect of her engagements: *Butler v. Cumpston*, 7 Eq. 16.

And similarly, her savings out of alimony allowed to her after a divorce *à mensâ et thoro*, before 1858, became her own property, and could not be claimed by her husband after her death: *Moore v. Barber*, 13 W. R. 935; 5 Giff. 43; 34 L. J. Ch. 667; 11 Jur. N. S. 539; 12 L. T. 664; and so out of a maintenance allowed on separation: *Brooke v. B.*, 25 Beav. 347; or to the wife of a lunatic, living apart from him, under an order in lunacy, not expressly stating that the allowance was for her separate use: *Re Goods of Tharp*, 3 P. D. 76, C. A.; *secus*, savings out of money supplied by the husband for household purposes: *Barrack v. McCulloch*, 3 K. & J. 114; *Mews v. M.*, 15 Beav. 529.

If income not originally included in a covenant in a marriage settlement to settle other and after-acquired property is invested by the wife during the coverture, the investments so made do not become subject to the covenant: *Finlay v. Darling*, (1897) 1 Ch. 719; considering *Lewis v. Madocks*,

8 Ves. 150; 17 Ves. 48, and discussing but not following *In re Bendy*, (1895) 1 Ch. 109; and see Lewin, 943.

Advancement.—Under a power to apply for her advancement or benefit a portion of the capital of a fund settled to the separate use of a wife for life, with remainder to her children, trustees have been allowed to make an advance to the husband on his personal security for the purpose of setting him up in business: *Re Kershaw's Trusts*, 6 Eq. 322; but an advancement made at the request of the *feme* with knowledge that the amount would be used to pay a debt due from her husband to one of the trustees was held to be a breach of trust: *Molyneux v. Fletcher*, (1898) 1 Q. B. 648.

Curtesy.—The husband's curtesy attaches to estates of inheritance, whether legal or equitable, of which the wife is seised for her separate use: *Cooper v. Macdonald*, 7 Ch. D. 258; *Appleton v. Rowley*, 8 Eq. 139; *Harris v. Mott*, 14 Beav. 169; *Follett v. Tyrer*, 14 Sim. 125; *contra*, *Moore v. Webster*, 3 Eq. 267; and the law in this respect is not altered by the M. W. P. Act, 1882: *Hope v. H.*, (1892) 2 Ch. 336; *Re Lambert's Estate*, *Stanton v. L.*, 39 Ch. D. 626; Lewin, 900, 918.

Where a testator devised freeholds to his daughter (who predeceased him) for her separate use, her husband was entitled as tenant by the curtesy, as there was no means by which he could have obtained seisin, and *impotentia excusat legem*: *Eager v. Furnivall*, 17 Ch. D. 115.

Rights against Husband.—A husband who has by post-nuptial deed settled a house (private hotel) and business on the wife, to be carried on by her as if she were a *feme sole*, will be restrained from interfering in the conduct of the business, and also from continuing in possession of the private hotel and premises, or any part thereof: *Wood v. W.*, 19 W. R. 1049; and an interim injunction was granted to restrain a husband from using for his own purposes, and not for the purpose of consorting with his wife (who was taking proceedings in divorce against him), a leasehold house in which she was residing, and which was settled on her for life for her separate use: *Symonds v. Hallett*, 24 Ch. D. 346, C. A.; and see *Green v. G.*, 5 Ha. 400, n.

Where a husband forcibly took from his wife money which had been left to her for her separate use, and she frequently but ineffectually asked him for the money, he was held to be a trustee of the money for her, and the Statute of Limitations was no bar to her right of action against his exors for the amount with interest from his death: *Wassell v. Leggatt*, (1896) 1 Ch. 554.

Improvements by the husband on the wife's separate real estate will enure for her benefit, *e.g.*, her interest in houses so built will be for her separate use: *Barrack v. McCulloch*, 3 K. & J. 110.

And as to the creation, incidents, and liabilities of separate estate, see *Hulme v. Tenant*, 1 L. C. Eq. 654.

(II.) RESTRAINT ON ANTICIPATION.

1. *Restraint on Anticipation removed—Conveyancing Act, 1881, s. 39.*

UPON the application of M., the wife of L., and upon hearing the solr for the applicant, and upon reading &c., Let the restraint against anticipation imposed by the will of the testator R., on the annuity of £1,000 payable to the applicant for her separate use for life, be removed, in order that the applicant M. may raise by way of loan a sum not exceeding £700, with interest at the rate of £5 p. c. per ann., secured by the said annuity, and a policy of assurance to be effected on the life of the applicant. And Let the trustees or trustee for the time being of the will of R., out of any surplus money from the said annuity, after providing for interest and premiums payable in respect of the securities for £— mentioned in the affidavit of &c., and without prejudice to the said securities, from time to time pay off and discharge the

mortgage security hereby authorized, to the intent that the same may be paid and satisfied, and that the restraint on anticipation removed as aforesaid may attach to the said annuity.—*Re Landers*, Pearson, J., at Chambers, 18 Dec., 1885, B. 1640.

2. Mortgage notwithstanding Restraint—Repayment secured by Life Policy.

UPON the application by originating summons of A. B. &c., and upon hearing counsel for the applicant and for the respondent, And the Judge being of opinion that it is for the applicant's benefit that she should be allowed to bind her interest in the property to which she is entitled for life under the said wills (notwithstanding that she is restrained from anticipation) to an extent not exceeding £3,500, provided only that she is to raise such sum on mortgage at a rate of interest not exceeding £5 p. c. per ann., on the security of the policies of insurance to the same amount on her life and of her interest in the property aforesaid, and provided also that the money so raised shall not be liable to be called in, but shall be repayable by instalments not exceeding £600 per ann.; And the applicant having been personally examined by the Judge, and consenting to this order, and desiring to be at liberty to raise such sum upon such terms, and that her interest be bound accordingly, Let it be referred to the taxing master to tax, as between solr and client, the costs of the applicant and respondents of this application and order, and of carrying out the same, including in the costs of the respondents any charges and expenses incurred of and incidental to this application and order, and carrying out the same; And upon the applicant raising the sum aforesaid on such security as aforesaid, and on the terms aforesaid, notwithstanding that she is restrained from anticipation, Let the interest of the applicant in the property be bound accordingly; And Let such sum when raised be paid to the respondents, they by their counsel undertaking to apply the same in payment of the said costs when taxed, and thereafter in the payment of the debts mentioned in the schedule to the applicant's said affidavit filed &c., so far as the same will extend and to pay over the surplus (if any) to the applicant. And the respondents, the trustees, by their counsel further undertaking to retain out of the applicant's income under the said wills, and apply such sums as may be necessary in payment of the premiums on the said insurance policies, and in payment of the instalments to the mortgagees, and of the interest on the balance of the principal moneys from time to time outstanding, Let the said trustees be at liberty to retain such sums and to apply the same in manner aforesaid, the receipts of the insurance co. or cos., and of the mortgagees, to be a good discharge to the trustees for each such payment. And Let the applicant within one month from the date hereof execute a proper settlement (the form thereof to be settled by the Judge in case the parties differ) of all the furniture supplied by Messrs. Shoolbred as in her said affidavits mentioned, upon trusts the

same as the trusts of the personal property to which she is entitled under the said wills.—*Liberty to apply.*—*Re Bingley*, Chitty, J., at Chambers, 1 Nov. 1888, A. 1594.

3. *Liberty for Married Woman restrained from Anticipation to charge her Life Estate.*

UPON the application by originating summons of A. B., the wife of C. D., and of the said C. D., and upon hearing counsel for the applicants and for the respondents, Declare that it is for the benefit of A. B. that, notwithstanding the restraint against anticipation imposed by the will of E. F., she should be at liberty to charge her life estate in the trust funds by the said will settled in trust for and now standing in the names of the present trustees of such will as therein mentioned. And Let the said A. B. be at liberty to charge her life interest with an annual sum not exceeding £50 for the purpose of raising by mortgage sufficient to pay certain debts to that amount incurred, together with the costs of and relating to such mortgage and of this application, and consequent thereon, such costs to be taxed &c.—*Re Hale*, Chitty, J., at Chambers, 11 Jan. 1887, A. 238.

4. *Another Form.*

UPON the appeal of A. B. &c., Let the said A. B. be at liberty to bind her life interests, both in possession and reversion, under the will of C. D. by way of mortgage, for the purpose of raising £—, and to charge her said life interests in the property comprised in the said will, with payment of the said £— and interest, and the premiums on a policy of assurance for £— on her life, notwithstanding the restraint on anticipation contained in the said will, and by any preliminary deed or deeds of mortgage to raise any part or parts of the said £—, not exceeding in the aggregate £—, pending negotiations for raising the said £—; And Let such deed or deeds be in such form and on such conditions as the said A. B. may think fit, and be binding on her said life interests notwithstanding the restraint on anticipation in the said will. Directions as to payment and application of the said £—. —*Re Little*, C. A., 2 Feb. 1887, A. 141; S. C., 36 Ch. D. 701, C. A.

5. *Married Woman to be at liberty to concur in a Mortgage.*

UPON the application of A. B., the wife of C. D., and upon hearing the solr for the applicant, Let A. B. (notwithstanding the restraint &c.) be at liberty to concur with her daughters, E. F. and G. H., in executing a mortgage of the hereditaments hereinafter described, that is to say &c., &c., in fee simple to secure the payment of £— proposed to be forthwith advanced or paid by the mortgagees to the applicant, and the said E. F. and G. H., and also such further sums (if any) not exceeding £— as may be advanced to them in

order to provide for the payment of the purchase-money of the piece of ground, messuages, and hereditaments, situate at &c., if the same shall be purchased by the applicant and the said E. F. and G. H., or by the said G. H. for their benefit, and the costs, charges, and expenses in relation to such purchase, with interest upon such principal sums at £4 p. c. per ann. And upon such mortgage being executed by the applicant, Let all the right and interest of the applicant in the said hereditaments, and the rents, profits, and income thereof under the trusts of the said will and otherwise, be bound by the said mortgage, and charged with the payment of the principal moneys and interest thereby intended to be secured as if the applicant had been unmarried at the time of the execution thereof.—*Re Marshall, Fry, J.*, at Chambers, 16 March, 1883, B. 427.

6. *Payment of Debts of Married Woman out of Corpus, notwithstanding Restraint—Purchase of Government Annuity.*

THE application by originating summons of A. B., which upon hearing &c. in Chambers was adjourned &c.; And upon hearing counsel for the Plt and Defts, Let, notwithstanding the Plt is restrained from anticipation of her interest under the will of C. D., the Defts sell the £— consols forming part of her share of the testator's residuary estate now standing in their names and held by them upon the trusts by the said will declared, and out of the proceeds of such sale and £—, the balance of that share, when the same shall be received by them, retain and pay the costs of all parties of this application, to be taxed &c. as between solr and client, and thereout also pay the debts now owing by the Plt, and invest the residue in the purchase in their names of a Government annuity for the Plt, such annuity to be made subject to a restraint on anticipation.—Liberty to apply.—*Re Saville, Watkins v. Malcolm, Stirling, J.*, 25 April, 1888, B. 458.

7. *Payment of Husband's Debts—Restraint removed—Amount secured by Policy on Life of Wife.*

UPON the application of A. B., the wife of C. D. &c., and E. and F., the applicant's solrs, personally undertaking to pay out of the moneys to be received by them under this order the amounts due to the creditors of the applicant's husband, but not to exceed £—, Let the said A. B. (notwithstanding the restraint against anticipation imposed upon her by the indenture of settlement dated &c.) be at liberty to charge her life interest in such trust funds with a sum of money not exceeding £—, and interest thereon at £5 p. c. per ann., and the premium on a policy of assurance to be effected on the life of the said A. B. to secure the repayment of the said principal sum of £—.—*Re Taylor's Settlement, North, J.*, at Chambers, 12 May, 1892, B. 596.

NOTES.

Restraint on Anticipation.

As in the case of separate use, no set form of words is required to control the power of anticipation: *Baker v. Bradley*, 7 D. M. & G. 597; *White v. Herrick*, 21 W. R. 454; *Field v. Evans*, 15 Sim. 375; *Fletcher v. Green*, 33 Beav. 426; *Re Smith, Chapman v. Wood*, 51 L. T. 501.

The restraint on anticipation may apply to an absolute interest as well as to a life estate, and so that the *feme* cannot alienate either the corpus or income during coverture: *Re Ellis' Trusts*, 17 Eq. 409; *Baggett v. Meux*, 1 Ph. 627; *Tullett v. Armstrong*, 4 M. & Cr. 377; *Re Benton, Smith v. S.*, 19 Ch. D. 277; *Re Clark's Trusts*, 21 Ch. D. 748; *Re Sarel*, 10 Jur. N. S. 876; 10 L. T. 691; 4 W. R. 231; 4 N. B. 321; *Re Gaskell*, 11 Jur. N. S. 780; 12 L. T. 763; *Re Bown, O'Hulloran v. King*, 27 Ch. D. 411, C. A.; *Re Grey, Acason v. Greenwood*, 34 Ch. D. 712, C. A.; if an intention is shown that the trustees should retain the property, and pay the income only to her: *Re Bown, sup.*; *Re Spencer, Thomas v. S.*, 30 Ch. D. 183; *Re Currey, Gibson v. Way*, 32 Ch. D. 361; *Re Grey, sup.*; *Re Hutchings to Burt*, 58 L. T. 6; *Re Tippet and Newbould*, 37 Ch. D. 444, C. A.; disapproving the distinction drawn in previous cases between a gift of a sum of money and an income-producing fund: see *Re Croughton's Trusts*, 8 Ch. D. 460; *Re Clarke's Trusts*, 21 Ch. D. 748; *Re Taber, Arnold v. Kayess*, 51 L. J. Ch. 721; 46 L. T. 805; 30 W. R. 883; *Re Coombes*, W. N. (83) 169; and may operate as a restraint while the property is reversionary, though ineffectual when it falls into possession: *Re Bown, sup.*; but will not necessarily be confined to the duration of a preceding particular estate: *Re Tippet and Newbould*, 37 Ch. D. 444, C. A.

The restraint is of no avail unless the income is given to the separate use, and a gift to the separate use will not be implied from the mere existence of the restraint: *Stogdon v. Lee*, (1891) 1 Q. B. 661, C. A.; but since the Act of 1882, a restraint on anticipation may be attached to the property of a married woman, although the words "separate use" or their equivalent are not used: *Re Lumley*; *Exp. Hood-Barrs*, (1896) 2 Ch. 690, C. A.; referring to *Stogdon v. Lee, sup.*, and see *Re Lavender's Poliry* (1898), 1 I. R. 175, C. A.

The trustee of property, to the income of which a married woman is entitled for her separate use without power of anticipation, is not justified in paying the income to a person holding a power of attorney from husband and wife to receive and sue for any moneys due to them: *Kenrick v. Wood*, 9 Eq. 333; and see *Re Vardon's Trusts*, 31 Ch. D. 276, C. A.

A married woman cannot sanction the investment of her separate estate upon improper securities: *Davies v. Hodgson*, 25 Beav. 177; nor release her trustees from liability incurred by their disregard of a restraint on anticipation: *Dickson v. Hook*, 14 W. R. 552; *Cresswell v. Dewell*, 12 W. R. 123; 4 Giff. 46; 10 Jur. N. S. 357.

Separate property settled with a restraint on anticipation cannot be validly charged by a wife during coverture: *Roberts v. Watkins*, 47 L. J. Q. B. 552; 36 L. T. 79, and cases there cited; *Pike v. Fitzgibbon*, 17 Ch. D. 466, 467, C. A.; even in case of deliberate fraud by her: *Cahill v. C.*, 8 App. Ca. 420, 427; 5 L. R. Ir. 227; 7 L. R. Ir. 361; *Re Glanvill, Ellis v. Johnson*, 31 Ch. D. 532, C. A.; *Stanley v. S.*, 7 Ch. D. 589; *Thomas v. Price*, 46 L. J. Ch. 761; nor affected by admission or estoppel: *Lady Bateman v. Faber*, (1897) 2 Ch. 223; (1898) 1 Ch. 144, C. A.; nor bound by a previous covenant for settlement of after-acquired property: *Re Currey, Gibson v. Way*, 32 Ch. D. 361; nor by a compromise annulling the settlement on a decree nisi for divorce being made: *Thomson v. T.*, (1896) P. 263, C. A.; nor by an order of the Court in proceedings under the Matrimonial Causes Act, 1884 (47 & 48 V. c. 68), s. 3: *Michell v. M.*, (1891) P. 208, C. A.; *secus, semble*, under 22 & 23 V. c. 61, s. 8: *Pratt v. Jenner*, 1 Ch. 493; nor affected by a judgment summons under the Debtors Act, s. 5: *Meager v. Pellew*, 14 Q. B. D. 973, C. A.; nor by a judgment made against her previously to the income accruing due: *Whiteley v. Edwards*, (1896) 2 Q. B. 48, C. A. (*secus*, where the income has accrued due, though not actually in her hands, at the date of the judgment: *Hood-Barrs v. Heriot*, (1896) A. C. 174, H. L.); nor by a sequestration for costs under an order made before the income had accrued

due: *Re Lumley; Exp. Hood-Barrs*, (1894) 3 Ch. 135, C. A.; nor can it be applied in payment of costs of proceedings improperly instituted by her by a next friend: *Re Glanville, Ellis v. Johnson*, 31 Ch. D. 532, C. A.; dissenting from *Re Andrews, Edwards v. Dewar*, 30 Ch. D. 159; but as to her liability when suing under the Married Women's Property Acts, 1882 and 1893, *v. sup.*, pp. 889, 894.

But where a married woman becomes liable to refund, a subsequent order declaring the liability will affect arrears of income, subject to a restraint, which had accrued due in the interval: *Re Dixon, D. v. Smith*, 35 Ch. D. 4, C. A.

A married woman cannot be put to her election as to property which she is restrained from anticipating: *Re Vardon's Trusts*, 31 Ch. D. 275, C. A.; *Re Wheatley, Smith v. Spence*, 27 Ch. D. 606; unless under a special condition in the will: *Whitwell v. Wilson*, W. N. (90) 171; nor, at all events where the restraint is imposed by the testator, does a subsequent discovery enable her to elect: *Haynes v. Foster*, (1901) 1 Ch. 361.

Formerly, a married woman restrained from anticipation could not be held liable in respect of breaches of trust; but now, under the Trustee Act, 1893 (56 & 57 V. c. 53), s. 45 (1), replacing sect. 6 of the Trustee Act, 1888 (51 & 52 V. c. 59), "where a trustee commits a breach of trust at the instigation or request, or with the consent in writing of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the Court seems just, for impounding all, or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him."

As to the effect of this section, and the application of it by the Court to the case of a married woman, see Lewin on Trusts, 10th ed., p. 1122, *et seq.*, citing *Griffith v. Hughes*, (1892) 2 Ch. 105 (where the discretion of the Court was exercised adversely to the married woman), and *Ricketts v. R.*, 64 L. T. 263; *Bolton v. Currie*, (1895) 1 Ch. 544; and *Mara v. Browne*, (1895) 2 Ch. 69, 93 (where the Court declined so to exercise discretion).

At the trial of an action against a tenant for life and executors of a deceased trustee in respect of a breach of trust by advancing the trust funds to the tenant for life and her husband, no notice having been given by the executors to the tenant for life under O. XVI, 55, that they claimed contribution or indemnity against her, the Court gave leave to the exors, without going into evidence, to apply in Chambers with reference to enforcing their rights, if any, against her: *Re Holt; Re Rollason; Holt v. H.*, (1897) 2 Ch. 525, *inf.* p. 1125, Form 11, and see *Molyneux v. Fletcher*, (1898) 1 Q. B. 648, 656.

She can only deal with the interest of a fund settled to her separate use without power of anticipation after it has become payable, and not with an apportioned part up to the date of assignment: *Re Brettell*, 2 D. J. & S. 79; *Jollands v. Burdett*, 10 Jur. N. S. 340.

Where a *feme* while sole mortgaged her life interest, and afterwards married, and effected a second mortgage, which was inoperative, as to a part which she was restrained from anticipating, it was held that the securities must be marshalled so that the interest due to the first mortgagee should be paid out of the portion of the income which was not available for the second mortgagee: *Re Loder's Trusts*, 56 L. J. Ch. 230; 35 W. R. 58; 35 L. T. 582; W. N. (86) 166.

Words creating separate estate without power of anticipation, though apparently restricted to the marriage then contemplated, will not, unless the intention be expressly declared, be limited to that marriage: *Hawkes v. Hubback*, 11 Eq. 5; *Re Gaffee*, 1 Mac. & G. 541.

The clause restraining alienation, though inoperative during discovery, revives in case of subsequent marriage: see *Tullett v. Armstrong, Scarborough v. Borman*, 1 Beav. 1, 34; 4 M. & Cr. 377, 378; but may be removed by the act of the *feme* while covert, *e.g.*, a covenant to settle, though the interest was reversionary: *Re Wood, W. v. Hooper*, 61 L. T. 197.

And a provision for the sole and separate use of a woman in case she should survive her intended husband, with a restraint on anticipation, has been held to render the property inalienable during the intended as well as any future coverture: *Re Molyneux's Estate*, I. R. 6 Eq. 411.

Secus if the gift is expressly made to the separate use of the wife independently of the particular husband (named): *Moore v. Morris*, 4 Drew. 33.

Where a life interest was given to a married woman with a restraint on anticipation, and a gift over on her decease, or on her anticipating the income, and she afterwards assigned by way of mortgage, the assignment being held wholly inoperative, there was no forfeiture, "anticipating" not being equivalent to attempting to anticipate: *Re Wormald, Frank v. Muzeen*, 43 Ch. D. 630, C. A. In *Stewart v. Fletcher*, 38 Ch. D. 627 (*sup.* Vol. I. p. 217), the Court, in ordering payment of dividends to a woman restrained from anticipation, added a direction that they were not to be paid to any attorney, except upon an affidavit or statutory declaration by such attorney, that he received them on her behalf, and for her use, and not for any other person to whom she had assigned, or purported to assign them.

Even for the benefit of a married woman, the Court could not release her separate estate from the restraint upon anticipation: *Robinson v. Wheelwright*, 6 D. M. & G. 535; 21 Beav. 214; *Re Glanville, Ellis v. Johnson*, 31 Ch. D. 532, C. A.; nor aid her in anticipating, though by the law of her husband's domicile the clause against anticipation failed: *Peillon v. Brooking*, 25 Beav. 218.

Removal of Restraint under Conveyancing Act.

Now by the Conveyancing Act, 1881 (44 & 45 V. c. 41), s. 39, the Court may, "notwithstanding that a married woman is restrained from anticipation, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property." The power of the Court under this section is discretionary and to be exercised only where a strong case is made out: *Re Little, Harrison v. H.*, 40 Ch. D. 418, C. A.; and with reference to some particular disposition to be made by the *feme*: *Re Warren*, 52 L. J. Ch. 928; 49 L. T. 696. The Court must be satisfied that it will be for the benefit of the wife individually to grant the application: *Re Jordan, Kino v. Picard*, 55 L. J. Ch. 330; 54 L. T. 127; 34 W. R. 270; W. N. (86) 6; *Re Currey*, 56 L. J. Ch. 389; 56 L. T. 80; 35 W. R. 326; *Re Segrave's Trusts*, 17 L. R. Ir. 424; *Re Millar*, 25 L. R. Ir. 107; *Re Tennant*, 25 L. R. Ir. 522; *Re Flood*, 11 L. R. Ir. 355; and not merely for the benefit of the husband: *Tamplin v. Miller*, 30 W. R. 422; *Re S.'s Settlement*, W. N. (93) 127; or to raise money to pay debts incurred through the extravagance of her or of her husband: *Re Pollard's Settlement*, (1896) 1 Ch. 901; (1896) 2 Ch. 552, C. A.; or to benefit the wife by releasing a power to appoint amongst her children: *Re Little*, 40 Ch. D. 418, C. A.; and see *Cunynghame v. Thurlow*, 1 R. & M. 436; *Re Radcliffe, R. v. Bewes*, (1892) 1 Ch. 227, C. A.; (1891) 2 Ch. 662; or to enable her to enter into a compromise annulling the settlement on a decree *nisi* for a divorce being made: *Thomson v. T.*, (1896) P. 263, C. A.; or to obtain an increased income by transferring the fund to another and less stringent trust: *Re Blundell*, (1901) 2 Ch. 221, C. A.; and generally as to the circumstances under which the Court will discharge the restraint, see Lewin, 962, 963; *Hodges v. H.*, 20 Ch. D. 749; *Re Milner's Settlement*, (1891) 3 Ch. 547; *Re Marquis of Ailesbury and Lord Iveagh*, (1893) 2 Ch. 345.

The application under the section should be by summons: *Latham v. L.*, W. N. (89) 171; *Re Lillwall's Settlement Trusts*, 30 W. R. 243; but may be by petition: see *Re Blundell*, *sup.* For form of summons, see D. C. F. 1223. As to not requiring trustees to be served, and as to form of order, see *Re Little's Will*, 36 Ch. D. 701; and as to separate examination of married woman, see *Hodges v. H.*, 20 Ch. D. 749; *Musgrave v. Sandeman*, 48 L. T. 215.

A restraint against alienation of rents and profits does not prevent a wife (equitable tenant in tail) from barring the entail and defeating her husband's right to curtesy by devising the estate: *Cooper v. Macdonald*, 7 Ch. D. 288.

When the restriction against alienation is carried beyond the legal limit it may be rejected, leaving the appointment for separate use valid: *Re Cunynghame's Settlement*, 11 Eq. 324; *Teague's Settlement*, 10 Eq. 564; *Re Ridley, Buckton v. Hay*, 11 Ch. D. 645; *Re Errington, Bawtree v. E.*, W. N. (87) 23; *Herbert v. Webster*, 15 Ch. D. 610; or upheld so far as it is applicable to persons *in esse*, and therefore within the legal limit: *Armitage v. Coates*, 35 Beav. 1; see Lewin, 964, and *Re Dawson, Johnston v. Hill*, 39 Ch. D. 155 (as to person past age of child-bearing).

As to the effect of sect. 19 of the Married Women's Property Act, 1882, see *inf.* pp. 919, 920.

As to the effect of a judicial separation upon a restraint on anticipation, see *Waite v. Morland*, 38 Ch. D. 135.

(III.) SEPARATE ESTATE UNDER THE MARRIED WOMEN'S PROPERTY ACTS.

1. *Appointment of Trustees of Policy Money—Married Women's Property Act, 1882, s. 11.*

UPON the petition of A. B., Let C. D. of &c., and E. F. of &c., be appointed trustees for the purpose of receiving from the London and Lancashire Assurance Co. £— bonuses and other moneys payable under the policy effected in that office on the life of X., dated &c., and numbered &c.—*Re Davies' Policy*, Chitty, J., 16 Nov. 1891, A. 1717; S. C., (1892) 1 Ch. 90.

For a like order under the Married Women's Property Act, 1870, s. 10, see *Re Turner*, V.-C. B. at Chambers, 14 Sept. 1875, B. 1592; Seton, 4th ed. p. 663.

For order, on petition of widow and children, appointing trustees to receive the policy-money and declaring the trusts on which it was to be held, i.e., after payment of costs as between solor and client, to invest the residue, and pay the income to widow for life for her separate use, without power of anticipation, with remainder, as to both capital and income, for the children at twenty-one, or marriage under that age, in equal shares; if but one child, the whole to that one child, with remainder, if neither child attained twenty-one, or married under that age, for the widow absolutely: *Re Mellor's Policy*, V.-C. M., 13 July, 1877; 6 Ch. D. 127; a subsequent order was made on the 7th Dec. 1877, distributing the policy moneys as if the husband had died intestate: see 7 Ch. D. 200; but see *Re Adams' Policy Trusts*, *inf.* p. 914.

For forms of application, see D. C. F. 1241 *et seq.*

2. *Declaration that a Married Woman Trustee cannot convey without Deed acknowledged—Married Women's Property Act, 1882 (45 & 46 V. c. 75), ss. 1, 18, 24.*

UPON the application of S. A. & Sons, Ltd., for the opinion of the Judge by originating summons, dated &c., which, upon hearing the solrs &c., was adjourned to be heard in Court coming on this day &c. And upon hearing counsel &c., And upon reading &c., This Court doth declare that the said E. H. H. [*married woman*], A. R., and H. H. cannot, in pursuance of the provisions contained in the above-mentioned contract, effectually convey the real estate comprised in the said contract so as to vest the same in the said S. A. & Sons, Ltd., without the concurrence of the said T. H., the husband of the said E. H. H. The said E. H. H., A. R., and H. H. to pay the applicants' costs, to be taxed.—See *Re Harkness and Allsopp's Contract*, North, J., 2 June, 1896, A. 2272; (1896) 2 Ch. 358.

MARRIED WOMEN'S PROPERTY ACTS, 1870 AND 1874.

The character of separate estate was extended by the Married Women's Property Act, 1870 (33 & 34 V. c. 93), to the following descriptions of property:—

Sect. 1. The wages and earnings of any married woman acquired by her after the 9th August, 1870, in any employment, occupation, or trade in which she was engaged or which she carried on separately from her husband, and also any money or property so acquired through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, &c., or property, were to be deemed to be property held and settled to her separate use

independently of any husband; and her receipts alone were to be a good discharge for such wages, &c.

This section was held to apply not only to the earnings of a separate business carried on by a married woman, but also to the business and stock in trade from which the earnings were made: *Ashworth v. Outram*, 5 Ch. D. 923, 939, C. A.; and see *Lovell v. Newton*, 4 C. P. D. 7; *Re Dearmer, James v. D.*, 53 L. T. 905; and after her death such earnings formed equitable assets: *Re Poole, Thompson v. Bennett*, 6 Ch. D. 739.

Sect. 2. Deposits in the savings banks in the name of a married woman, or of a woman who married after such deposit, were to be deemed to be her separate property, and to be accounted for and paid to her as if she were unmarried.

By sect. 3, it was provided that any married woman, or woman about to be married, might apply to the Governor and Company of the Bank of England or of Ireland, by a form to be provided for that purpose, that stock not being less than 20*l.*, to which the woman so applying was entitled or which she was about to acquire, might be transferred to, or made to stand in the books, &c. in the name or intended name, of the woman, as a married woman entitled to her separate use; and, on such form being entered in the books accordingly, the same should be deemed to be her separate property, and should be transferred and the dividends paid as if she were an unmarried woman: provided that if any such investment in the funds was made by a married woman by means of moneys of her husband without his consent, the Court might, on application under sect. 9 of the Act, order such investment, and the dividends or any part thereof, to be transferred and paid to the husband.

Under this section a fund in Court to which a married woman was entitled for her separate use, or subject to her power of appointment, might, with the consent of the husband and the reversioner, be transferred into her name pursuant to the Act: *Re Bartholomew*, 19 W. R. 95; 23 L. T. 433; *Re Butlin*, 23 L. T. 523; 19 W. R. 241; *Frank v. Mackay*, I. R. 8 Eq. 93; and where one of the applicants was under age, and a ward of Court at the time of her marriage, the fund was ordered to be settled on her: *Re Butlin, sup.*

Until stock in the Bank of England (to which a married woman had become entitled, under sect. 7, for her separate use) was actually standing in her name, under sect. 3, she had no right, and the Bank could not be compelled, to transfer the stock without the concurrence of her husband: *Howard v. Bank of England*, 19 Eq. 295.

Sect. 4. The like provisions were made with respect to paid-up shares or any debenture or debenture stock, or any stock of any incorporated or joint stock co., to the holding of which no liability was attached, and to which a married woman, or woman about to be married, was entitled; and by sect. 5, with respect to any share, benefit, debenture, right or claim in, to, or upon the funds of an industrial and provident, friendly, benefit, building, or loan society, to the holding of which share, &c., no liability was attached, see *Reg. v. Carnatic Rail. Co.*, 8 L. R. Q. B. 299.

Sect. 7. Personal property to which any married woman after the 9th August, 1870, should become entitled under an intestacy (whatever the amount: *Re Voss, King v. V.*, 13 Ch. D. 504), or money not exceeding 200*l.* under any deed or will; and,—

Sect. 8. The rents and profits of any freehold, copyhold, or customary-hold property, which should descend upon any woman married after 9th August, 1870, as heiress or co-heiress of an intestate, were, subject and without prejudice to the trusts of any settlement affecting the same, to belong to her for her separate use, and her receipts alone were a good discharge for the same.

This section does not give her an enlarged dominion over the inheritance: *Johnson v. J.*, 35 Ch. D. 345.

Where a legacy and share of residue devolves on a married woman under the same instrument, sect. 7 must be applied to each sum separately and not to both in the aggregate: *Re Davies, Harrison v. D.*, (1897) 2 Ch. 204.

Sect. 9. In questions between husband and wife as to property by the Act declared to be separate property of the wife, either party might apply by summons or motion to the (Chancery Division of the High Court of Justice)

or, irrespective of the value of the property, to the Judge of the County Court.

Sect. 10. A married woman might effect a policy of insurance upon her own life or the life of her husband for her separate use, and the same and all benefit thereof, if expressed on the face of it to be so effected, should enure accordingly, and the contract be as valid as if made with an unmarried woman. A policy effected by a married man on his own life, and expressed to be for the benefit of his wife, or of his wife and children, was to enure and be deemed a trust for the benefit of his wife for her separate use and of his children, according to the interest so expressed, and so long as any object of the trust remained was not to be subject to the control of the husband, or to his creditors, or form part of his estate: see on this section, *Holt v. Everall*, 2 Ch. D. 266.

Where the interest to be taken by the widow and her children was not expressed on the face of the policy, the money secured, though in the first instance ordered to be held upon the usual trusts (see *Re Mellor's Policy Trusts*, 6 Ch. D. 127), was on subsequent application allowed to be distributed as if the husband had died intestate, the widow being poor, and the income of the policy moneys insufficient for the maintenance of herself and children: *S. C.*, 7 Ch. D. 200. This was not followed in *Re Adam's Policy Trusts*, 23 Ch. D. 525, where Chitty, J., intimated the opinion that under a policy for the benefit of wife and children, the widow took for life for her separate use, with remainder to the children as joint tenants, and a recital was inserted in the order that the surviving children took as joint tenants; but in *Re Seyton, S. v. Satterthwaite*, 34 Ch. D. 511, North, J., held that in such a case widow and children took concurrently as joint tenants; and this has since been followed by Chitty, J.: *Re Davies' Policy*, (1892) 1 Ch. 90.

Where the appointment by the Court of a new trustee is required, the petition or summons should be entitled also in the matter of the Trustee Act, 1893: *Re Soutar's Policy Trusts*, 26 Ch. D. 236; and the Court can under its general jurisdiction appoint two new trustees: *Schultze v. S.*, 56 L. J. Ch. 356; 56 L. T. 231.

Where the fund was to be retained on behalf of infants, the Court declined to appoint a single trustee under this section: *Re Howson's Policy Trusts*, W. N. (85) 213.

Where a person effected a policy upon his own life under the M. W. P. Act for the benefit of his wife for her separate use, and of the children to be born of the marriage as he should appoint, and he died without having exercised the power of appointment, leaving his widow and one child, an infant, surviving, the policy money was directed to be paid, as to one moiety to the widow, and as to the other moiety to be invested in trust for the child, and the income during minority paid to the widow for his maintenance: *Re Edwards' Policy*, V.-C. M., 28 W. B. 72; and see *Fisher v. Shirley*, 43 Ch. D. 290.

The section remains in force as to policies effected under it, notwithstanding the provisions of sect. 11 of the Act of 1882 (*v. inf.* p. 918), and therefore a trustee must be appointed to give a discharge for the policy moneys, whether they become payable before or after the Act of 1882, and the application for such payment may properly be entitled only in the matter of the Act of 1870 and not in that of 1882: *Re Turnbull, T. v. T.*, (1897) 2 Ch. 415; *Re Kuypers' Policy Trusts*, (1899) 1 Ch. 38 (not following *Re Soutar's Policy Trust*, 26 Ch. D. 236).

Sect. 11. A married woman might maintain an action in her own name for the recovery of any wages, earnings, money, and property declared by the Act to be separate property, or of any property belonging to her before marriage, and which her husband should by writing under his hand have agreed with her should belong to her after marriage as her separate property, and she was to have in her own name the same remedies, both civil and criminal, for the protection and security of such wages, &c., as if they belonged to her as an unmarried woman. See on this section, *Summers v. City Bank*, L. R. 9 C. P. 580; *Howard v. Bank of England*, 19 Eq. 295; *Duncan v. Cashin*, L. R. 10 C. P. 554.

This section did not allow a married woman to be sued alone without her husband in an action to charge her separate earnings with a debt contracted by her: *Hancock v. Lablache*, 3 C. P. D. 197; *Atwood v. Chichester*, 3 Q. B. D.

722; but applied so as to allow her to present, without a next friend, a petition for payment of her separate property out of Court: *Re Fisher's Trusts*, 30 W. R. 56; 45 L. T. 504.

Sect. 12. A husband was not, by reason of his marriage after the passing of the Act, to be liable for the debts of his wife contracted before marriage; and the wife was liable to be sued for, and any property belonging to her for her separate use was liable to satisfy such debts "as if she had continued unmarried."

Under this section the separate property of the wife remained liable for her ante-nuptial debts even though she was restrained from anticipation: *Axford v. Reid*, 22 Q. B. D. 548, C. A.; *Re Hedgely, Small v. H.*, 34 Ch. D. 379; *London and Provincial Bank v. Bogle*, 7 Ch. D. 773; but she could not be made a bankrupt: *Re Holland*, 9 Ch. 307.

The husband surviving and taking out admon to the wife was, notwithstanding the section, liable for her debts: *Turner v. Caulfield*, 7 L. R. Ir. 347.

Sect. 13. A married woman having separate property might be made liable for the maintenance of her husband where he became chargeable to a union or parish, and the order might be made and enforced against her in the same way as such an order might be made and enforced against a husband by the Poor Law Amendment Act, 1868 (31 & 32 V. c. 122), s. 33; and by sect. 14, she was to be subject to the same liability for the maintenance of her children as a widow.

By the Amendment Act of 1874 (37 & 38 V. c. 50), as to marriages which took place after the 30th July, 1874, the liability of the husband was restored (sect. 1), but was confined to the extent of the fortune of the wife received, or which ought to have been received, by him, if he pleaded that limit to his liability; but it was in his option either to claim this limit to his liability or not, and if he did not so claim it, he was liable for the wife's debts in the same manner as the husband originally was at common law. Under this Act, therefore, a creditor of the wife suing the husband and wife, was not bound to allege facts showing the liability of the husband, but the husband, relying on the Act, had to plead it by way of defence: *Matthews v. Whittle*, 13 Ch. D. 811; but the liability of the husband did not continue after the wife's death: *Bell v. Stocker*, 10 Q. B. D. 129.

By sect. 22 of the Married Women's Property Act, 1882, the Acts of 1870 and 1874 are repealed, but such repeal "shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act" (i.e., the Act of 1882), "to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act."

MARRIED WOMEN'S PROPERTY ACT, 1882.

Capacity of Married Woman.

By sect. 1 of the Married Women's Property Act, 1882 (45 & 46 V. c. 75), sub-sect. 1, "a married woman shall in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property, in the same manner as if she were a *feme sole*, without the intervention of any trustee."

Sect. 1 is a general section, which is to be construed with sects. 2 and 5 (v. inf. p. 917): *Re Cuno, Mansfield v. M.*, 43 Ch. D. 12, 15, C. A.; and see *Re Drummond and Davie*, (1891) 1 Ch. 524, 534.

As this sub-section does not deal with the devolution of property undisposed of by the *feme*, it does not affect the marital right of the husband as against the next of kin: *Re Lambert's Estate, Stanton v. L.*, 39 Ch. D. 626; *Surman v. Wharton*, (1891) 1 Q. B. 491, 493; *Smart v. Tranter*, 43 Ch. D. 587, C. A.; nor deprive him of his estate by the curtesy in her realty undisposed of: *Hope v. H.*, (1892) 2 Ch. 336; nor does it alter the status of the *feme* so as to affect the operation of the rule whereby husband and wife, under a gift to them, take as one person: *Re Jupp, J. v. Buckwell*, 39 Ch. D. 148; *Re*

March, Mander v. Harris, 27 Ch. D. 166, C. A.; 24 Ch. D. 222; *Re Dixon, Byram v. Tull*, 42 Ch. D. 306.

Where real estate of the husband is, since the Act, conveyed to husband and wife, the presumption of intended advancement not being rebutted, they take as joint tenants, and her interest belongs to her for her separate use: *Thornley v. T.*, (1893) 2 Ch. 229.

As to the effect of the Act in reference to the will of the married woman, *v. inf.* p. 926.

By sub-sect. 2 (*v. sup.* p. 887), a married woman is rendered capable "of entering into and rendering herself liable in respect of, and to the extent of her separate property on any contract," and of suing and being sued, either in contract, or tort, or otherwise; and any damages or costs recovered by her are to be her separate property, and any damages or costs recovered against her are made payable out of her separate property. This enactment is not retrospective: *Davies v. Stanford*, 61 L. T. 234; and it does not abolish the general liability of the husband for his wife's torts: *Seroka v. Kattenburg*, 17 Q. B. D. 117; *sup.* p. 894.

By sub-sect. 3, "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown;" and by sub-sect. 4, "every contract entered into by a married woman with respect to and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire."

These enactments (which were repealed by the Act of 1893, *v. sup.* p. 891) did not enable a married woman who had no separate property to bind herself by contract: *Stogdon v. Lee*, (1891) 1 Q. B. 661, C. A.; *Palliser v. Gurney*, 19 Q. B. D. 519; *Re Shakespear, Deakin v. Lakin*, 30 Ch. D. 169; and see *Pelton v. Harrison*, (1891) 2 Q. B. 422, C. A.; and, therefore, the Plt suing her was put to prove that she had at the time of entering into the contract, separate property, free from restraint on anticipation, as to which she might reasonably be deemed to have contracted: *Tetley v. Griffith*, 57 L. T. 673; 36 W. R. 96; W. N. (87) 218; *Braunstein v. Lewis*, 64 L. T. 265; 65 L. T. 449; *Leak v. Driffield*, 24 Q. B. D. 98; *v. sup.* p. 890; *secus*, where Plt was suing otherwise than in contract, as in that case the liability of the *feme* to be sued was general: *Whittaker v. Kershaw*, 45 Ch. D. 320, 327, 329, C. A.

Semble, the enactments are not retrospective so as to affect contracts entered into previously to 1883: *Re Roper, R. v. Doncaster*, 39 Ch. D. 482, 487; and see *Conolan v. Leyland*, 27 Ch. D. 632; *Re March, Mander v. Harris*, 27 Ch. D. 166, C. A.; *Turnbull v. Forman*, 15 Q. B. D. 234, C. A.; but a consent order after 1883, referring to arbitration questions under a contract made before 1883, was held to be a new contract: *Conolan v. Leyland, sup.*

As the Act refers to separate property only, the contract of the married woman did not affect property acquired by her after the coverture: *Beckett v. Tasker*, 19 Q. B. D. 7; or separate property subject to restraint on anticipation at the time of the contract, but afterwards becoming free therefrom on the coverture ceasing: *Pelton v. Harrison*, (1891) 2 Q. B. 422; and see *Softlaw v. Welch*, (1899) 2 Q. B. 419, C. A.; but see *Re Wheeler's Settlement, Briggs v. Ryan*, (1899) 2 Ch. 717 (tending to show that the expression "separate property" may include property to which a separate use will attach on coverture *in futuro*); but it did affect separate property acquired during a subsequent coverture: *Jay v. Robinson*, 25 Q. B. D. 467, C. A.

By sub-sect. 5, "every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*."

As power is not "property," a married woman adjudicated bankrupt under this sub-section, cannot be compelled to exercise a general power in favour of the trustee in bankruptcy: *Exp. Gilchrist, Re Armstrong*, 17 Q. B. D. 521, C. A.; and as a judgment against a married woman, according to the form in *Scott v. Morley* (*v. sup.* p. 885), is not personal, she cannot be made bankrupt on a notice grounded on it under sect. 4, sub-sect. 1 (g), of the Bankruptcy Act, 1883: *Re Lynes, Exp. Lester*, (1893) 2 Q. B. 113, C. A.; *Re Elliott* (1900), 2 I. R. 439; although she has subsequently become a widow: *Re Hewett, Exp. Levene*, (1895) 1 Q. B. 328; or is trading separately from her husband under a firm name, and judgment is obtained against her in that

name: *Re Frances Handford & Co., Exp. Frances Handford*, (1899) 1 Q. B. 566, C. A.

The married woman will be deemed to be "carrying on trade" so long as there are debts due to her trade creditors remaining unpaid: *Re Dagnall, Exp. Soan and Morley*, (1896) 2 Q. B. 407; *Re Worsley*, (1901) 1 K. B. 309, C. A.; and the trade may be "separate" although the husband is living in the house and acting in the management: *S. C.*

Where after a petition for adjudication had been presented against a spinster she obtained an adjournment of the case, and married during the interval of adjournment, it was held that, as she was not carrying on a trade separately from her husband, she was not subject to the bankruptcy laws, and a receiving order made against her was discharged: *Re a Debtor, Exp. the Debtor*, (1898) 2 Q. B. 576, C. A.

The sub-section applies although the business is entirely managed by her husband, provided he has no control over the money in or assets of the business: *Re Edwardes, Exp. Edwardes*, 43 W. R. 509; explaining *Re Helsby*, 1 Manson, 12; 63 L. J. Q. B. 261; 69 L. T. 864.

As to the position before the Act of a married woman in regard to the bankruptcy laws, *v. sup.* p. 903.

Woman married after the Act.

By sect. 2, "every woman who marries *after* the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid, all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

As to the protection extended to the trade or business from which the earnings arise, see *Ashworth v. Outram*, 5 Ch. D. 923, C. A., *sup.* p. 913.

Where a married woman carries on a separate trade it must be assumed, unless the contrary is shown, that she has separate property: *Eddowes v. Argentine Loan Co.*, 63 L. T. 364.

Woman married before the Act.

By sect. 5, "every woman married *before* the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money and property so gained or acquired by her as aforesaid."

As the section relates to the accruer of title, it does not affect the rights of the husband in respect of property which accrues in title before, but falls into possession after the Act: *Reid v. R.*, 31 Ch. D. 402, C. A.

But a mere *spes successionis*, as one of a class of possible next of kin, is not a contingent title within the section; and on the class becoming ascertainable subsequently to the Act, the section applied: *Re Parsons, Stockley v. P.*, 45 Ch. D. 51; dissenting from *Re Beaupre's Trusts*, 21 L. R. Ir. 397, C. A.

Damages awarded to the wife in an action by her and her husband, in respect of personal injury to her, must be her separate property under this section, if they are not so under sect. 1, sub-sect. 2: *Beasley v. Rooney*, (1891) 1 Q. B. 509.

Stocks, Shares, &c. of Married Women.

By sect. 6, "all deposits in any post office or other savings bank, or in any other bank, all annuities granted by the commrs for the reduction of the national debt, or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which, at the commencement of this Act" (1st January, 1883), "are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any indus-

trial, provident, friendly, benefit, building, or loan society, which at the commencement of the Act are standing in her name" (*i.e., semble*, her sole name), "shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman;" and the fact that such property is standing in the sole name of a married woman "shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband," and to indemnify the several persons, public bodies and companies concerned in respect thereof.

By sect. 7, all such deposits, annuities, sums, shares, stock, debentures, debenture stock, and other interests as referred to in the last section, which after the commencement of the Act shall be allotted to or made to stand in the sole name of a married woman, are to be deemed, unless and until the contrary be shown, to be her separate property, in respect of which, so far as any liability may be incident thereto, her separate estate is alone to be liable. But nothing in the Act is to require or authorize any corporation or company to admit any married woman to be a holder of any shares or stock therein, to which any liability may be incident, contrary to the provisions of the instrument regulating such corporation or company.

By sect. 8, the above provisions are extended to the case of stocks, shares, &c. invested in the names of any married woman jointly with any persons or person other than her husband; and by sect. 9, the concurrence of the husband in any transfer is rendered unnecessary.

By sect. 10, where an investment has been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under sect. 17 (*v. sup.* p. 895), order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband.

Policy of Assurance.

Sect. 11 provides that a married woman may effect a policy upon her own life, or the life of her husband, for her separate use; and that a policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts. The insured may, by the policy, or by any memorandum, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the policy moneys; and in default of any such appointment, such policy, immediately on its being effected, is to vest in the insured in trust for the purposes aforesaid. If at any time there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, the appointment may be made by any Court having jurisdiction under the Trustee Act, 1850, or the Acts amending the same (now the Trustee Act, 1893, *v. inf.* Chap. XLI., Sect. 10, pp. 1209 *et seq.*).

For the cases on the corresponding section (sect. 10) of the Married Women's Property Act, 1870, *v. sup.* p. 914.

When the object of the trust is performed, or becomes incapable of performance, the policy reverts to the estate of the insured. Therefore, where the death of the insured was caused by the felonious act of his wife, who was the sole *cestui que trust* under the policy, his executors could, in the absence of stipulation to the contrary, recover from the insurance office on the policy: *Cleaver v. Mutual Reserve Fund*, (1892) 1 Q. B. 147, C. A.

Ante-Nuptial Debts.

By sect. 13 (*v. sup.* p. 891), a woman, after her marriage, is to continue liable to the extent of her separate estate for her ante-nuptial debts, contracts, or wrongs, and may be sued accordingly, and all sums recovered against her

shall be payable out of her separate property, and, as between her and her husband, unless there be any contract between them to the contrary, her separate property is to be primarily liable.

The section extends to debts contracted under the powers of the Act during a former coverture: *Jay v. Robinson*, 25 Q. B. D. 467, C. A.; *Pelton v. Harrison*, (1891) 2 Q. B. 422; but as the Act does not destroy the unity of person existing between husband and wife, he cannot sue her for money lent to or paid for her at her request before their marriage: *Butler v. B.*, 14 Q. B. D. 831.

The personal liability of a married woman at common law upon contracts made by her before marriage is not taken away by the Married Women's Property Act, 1882: *Robinson, King & Co. v. Lynes*, (1894) 2 Q. B. 577.

By sect. 14, a husband is liable for his wife's ante-nuptial debts, contracts, and wrongs, to the extent of all property whatsoever belonging to her which he shall have acquired or become entitled to from or through her, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bond fide* recovered against him in respect of such debts, &c., but he is not to be liable for the same any further or otherwise.

The husband can avail himself of the Statute of Limitations in respect of his wife's ante-nuptial debt as from the time when the debt accrued due by her: *Beck v. Pierce*, 23 Q. B. D. 316, C. A.

By sect. 15, the husband and wife may be sued jointly in respect of any such debt or liability, if the Plt seeks to establish his claim against them both. If the husband is not found liable, he is to have judgment for his costs of defence, whatever may be the result of the action against the wife; and if the husband is liable for part, the judgment to the extent of the amount for which he is liable is to be "a joint judgment against the husband personally, and against the wife as to her separate property; and as to the residue" of the debt or damages, "a separate judgment against the wife as to her separate property only."

Settlements excepted from Act.

Sect. 19 enacts, "Nothing in this Act contained shall interfere with or affect any settlement, or agreement for a settlement, made or to be made, whether before or after marriage, respecting the property of any married woman."

The effect of this provision has been held to be that the operation of a settlement is to be determined precisely as under the previous law, so that no one who could have taken an interest under that law is to be deprived thereof: *Re Onslow, Plowden v. Gayford*, 39 Ch. D. 622, 625; *Hancock v. H.*, 38 Ch. D. 78, C. A.; *Buckland v. B.*, (1900) 2 Ch. 534; and property which would have been bound by a settlement if the Act had not passed, will not be touched by sect. 5: *Hancock v. H.*, *sup.*; considering *Re Queade's Trusts*, 53 L. T. 74; 33 W. R. 816; 54 L. J. Ch. 786; or sect. 2: *Stevens v. Trevor-Garrick*, (1893) 2 Ch. 307; *Buckland v. B.*, *sup.* Therefore a covenant for settlement of the wife's after-acquired property entered into by the husband alone will still be as effectual as it would have been before 1883: *Re Whitaker, Christian v. W.*, 34 Ch. D. 227, C. A.; *Hancock v. H.*, *sup.*; and see *Re Stonor's Trusts*, 24 Ch. D. 195; *Hemingway v. Braithwaite*, 61 L. T. 224; *Stevens v. Trevor-Garrick*, *sup.*; and a marriage settlement by an infant *feme*, with the concurrence of the husband, of property not limited to her separate use cannot be avoided by her repudiation on majority: *Buckland v. B.*, *sup.*; but when the settlement has passed an interest to a married woman, the statutory incidents attach thereto: *Re Onslow*, *sup.*; and if she becomes *discovert* and marries again, she will hold it as separate property in accordance with the Act: *S. C.*; and an alienation by her which would not have been practicable before the Act is not an interference with or act affecting the settlement: *Exp. Boyd, Re Armstrong*, 21 Q. B. D. 264, C. A., where the separate life estate of a *feme* made bankrupt under sect. 1, sub-sect. 5, was held to pass to her trustee in bankruptcy.

Restraint on Anticipation.

Sect. 19 further provides that nothing in the Act contained "shall interfere with or render inoperative any restriction against anticipation at present attached or hereafter to be attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will,

or other instrument; but no restriction on anticipation contained in any settlement, or agreement for a settlement, of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement, or agreement for a settlement, shall have any greater force or validity against creditors of such woman than a like settlement, or agreement for a settlement, made or entered into by a man would have against his creditors."

Under this section property subject to a restraint on anticipation, whether belonging to the married woman at the time of the contract or subsequently acquired, was not bound though the coverture had afterwards determined: *Pelton v. Harrison*, (1891) 2 Q. B. 422; *Beckett v. Tasker*, 19 Q. B. D. 7; *Myles v. Burton*, 14 L. R. Ir. 258; *secus*, where the property became free from the restraint during the coverture, as then sect. 1, sub-sect. 4, was applicable: *sup.* p. 916; *Cox v. Bennett*, (1891) 1 Ch. 617.

Money in the hands of a trustee in respect of separate property subject to a restraint on anticipation, and accruing due after judgment, cannot be attached by the judgment creditor: *Galmoye v. Cowan*, 58 L. J. Ch. 769.

A debt contracted during a previous coverture is a debt contracted before marriage within the section: *Jay v. Robinson*, 25 Q. B. D. 467, C. A.

The concluding clause applies only to settlements made after the Act: *Beckett v. Tasker*, *sup.*; *Myles v. Burton*, *sup.*; *Smith v. Whitlock*, 55 L. J. Q. B. 286; and, read with the first clause, has been held not to prevent a married woman, as against creditors subsequent to her marriage, settling her separate property by a post-nuptial settlement on herself with a restraint on anticipation: *Hemingway v. Braithwaite*, 61 L. T. 224.

(IV.) CONTRACTS BETWEEN HUSBAND AND WIFE.

Husband and wife may bargain *inter se*, and a contract, afterwards embodied in a post-nuptial settlement, by which something is given up and something taken in exchange on either side, is a transaction for valuable consideration, and was not avoided under 27 Eliz. c. 4 (see now 56 & 57 V. c. 21), as against a subsequent purchaser for value from husband and wife without notice: *Teasdale v. Braithwaite*, 4 Ch. D. 85; 5 Ch. D. 630, C. A.; *Re Foster and Lister's Contract*, 25 W. B. 553; *Hewison v. Negus*, 16 Beav. 594 (affirmed 17 Jur. 567); *Shurmur v. Sedgwick*, 24 Ch. D. 597; and see *Atkinson v. Smith*, 3 D. & J. 186; *McGregor v. M.*, 21 Q. B. D. 424, C. A.

Where the husband acts as solr, it is his duty to explain most fully any provisions in the settlement of his wife's property which are in his favour, and the burden of proof will lie on his represves to uphold the settlement after his death if it is *ex facie* improper: *Lovesay v. Smith*, 15 Ch. D. 655; and although there may be no absolute presumption against the validity of a deed of gift by a wife to her husband prepared by his solr (*Barron v. Willis*, (1899) 2 Ch. 578 (*per* Cozens-Hardy, J.)), yet, if a confidential relation is established between her and the solr, and the deed benefits the son of the solr, it will not be binding on her in the absence of independent advice: *S. C.*, (1900) 2 Ch. 121, C. A.

And on the question of consideration between husband and wife, see *May*, Vol. Conv. 281; *Dart*, V. P. 1001, 1005.

When in litigation with her husband she can be bound by her agreement to compromise or submit matters in dispute between them to arbitration: *Bateman v. Ross*, 1 Dow, 235; *McGregor v. M.*, 21 Q. B. D. 424, C. A.; *Hart v. H.*, 18 Ch. D. 670; the right to compromise being incident to the right to sue: *Besant v. Wood*, 12 Ch. D. 605, 622; *Rose v. R.*, 8 P. D. 98, C. A.; and see *Williams v. Baily*, 2 Eq. 731; *Cahill v. C.*, 8 App. Ca. 420, 431, 436.

With respect to property which the wife, though entitled for her separate use, is restrained from anticipating, she has no power of contracting with her husband or with other persons: *Walrond v. W.*, Joh. 18.

Since the Married Women's Property Act, 1882, a husband may sue his wife for money lent by him to her after their marriage, and for money paid by him for her after the marriage, at her request made either before or after the marriage: *Butler v. B.*, 15 Q. B. D. 374, C. A.; *secus*, as to money lent to her or paid for her before the marriage, as the Act has not destroyed the unity of person between husband and wife: *S. C.*, 14 Q. B. D. 831.

On the question of gifts between husband and wife, see *Grant v. G.*, 34

Beav. 623, and cases there cited. See also *Re Breton's Estate*, *Breton v. Woolven*, 17 Ch. D. 416; *Lewin*, 69, 70; and as to gifts of separate property by wife to husband, and the distinction between capital and income, see *Lewin*, 881 *seq.*; *Re Curtis*, *Hawes v. C.*, 52 L. T. 244; *Re Flamank*, *Woods v. Cook*, 40 Ch. D. 461; *Re Blake*, *B. v. Power*, W. N. (89) 46; 37 W. R. 441; 60 L. T. 663; *Edwards v. Cheyne*, 13 App. Ca. 385; *Re Dixon*, *Heynes v. D.*, (1899) 2 Ch. 561 (as to Statute of Limitations not running where husband retains interest payable by him and receivable by his wife); *Re Young*, *Trye v. Sullivan*, 28 Ch. D. 705; *Re Winn*, *Reed v. W.*, 57 L. T. 382; W. N. (87) 157. And the M. W. P. Act, 1882, has not abolished the general law as to gifts of paraphernalia: *Tusker v. T. and Lowe*, (1895) P. 2 (in which case presents given by husband to wife as "peace offerings" after disputes and on other occasions were held to be not paraphernalia, but the separate property of the wife).

By the Married Women's Property Act, 1882 (45 & 46 V. c. 75), s. 3, any money or other estate of the wife lent or entrusted by her to her husband "for the purpose of any trade or business carried on by him or otherwise," is to be treated as assets of his estate in case of his bankruptcy, and she is to be entitled to a dividend as creditor after all other creditors for valuable consideration in money or money's worth are satisfied.

This section does not apply where the loan is not to the husband, but to his firm: *Re Tuff*, *Exp. Nottingham*, 19 Q. B. D. 88; nor for purposes unconnected with his trade or business: *Re Tidswell*, *Exp. T.*, 56 L. J. Q. B. 548; 35 W. R. 66; *Re Clarke*, *Exp. Schulze*, (1898) 2 Q. B. 330, C. A.; *Mackintosh v. Pogose*, (1895) 1 Ch. 505; *Re Cronmire*, (1901) 1 Q. B. 480, C. A.; but it applies where the estate of the deceased husband, though sufficient for payment in full of his debts and liabilities, apart from the costs of admon, is insufficient by reason of such costs: *In re Leng*, *Tarn v. Emmerston*, (1895) 1 Ch. 652, C. A. The section is not retrospective: *Re Home*, 54 L. T. 301; and as it refers only to bankruptcy, it does not preclude the widow retaining as administratrix money advanced to her husband for his business: *Re May*, *Crawford v. M.*, 45 Ch. D. 499; but in the event of bankruptcy, the wife must displace any *prima facie* inference that the money was lent for the purposes of the trade or business: *Re Genese*, *Exp. District Bk. of London*, 16 Q. B. D. 700; *Re Cronmire*, *sup.*

By s. 10 of the Act, nothing in the Act contained "shall give validity as against creditors of the husband to any gift by a husband to his wife of any property which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife, in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed."

(V.) MORTGAGES BY HUSBAND AND WIFE.

Where a wife joins her husband in mortgaging her estate, she is not to be considered as having parted with or affected her estate in the equity of redemption, unless a clear intention to that effect be shown: *Jackson v. Innes*, 1 Bli. 104; *Ruscombe v. Hare*, 2 Bli. N. S. 192.

The uses of a settlement may, however, be defeated by a mortgage by husband and wife of the settled property in exercise of their joint power of appointment: *Jones v. Davies*, 8 Ch. D. 205.

Where several successive mortgages of the wife's estate were made, a variation in the language of the later deeds was held to show a change of intention, and the estate in the equity of redemption was treated as altered: *Barnett v. Wilson*, 2 Y. & C. C. 407.

A mortgage by a husband of his wife's chattels real reserving the equity of redemption to himself is not such an alienation as to destroy her right, on surviving, to redeem: *Clark v. Burgh*, 2 Col. 221; and see *Hill v. Edmonds*, 5 D. & S. 603; *Pigott v. P.*, 4 Eq. 549; *McCullagh v. Littleedale*, 1 R. 9 Eq. 465.

If money borrowed by husband and wife be applied for the husband's benefit, the wife is regarded as a surety only, and entitled to have her husband's estate applied in exoneration of her own, and also to redeem the mortgage and stand in the place of the mortgagee: *Hudson v. Carmichael*, Kay, 613; *E. Huntingdon v. Cs. Huntingdon*, 2 L. C. Eq. 1032; *Robinson v. Gee*, 1 Vez. 252; *Gleaves v. Paine*, 1 D. J. & S. 87, *inf.* p. 922; but the

doctrine is purely equitable, and the presumption of suretyship may be negatived by the circumstances, *e.g.*, where the wife's restraint on anticipation has been removed by order of the Court and money has been spent in paying off the debts incurred by the joint extravagance of the spouses: *Paget v. P.*, (1898) 1 Ch. 470, C. A.; (1898) 1 Ch. 47; and the doctrine is inapplicable if her estate has been mortgaged to pay her own antenuptial debts, or the money has not been received by the husband but applied for her use: *Lewis v. Nangle*, Amb. 150; *E. Kinnoul v. Money*, 3 Swa. 201, n.; *Clinton v. Hooper*, 1 Ves. j. 173; and an inquiry will be directed on this point: see *Thomas v. T.*, 7 Dec. 1855, B. 1196; 2 K. & J. 85.

If the mortgage, though for the husband's benefit, is made in exercise of a joint power of appointment for raising money, by mortgage or otherwise, and the only interest of the wife is subject to the power, the property charged is not the estate of the wife so as to give her the right of exoneration as a surety as against her husband's interest: *Scholefield v. Lockwood*, 4 D. J. & S. 22; 32 Beav. 434.

Separate property of a married woman mortgaged by her to secure a sum and further advances to her or her husband was held to be charged with further advances made to the husband alone: *Greenough v. Shorrock*, 4 N. R. 40; 10 L. T. 316.

A married woman cannot directly or indirectly mortgage property settled to her separate use without power of anticipation, and her interest during coverture will be protected, even though she has fraudulently suppressed the circumstances of the property: *Thomas v. Price*, 46 L. J. Ch. 761; *Stanley v. S.*, 7 Ch. D. 589.

On a mortgage of the wife's estate for the husband's debt, reserving the equity of redemption to the wife, she was, upon his bankruptcy, held entitled, the assignees of the husband not claiming the right to redeem as against the mortgagee, and to a settlement of the property so redeemed upon herself and children: *Gleaves v. Paine*, 1 D. J. & S. 87.

If a woman married before the Dower Act joins with her husband in a mortgage of his freehold estate to secure his debt, and the equity of redemption is limited to the husband alone, she has no right to redeem in respect of her dower, which was extinguished both in equity and at law; and her right to dower being extinguished she had no property as to which any right to redeem as a surety could arise: *Dawson v. Whitehaven Bank*, 6 Ch. D. 218, C. A. (reversing 4 Ch. D. 639, and discussing and explaining *Jackson v. Parker*, Amb. 687; *Jackson v. Innes*, 1 Bli. 104).

A mortgage by husband and wife of her reversionary interest being to secure advances to her before, and to him after the marriage, the common foreclosure decree was made against both: *Lewis v. Poole*, 3 Giff. 636.

Where the wife had joined her husband in mortgaging her property to secure his debt, the form of decree was a judgment against the husband for payment personally of the amount certified, and in default foreclosure of husband and wife: see *Gibbon v. Walker*, 38 L. T. 217.

A married woman is bound at once by a decree for foreclosure, and has no day to show cause or to redeem after the coverture has determined (see *Mallack v. Galton*, 3 P. Wms. 352), but the decree ought not to be made absolute at once, even by consent, on an affidavit verifying the amount due: *Harrison v. Kennedy*, 1 Hare, li.

For decree giving a wife the right to redeem one of two estates of hers, mortgaged separately to the same person for separate sums, and directing distinct accounts of the sums due on the two mortgages, see *Hill v. Edmonds*, V.-C. P., 4 June, 1852, A. 1380, 5 D. & S. 603; and see *Fish. Mort. s. 2063* for an abstract of the decree.

(VI.) AUTHORITY OF WIFE TO PLEDGE HER HUSBAND'S CREDIT.

During cohabitation the implied authority of the wife to pledge her husband's credit is limited to necessities, and things falling within the domestic department ordinarily confided to her management: *Phillipson v. Hayter*, L. R. 6 O. P. 38; and see *Lane v. Ironmonger*, 13 M. & W. 368; *Jolly v. Rees*, 15 C. B. N. S. 628; *Debenham v. Mellon*, 6 App. Ca. 24; and is no greater where the husband is a lunatic than in the ordinary case of husband and

wife: *Richardson v. Dubois*, L. R. 5 Q. B. 51; but the insanity of the husband does not necessarily terminate the authority of the wife implied from his holding her out as his agent: *Drew v. Nunn*, 4 Q. B. D. 661, C. A.

A husband is not liable to a debtor's summons for debts contracted without his authority by his wife carrying on business separately in her maiden name: *Exp. Shepherd*, 10 Ch. D. 573, C. A.

When living apart, but not judicially separated, the wife *prima facie* has no authority to bind her husband, and it is for the party seeking to charge the husband to make out from the circumstances of the separation—*e. g.*, where she has been deserted, or compelled by the husband's misconduct to leave him, or the separation is by mutual consent, and she is not sufficiently maintained—his right to recover against the husband: see *Macq. H. & W.* 145; *Eastland v. Burchell*, 3 Q. B. D. 432; *Wilson v. Glossop*, 20 Q. B. D. 354, C. A.

Expenses incurred by a wife preliminary and incidental to a suit for restitution of conjugal rights, or to obtain a judicial separation or dissolution of marriage, can be recovered from the husband or, after his death, from his estate, as necessities for which she has implied authority to pledge his credit: *Wilson v. Ford*, L. R. 3 Ex. 63; *Stocken v. Pattrick*, 29 L. T. 507; *Brown v. Ackroyd*, 5 E. & B. 819; and see *Re Hooper*, 2 D. J. & S. 91; *Ottaway v. Hamilton*, 3 C. P. D. 393, C. A.; but it must be shown that the proceedings were necessary in fact: *Taylor v. Hasiltone*, 52 L. J. Q. B. 101; 47 L. T. 440.

Money advanced to a deserted wife for the purpose of her support can be recovered from the husband: *Deare v. Soutten*, 9 Eq. 151; and see *Jenner v. Morris*, 3 D. F. & J. 45; as also medical expenses incurred by her in consequence of the husband's cruelty: *Beale v. Arabin*, 36 L. T. 249; and necessities supplied for the maintenance of their child under seven years, of whom the wife, living separate from her husband by reason of his adultery, had the custody by an order of the Court of Chancery under the Custody of Infants Act, 1839 (2 & 3 V. c. 54, now repealed): *Bazeley v. Forder*, L. R. 3 Q. B. 559.

A verdict in the Divorce Court that the wife has been guilty of adultery, not followed (from the adultery of the husband) by any decree altering the status of the parties, affords no defence to an action for necessities supplied to the Deft's wife whilst living apart from him: *Needham v. Bremner*, L. R. 1 C. P. 583.

Money advanced to the wife of a lunatic, and applied by her in payment of necessary expenses, may also be recovered from his estate, though she has a separate income: *Re Wood's Estate*, 3 D. F. & J. 465; but see as to the common law rule, *Richardson v. Dubois*, L. R. 5 Q. B. 51.

And generally as to the liability of a husband during coverture for his wife's contracts, see *Manby v. Scott*, 2 Sm. L. C. 488, 10th ed. 433; *Macq. H. & W.* 136, 145; Chitty, Cont. 270 *et seq.*

(VII.) MARRIED WOMAN EXECUTRIX.

A married woman may be appointed and may act as executrix, but (previously to the Married Women's Property Act, 1882) not without the consent of her husband: see *Wms. Exors.* 185; *Clerke v. C.*, 6 P. D. 103.

The husband of an executrix was liable during coverture for her *devastavit* committed during coverture, but not further than to the extent of the testator's assets possessed or come to the husband's or wife's hands after their marriage. And this liability of the husband (except as her admor) ceased upon the death of the wife: see *Wms. Exors.* 1837; *Smith v. S.*, 21 Beav. 385; *Adair v. Shaw*, 1 Sch. & Lef. 243.

The husband's liability for her breaches of trust extended to those arising from negligence, as well as those caused by her active misconduct: *Bahin v. Hughes*, 31 Ch. D. 390, C. A.; and a husband was held accountable for income overpaid to his wife, who was tenant for life and co-trustee under a will: *Re Smith's Estate*, *Clifford v. Washington*, 48 L. J. Ch. 205.

If a married woman, who had been appointed executrix, accepted probate and survived her husband, she and her estate were liable for *devastavit* during coverture, even though it were the act of her husband: see *Soady v. Turnbull*, 1 Ch. 494 (and cases there cited); *Adair v. Shaw*, 1 Sch. & Lef. 243; *Wms. Exors.* 1840.

The husband, being liable for her debts contracted before marriage by the Married Women's Property Amendment Act, 1874, to the extent of the property acquired by him in right of her, was also liable during coverture for her previous *devastavit*.

By the Married Women's Property Act, 1882, s. 24, the word "contract" in that Act is to include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of the Act as to liabilities of married women are to extend to all liabilities by reason of any breach of trust or *devastavit* committed by any married woman, being a trustee or executrix or administratrix, either before or after her marriage, and her husband is not to be subject to such liabilities unless he has acted or intermeddled in the trust or admon. This section must be read in connection with sects. 1, 13, and 19, *sup.* pp. 916, 918, 919, and sect. 18, which provides that a married woman who is an executrix or administratrix alone or jointly with others, or a trustee alone or jointly of property subject to any trust, may sue or be sued, and transfer, or join in transferring, any public or other stocks, funds, or investments in that character without her husband as if she were a *feme sole*.

Sect. 18 does not deal with land, and therefore does not enable a married woman, being a trustee of real estate for sale, to convey to a purchaser except with the concurrence of her husband, and by a deed acknowledged by her: *Re Harkness and Allsopp's Contract*, (1896) 2 Ch. 358, Form 2, *sup.* p. 912; but the principle of this decision does not apply to the case of a *feme covert* who is conveying as mortgagee and not as trustee: *Re Brooke and Fremlin's Contract*, (1898) 1 Ch. 647.

Since the Act it is no longer necessary that the husband should join in the admon bond: *In the goods of Ayres*, 8 P. D. 168.

Attachment may issue against a married woman administratrix who has disobeyed an order to pay into Court assets shown to be in her hands, though *secus* (*semble*) if the order were to make good her *devastavit*: *Re Turnbull*, (1900) 1 Ch. 180.

But there is nothing in the Act to take away the general liability of a husband for his wife's wrongful acts: *Seroka v. Kattenburg*, 17 Q. B. D. 117, *v. sup.* p. 894.

(VIII.) MARRIED WOMAN'S WILL.

The Court of Probate had no jurisdiction to decide questions as to the validity of a married woman's will, viz., whether her testamentary power was validly executed, or whether there was separate property to give her testamentary capacity, but simply granted probate to enable a Court of Equity to decide whether the power and execution, or the capacity, were sufficient: *Barnes v. Vincent*, 5 Moo. P. C. 201; *Noble v. Phelps*, L. R. 2 P. & M. 276; *S. C.*, 40 L. J. P. & M. 60. But *semble*, since the Jud. Act, 1873, s. 24 (7), the Probate Division has full power, if all parties interested are before the Court, finally to decide these questions: see *Re Tharp*, *Tharp v. Macdonald*, 3 P. D. 76, C. A.

The renunciation by an intended husband of his marital rights is not sufficient to clothe the wife with a testamentary power over her real property: *Dye v. D.*, 13 Q. B. D. 147, C. A.

For the general incapacity of a married woman to make a will, see *Wms. Exors.* 46, &c.

Exceptions to the general rule are:—

(a) When the husband waives his *jus mariti* to personal property of the wife, so as by his consent to give effect to a will made by her during coverture.

The assent must be to the particular will, with full knowledge of its contents, and not merely to her making a will: see *Rex v. Bettesworth*, 2 Stra. 891; *Willock v. Noble*, L. R. 7 H. L. 580.

The assent may be given after her death: *Elliot v. North*, (1901) 1 Ch. 424; and if given before, and subsequently ratified, cannot be revoked: *Chappell v. Charlton*, 56 L. J. P. D. 73; 57 L. T. 496.

His death in her lifetime, by determining his *jus mariti*, operated as a revocation of the assent, and therefore if the wife survived, the will, though made with his assent, was void against her next of kin, had to be re-executed, and would not pass property acquired by her since his death: *Noble v. Willock*, 8 Ch. 778; *Re Price*, *Stafford v. S.*, 28 Ch. D. 709; *Re Young*, *Trye v. Sullivan*,

28 Ch. D. 705; *Goods of Smith*, 1 Sw. & Tr. 125; Wms. Exors. 55; *secus*, his death after her, but before taking out probate: *Re Goods of Cooper*, 6 P. D. 34.

A subsequent testamentary instrument not referring to the previous will was not a sufficient republication: *Re Smith*, *Bilke v. Roper*, 45 Ch. D. 632, explaining *Rowley v. Eyton*, 2 Me. 128.

The Wills Act, 1837 (1 V. c. 26), did not relieve a married woman from her previous testamentary incapacity; sect. 24 did not operate so as to give effect to her will over property not in her power to dispose of when the will was made; and her will, invalid in other respects, was not rendered valid by the death of her husband in her lifetime: *Re Wollaston*, 12 W. R. 18; *Noble v. Willock*, 8 Ch. 778; and see *Thomas v. Jones*, 1 D. J. & S. 63; 2 J. & H. 475; but now by the Married Women's Property Act, 1893 (56 & 57 V. c. 63), s. 3, sect. 24 of the Wills Act is made to apply to the will of a married woman made during coverture, whether she is or is not possessed of any separate property at the time of making it, and such will does not require to be re-executed or re-published after the death of her husband. The section applies to every will of a married woman who dies after the date of the Act: *Re Wylie, W. v. Moffat*, (1895) 2 Ch. 116.

Previously to the Married Women's Property Act, 1882, where a married woman had a partial testamentary capacity, her will has been allowed to operate on, or probate has been limited to, property which, from being her separate estate (see *Goods of Smith*, 1 Sw. & Tr. 125; *Re Crofts*, L. R. 2 P. & M. 18), or from her having a testamentary power (see *A. G. v. Williamson*, 14 W. R. 910; *Re De Pradel*, L. R. 1 P. & M. 454), she could dispose of by will: Wms. Exors. 323.

(b) Wills made under and in execution of a power: see Sugd. Pow. 153; Farwell, Pow. 214 *et seq.*; Wms. Exors. 1321 *et seq.*

Under such a will the duty of administering the fund is transferred from the original trustees to the exors: *Re Hoskins' Trusts*, 46 L. J. Ch. 274; *Philbrick's Trusts*, 13 W. R. 576; 34 L. J. Ch. 368; 11 Jur. N. S. 558; 12 L. T. 261; who take as appointees and not as pers. represves: *Re Goods of Tomlinson*, 6 P. D. 209; and see *Brownrigg v. Pike*, 7 P. D. 61, 65; *Re Goods of Hornbuckle*, 15 P. D. 149; *Burnaby v. Equit. Rev. Int. Soc.*, 54 L. J. Ch. 466; 52 L. T. 350; 33 W. R. 639; *Re Treasure*, (1900) 2 Ch. 648; *Re Moore*, (1901) 1 Ch. 691; *Re Maddock*, 70 L. J. Ch. 660; *Re Power*, W. N. (01) 158; 49 W. R. 678.

Where the married woman by her will appoints exors, and directs them to apply the funds in payment of legacies which do not exhaust the fund, or which fail, the exors hold the surplus as part of her personal estate: *Rous v. Jackson*, 29 Ch. D. 521; *Re Horton*, 51 L. T. 420; *Re Ickeringill*, *Hinsley v. I.*, 17 Ch. D. 151; *Re Pinede's Sett.*, 12 Ch. D. 667; *Wilkinson v. Schneider*, 9 Eq. 423; *Brickenden v. Williams*, 7 Eq. 310; the question depending on the existence of an intention by the appointor to take the property out of the instrument creating the power for all purposes: *Re De Lusi's Trusts*, 3 L. R. Ir. 232; *Re Pinede's Sett.*, *sup.*; *Re Van Hagan*, *Sperling v. Rochfort*, 16 Ch. D. 18, C. A.; *Willoughby-Osborne v. Holyoake*, 22 Ch. D. 238; and the rule applies to real estate: *Re Van Hagan*, *sup.*; but not where the appointment is to an intended beneficiary without the intervention of a trustee: *Re Davies' Trusts*, 13 Eq. 163; *Re De Lusi's Trusts*, *sup.*; *Re Boyd, Kelly v. B.*, (1897) 2 Ch. 232; Lewin, 166, n.; and the mere fact that an exor of the will is appointed is not sufficient evidence of such intention: *Re Thurston, T. v. Evans*, 32 Ch. D. 508.

As to the question to what extent property subject to a power of appointment vested in a married woman becomes, on the exercise of the power by her, assets available for the satisfaction of her engagements, see Lewin, 947, 948; *Re Roper, R. v. Doncaster*, 39 Ch. D. 482; *Re De Burgh Lawson*, 41 Ch. D. 568; *Re Parkin, Hill v. Schwarz*, (1892) 3 Ch. 510; *Re Ann*, (1894) 1 Ch. 549, 555; Brickdale, 257, 258.

By the Married Women's Property Act, 1882 (45 & 46 V. c. 75), s. 4, the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities, in the same manner as her separate estate is made liable under the Act.

The section extends to an appointment since the Act by a married woman who had debts and liabilities existing at the date when the Act came into operation: *In re Hughes, Brandon v. H.*, (1898) 1 Ch. 529, C. A., and in the case of a married woman who is under a protection order (as to the effect of

which, *v. inf.* p. 967), the appointed property is available to answer debts or liabilities incurred by her, while under the protection, previously to the Act: *In re Hughes, Brandon v. H.*, (1898) 1 Ch. 529, C. A.

(c) Wills relating to property settled to her separate use—in respect of which, both real and personal, she has the same disposing power as if she were a *feme sole*: *Taylor v. Meads*, 4 D. J. & S. 597; *Hall v. Waterhouse*, 5 Giff. 64; *Pride v. Bubb*, 7 Ch. 64; and her will will pass after-acquired separate property though she had none when she made it: *Charlemont v. Spencer*, 11 L. R. Ir. 347, 490; but as the separate property is equitable assets, her exor will have no right of retainer: *Re Poole, Thompson v. Bennett*, 6 Ch. D. 739; and the exors are entitled to probate, and all the personal estate vests in them *jure representationis*: *Brownrigg v. Pike*, 7 P. D. 61, 65.

(d) Wills of separate property acquired under the Married Women's Protection Acts: see *sup.* pp. 912 *et seq.*

Sect. 1 of the Act of 1882, read together with sects. 2 and 5, confers a testamentary power of disposition only in respect of separate property, and therefore (before the Act of 1893, *v. sup.* p. 925) the will of a married woman would not pass property acquired by her after the coverture, unless republished, the principle of *Willock v. Noble*, L. R. 7 H. L. 580, being still applicable: *Re Smith, Bilke v. Roper*, 45 Ch. D. 632; *Re Cuno, Mansfield v. M.*, 43 Ch. D. 12, C. A.; *Re Smith, Clements v. Ward*, 35 Ch. D. 589, 597; *Re Williams*, 59 L. T. 310; *Re Taylor, Whitby v. Highton*, 57 L. J. Ch. 430; 58 L. T. 842; 36 W. R. 683; *Re Price, Stafford v. S.*, 28 Ch. D. 709.

The Act will not be construed retrospectively further than is absolutely necessary: *Re March, Mander v. Harris*, 27 Ch. D. 166, C. A.

The Act does not mean that a testatrix is to be deemed to have become a widow at the time when it came into operation; and therefore a will made previously to the Act by a woman who dies in her husband's lifetime is not within the principle of *Noble v. Willock*, *sup.* pp. 924, 925; *Re Bowen, James v. J.*, (1892) 2 Ch. 291.

Since the Act, probate of the will of a married woman under a power is granted to the exors in general form, and the right of the husband to admon *cæterorum* is excluded: *Re goods of Jevera*, 13 L. R. Ir. 1; *Re Lambert, Stanton v. L.*, 39 Ch. D. 626 (*q. v.* as to the effect of the new Probate Rules of March, 1887); and a husband who obtains probate of his wife's will in general terms is not deemed to have assented to the will or a disposition of property which she had no right to dispose of by will without his assent: *Re Atkinson, Waller v. A.*, (1899) 2 Ch. 1, C. A.; (1898) 1 Ch. 837; and wherever there is evidence of the existence of separate property probate will be granted to the exor: *Re goods of Price*, 12 P. D. 137; *Harding v. Sutton*, 59 L. T. 838; *Re Lambert, sup.*; though the will deals only with real estate: *Re goods of Cubbon*, 11 P. D. 169; but such probate only enables the exor to get in the assets, whether the *feme* had power to dispose of them by will or not, and does not affect the beneficial title: *Smart v. Tranter*, 43 Ch. D. 587, C. A.; 40 Ch. D. 165.

By sect. 23, for the purposes of the Act, the legal pers represve of any married woman is, in respect of her separate estate, to have the same rights and liabilities and be subject to the same jurisdiction as she would be if living. The husband taking *jure mariti* is legal pers. represve within this section, and therefore liable to her debts to the extent of the separate property: *Surman v. Wharton*, (1891) 1 Q. B. 169.

(e) Wills of property acquired after a protection order under 20 & 21 V. c. 85, s. 21.

The order has a retrospective effect, so that property acquired during the whole period of desertion may be validly bequeathed: *Goods of Elliot*, L. R. 2 P. & M. 274; and the will is valid though made after obtaining, but before registration of the order: *Re Faraday*, 2 Sw. & Tr. 369. Where the protection order was obtained improperly, the Court set aside the order, and pronounced against the will: *Mahoney v. McCarthy*, (1892) P. 21.

(f) Wills of property acquired after a decree for judicial separation.

(g) Wills of property to which a married woman is entitled as executrix, and in which the husband has no beneficial interest: see *Wms. Exors.* 47.

And as to the mode of admon of assets under the will of a married woman, see *Lewin*, 946 *et seq.*; *Re De Burgh Lawson, De B. L. v. De B. L.*, 41 Ch. D.

568, where under the will of a married woman directing her exors to pay her debts, and appointing property to them, it was held, according to the principle of *Re Tanqueray-Willauve and Landau*, 20 Ch. D. 465, C. A., that the so-called debts were a charge upon the appointed property.

And that a husband exor of his wife's testamentary appointment, not containing any charge of debts and funeral expenses, may retain such expenses though the estate is insufficient for creditors, see *Re M' Myn, Lightbown v. M.*, 33 Ch. D. 575.

The devolution of undisposed-of separate estate of a married woman is not altered by the Married Women's Property Act, 1882; it therefore belongs to her husband, and her exors are trustees of it for him: *Re Lambert's Estate, Stanton v. L.*, 39 Ch. D. 626; *Smart v. Tranter*, 43 Ch. D. 587, C. A.; 40 Ch. D. 165; *Re Atkinson, Waller v. A.*, (1899) 2 Ch. 1, C. A.; (1898) 1 Ch. 837; and his right as tenant by the curtesy is not taken away: *Hops v. H.*, (1892) 2 Ch. 336.

SECTION III.—PAYMENT TO HUSBAND, WIFE, OR TRUSTEES.

1. *Transfer and Payment to Husband of Woman married before 1883, where no Settlement.*

UPON hearing &c., and upon reading an affidavit of the Plts [*or* Defts] A., and B. his wife, filed the — day of —, of no settlement [*Enter any other evidence*], and the certificate of the fund; And the Plt [*or* Deft] B., the wife of the Plt [*or* Deft] A., being present in Court and examined, and not desiring that the £— Consols, and the £— cash hereinafter mentioned, or any part thereof, should be settled, but that the same should be transferred and paid to the said A. her husband, Let the fund in Court be dealt with as directed in the schedule hereto.—[Add Payment Schedule, directing transfer and payment to the husband.]

The order may be made at the hearing, or on further consideration, or on petition, or when the fund is under 1,000*l.*, or in other cases within O. LV, 2, on summons in Chambers.

When the fund is directed to be carried to a separate account, and it is not intended that the parties should again come to the Court, the liberty to apply may be expressly reserved to be at Chambers: see *Re Hotchkiss*, 8 Eq. 643, 650.

2. *Same—where an existing Settlement does not affect the Fund.*

UPON hearing &c., and upon reading the affidavit of A. and B. his wife, filed &c., of no settlement or agreement for a settlement, except the indenture of settlement [*or* agreement for a settlement] dated &c., made between &c., being the exhibit marked X in the said affidavit referred to [*Enter any other evidence*], and the certificate of the fund; And the Court being satisfied that the (share of the said B. in the) sum of £— cash [*or* Cons.] hereinafter mentioned is not nor is any part

thereof subject to the trusts of the said indenture [or agreement], or in any manner comprised therein or affected thereby, and the said B. &c., being present &c., Let &c. [Form 1].

The Court must be satisfied whether the settlement (if any) affects the fund, and for that purpose acts upon the certificate of counsel, which is usually taken as conclusive; but if there be any question it should be submitted by counsel to the Court.

3. *Same—on Application and Examination in Chambers.*

UPON the application of A., and B. his wife &c., and upon reading an affidavit &c. [Form 1; *Or if an existing settlement does not affect the fund, state as in Form 2, and add, And the Judge being satisfied that the (share of the said B. in the) said &c., is not, nor is any part thereof, subject to the trusts of the said indenture, or agreement*]; And the said B. being present in Chambers and examined by the Judge, and consenting and desiring &c., Let &c. [Form 1, *sup.*].

In Chambers the Master inspects the settlement, to ascertain whether it affects the fund, before the order is made.

4. *Order for Examination by Commissioners.*

LET B., the wife of A., attend X., Y., and Z., of &c., or any two of them, who are to examine her separately and apart from the said A. her husband, whether she desires to have the £— Consols and £— cash in Court to the credit &c., or any and what part thereof, settled for the benefit of herself, her husband, and children in such manner as the Court shall approve, or whether she desires that the said £— Consols and £— cash, or any or what part thereof, should be transferred and paid to the said A. her husband; and to take her examination in writing, which is to be signed by her and certified by them, and the signing of such examination and of the certificate of the said X., Y., and Z., or such of them as shall act under this order, is to be verified by affidavit; But previously to such examination the said A. and B. his wife are severally to make an affidavit that no settlement, or agreement for a settlement, whatsoever hath been made or entered into before, upon, or since their marriage; or in case any such settlement, or agreement for a settlement, hath been made or entered into as aforesaid, then the said A. and B. his wife are by their affidavit to identify such settlement, or agreement for a settlement, and state that no other settlement, or agreement for a settlement, has been made or entered into as aforesaid; And after the return of such examination and certificate such further order shall be made as shall be just [*Or if on petition, And Let this petition stand over until after the return of the said certificate and examination*].

The above form was revised and approved by the Master of the Rolls and the Vice-Chancellors, the old form being considered not sufficiently explicit.

For an order for examination by commrs, in a colony, of two married women, "to whom, and in what manner, and for what purpose they are willing and desirous that their respective shares in the testator's residuary estate"—"or of the stocks or funds representing the same, or any sum or sums on account of the same, as the same shall become payable or divisible (not exceeding in value in respect of each such share the sum of £1,500), shall be paid, transferred, applied or disposed of," see *Macdonald v. Mackenzie*, M. R. at Chambers, 5 March, 1873, B. 522.

If the petition prays payment, it should be directed to stand over till after the return.

For forms of affidavit verifying signatures, see D. C. F. 932.

5. *Order for transfer to a Woman married before 1883, who had obtained a Protection Order, of a Reversionary Interest which had fallen into possession since her desertion.*

UPON the petition &c.—And this Court being of opinion that the Petr. is absolutely entitled to the funds hereinafter mentioned as if she were a *feme sole*, Let the fund in Court be dealt with as directed in the schedule hereto. [Add Payment Schedule directing fund to be carried over to the credit of the matter, "The separate property of C. E., the wife of J. E., as if she were a *feme sole*," with direction to pay the dividends to her on her separate receipt.]—See *Re Whittingham's Trusts*, V.-C. W., 4 May, 1864, B. 1064; S. C., 12 W. R. 775.

The apparent inconsistency in this order in not directing the fund to be paid out is to be assumed as accounted for by the fact that the order was made as prayed for by the petition, that the husband and wife had mortgaged their reversion in the fund, and that the rights (if any) of the husband were vested in an assignee of his trustee in bankruptcy.

For decree declaring a married woman executrix and residuary legatee who had obtained a protection order, entitled to transfer consols standing in the name of her testatrix in the Bank of England, and to receive the dividends thereon as if she were a *feme sole*, see *Bathe v. Bk. of England*, V.-C. W., 4 June, 1858, A. 1184; 4 K. & J. 564.

For order on further consideration in an admon suit for payment to a married woman, suing as a *feme sole* under a protection order, of her share in the testator's estate, upon her affidavit of the continuance of the separation, and of there having been no settlement or agreement for a settlement, see *Ewart v. Chubb*, V.-C. Hall, 26 May, 1875, A. 1505; 20 Eq. 454.

For order for transfer of a fund paid into Court under the Trustee Relief Acts to a woman who had been deserted by her husband for more than twenty years, as if she were a *feme sole*, see *Re Pope's Trust*, V.-C. M., 18 April, 1873, B. 1090; 21 W. R. 646.

For order for transfer to a wife, who had been declared entitled to a settlement and subsequently divorced in a colony, of her fund standing to the separate account of her husband and herself, without regard to any claim by her divorced husband or his mortgagees, or claim to a settlement by the children, see *Heath v. Lewis*, 13 W. R. 129; 11 L. T. 333; 10 Jur. N. S. 1093.

For order on petition by a wife and her sister for payment of the wife's legacy, and the whole accumulations thereon since payment into Court, to the sister by whom she had been supported during her husband's desertion, two days after her marriage in 1846, see *Re Ford*, M. R., 18 June, 1863, A. 1332; 32 Beay. 621.

6. *Examination of Woman married before 1883 as to Post-nuptial Settlement.*

AND B., the wife of A., being present &c., and examined whether she is satisfied with the indenture of settlement dated &c., made &c., and expressing herself satisfied therewith, and consenting and desiring that the £— Consols hereinafter mentioned should be transferred to the trustees of the said settlement, Let the said settlement be confirmed.—[Add Payment Schedule directing transfer to the trustees.]—See *Leather v. L.*, V.-C. S., 17 Nov. 1854, B. 128.

7. *Order for Examination as to Post-nuptial Settlement.*

LET J., the wife of T., attend &c., or any two of them, who are to examine her separately and apart from her said husband, whether she is satisfied with the settlement made by the indenture dated &c., and made &c., and whether she is desirous that the same should be carried into execution; (And that the £— Consols and £— cash in Court &c., shall be transferred and paid to &c., the trustees named in the said indenture of settlement, to be held and applied by them upon the trusts thereof;) And if it shall appear that she is not satisfied with the said settlement, then the said &c., or such of them as shall examine her, are to inquire whether she desires to have the said £— &c. [Form 4, *sup.* p. 928], and to take her examination in writing, which is to be signed by her and certified by them (and the signing of such examination and certificate is to be verified by affidavit); After return, further order.—See *Trevena v. T.*, V.-C. E., 17 Nov. 1848, B. 286.

For like order, after marriage of infant ward, with father's consent, but without the Court's previous approval, see *Day v. D.*, M. R., 4 Dec. 1847, A. 246; 11 Beav. 35.

For decree in an admon suit on the Plt E., the wife of Plt T., being present in Court and examined, and consenting and desiring that the legacy of £— and interest thereinafter mentioned should be paid to her husband, that the Deft (the exor) pay to the said T., in right of his wife E., the sum of £—, bequeathed to her by the will of the testatrix, less the sum of £— for legacy duty paid thereon, together with the sum of £— for interest on the sum of £— at the rate of 4 p. c. per ann., see *Re Loveday, Aylmer v. Winterbotham*, V.-C. W., 25 Jan. 1858, 410.

8. *Payment to Husband, Wife married before 1883 electing to take Money arising from Land as Money.*

AND B., the wife of A., being present &c., and electing to take the £— Consols hereinafter mentioned as money, and consenting and desiring that the same should be transferred to the said A., her husband, Let the fund in Court be dealt with as directed in the schedule hereto.—[Add Payment Schedule directing fund in Court to be transferred to A. in right of his said wife.]—See *Re Carrington*, V.-C. K.,

3 March, 1856, A. 609; *Re Worthington*, M. R., 16 Dec. 1853, B. 218; 9 W. R. 769, n.—In case of an entail, see Form 9, *inf.*

For order to pay interest of stock in Court arising from land to husband and wife's assignee, on proof that she had duly acknowledged the deed of assignment, see *Re Lewis*, V.-C. S., 2 July, 1858, B. 1334.

For order in Chambers for examination of wife as to the disposition of an annuity of £100, payable to her out of the interest of a fund in Court, set apart to answer it, after consideration by the Judge himself, see *Watts v. W.*, V.-C. W., 20 July, 1859, B. 2337. Such consent was dispensed with as to an annuity of £40: *Yates v. Madden*, V.-C. K., 25 Jan. 1856; and see *inf.* Notes, pp. 932, 933.

For order for wife's examination as to a share of a legacy, in the hands of exors, but that part to which she was entitled for her separate use to be paid to her, see *Fletcher v. F.*, M. R., 31 July, 1854, A. 1617.

And for her examination as to a compromise respecting a fund in the exor's hands, *Watts v. Alford*, V.-C. W., 3 March, 1855, Reg. Min. 126.

9. *Order for Examination as to Money arising from Land subject to Entail, after disentailing Deed—Fines and Recoveries Act, 1833 (3 & 4 W. IV. c. 74), ss. 84—88.*

"UPON reading the said Petition &c. [*Enter usual evidence as to title, and disentailing deed*]; and an examined copy, signed by &c., the registrar of certificates, of the certificate of &c., two of the perpetual Commrs appointed under the statute for taking the acknowledgments of married women, that the said deed was on the &c., duly acknowledged before them by the said E."—Directions as to two-thirds.—"And Let the funds in Court be dealt with as directed in the Payment Schedule hereto; And Let the said E. attend &c., or any two of them, who are to examine her &c." [Form 4, p. 928].—[Add Payment Schedule directing carrying over of the remaining third part of the said £—, to the credit of this action &c., to an account to be intituled, "The account of E., the wife of W."]—See *Exp. Brassey*, V.-C. K., 6 Nov. 1850, A. 137, which the above form follows in spirit.

For order on like evidence for payment to the trustee under a deed duly acknowledged, see *Re Taylor*, *Pedder v. P.*, M. R., 5 Dec. 1859, B. 277.

10. *Order for Examination by Commissioners as to Re-investment of Fund in Land, or electing to take it as Money.*

LET the Petr A., the wife of the Petr L. &c., attend &c., or any two of them, who are to examine her separately and apart from the said L., her husband, touching the disposition of the consols and cash by the Payment Schedule hereto directed to be carried over to the account of A., the wife of L., entitled under the will of S. deceased, whether she elects to have the same laid out in the purchase of lands to be settled according to the will of S., the testator in &c., named; And if not laid out in lands, whether she desires to have the same or any and what part thereof settled for the benefit of herself, her husband, and children in such manner as the Court shall approve, or whether she

desires that the same or any and what part thereof should be transferred to the said L. her husband; And to take her examination in writing &c. [Form 4, p. 928].—[Add Payment Schedule directing fund to be carried over to above account.]—See *Re Hutchinson*, V.-C. S., 30 April, 1861, A. 802; following *Binford v. Bawden*, L. C., 6 July, 1792, A. 365; 1 Ves. jun. 512; 2 Ves. jun. 38; *Exp. Ellison*, 2 Y. & C. 528; *Sowry v. S.*, 8 W. R. 339; *Re Tyler*, *Ib.* 540.

NOTES.

TRANSFER AND PAYMENT OF MARRIED WOMAN'S FUND—SEPARATE EXAMINATION.

Payment to Husband.

Before directing payment to the husband of a fund, not subject to any settlement, to which a woman married before 1883 is entitled, the Court requires to be satisfied by her separate examination that she gives a free and unbiassed consent to such payment: see *Beaumont v. Carter*, 32 Beav. 586; *Wordsworth v. Dayrell*, 4 W. R. 689; 2 Jur. N. S. 631; *Milnes v. Busk*, 2 Ves. jun. 488; and it is not sufficient that her wishes have been ascertained by the trustees: *Re Swan*, 2 H. & M. 34. An affidavit of no settlement is also required; or if there be a settlement, it must be identified and produced, and the Court must be satisfied (by the certificate of counsel) that it does not affect the fund proposed to be paid out: see *Britten v. B.*, 9 Beav. 143; *Rose v. Rolls*, 1 Beav. 270; but it is now usual for the Court to look at the settlement, counsel calling attention to the main points.

Even when it is proposed, with the husband's consent, to pay the fund to the wife on her separate receipt, her examination will not be dispensed with: *Mawe v. Heaviside*, 7 Jur. N. S. 817; 9 W. R. 649; 30 L. J. Ch. 937; *Gibbons v. Kibbey*, 10 W. R. 55; 7 Jur. N. S. 1298; 5 L. T. 416; unless she is entitled to the fund for her separate use, in which case her examination and consent in Court are unnecessary: see *Macq. H. & W.* 304; *Crawley*, 86; but an affidavit of no settlement must be produced: *Anon.*, 3 Jur. N. S. 839.

In *Wordsworth v. Dayrell*, 4 W. R. 689; 2 Jur. N. S. 631, the consent of a married woman to the transfer to her husband of a fund in Court, her separate property, was required, though she had joined him in a petition for the purpose; but in *Re Crump*, 34 Beav. 570, a fund settled to her separate use was, on the petition of herself and her husband, ordered to be transferred into their joint names without her examination and consent.

But according to the usual practice, where the fund is the wife's separate property, the petition should be by her alone, and payment should be to her on her separate receipt.

If the petition is for payment of dividends of a fund in Court representing property settled to her separate use and compulsorily taken, the costs of the husband, if made a respondent, are not payable by the railway co. or other public body: *Osborne's Estate*, W. N. (78) 179.

Upon the application of husband and wife, for payment to him of a life annuity given to her by will, her consent was held unnecessary: *Shilleto v. Collett*, 7 Jur. N. S. 385.

Formerly the transfer of a married woman's fund would not be directed at the hearing: see *Campbell v. Harding*, 6 Sim. 283; *Amies v. Skillem*, 14 Sim. 431; and a petition was necessary. But since 13 & 14 V. c. 35, s. 28 (now repealed, but replaced by O. XXXVII, 1), enabling the Court to receive proof by affidavit of all proper parties being before the Court, and of all matters necessary to be proved, payment has been ordered at the hearing, or on further consideration.

It seems that the Court cannot refuse to take the wife's consent, unless circumstances of fraud appear, or compulsion on the part of the husband; *Willats v. Cay*, 2 Atk. 67; *Wright v. Rutter*, 2 Ves. jun. 673, 677 (and cases

there cited); and see *Longbottom v. Pearce*, 3 D. & J. 545, n.; *Biddles v. Jackson*, 1b. 544; *White v. Herrick*, 4 Ch. 345.

If the married woman is under twenty-one, her consent will not be taken: *Stubbs v. Sargon*, 2 Beav. 496; *Abraham v. Newcomb*, 12 Sim. 566 (overruling *Gullin v. G.*, 7 Sim. 236); *Shipway v. Ball*, 16 Ch. D. 376. And a ward of Court whose marriage has been without its sanction or in contempt will not be allowed to waive her right to a settlement out of her own property by giving her consent: *Stackpoole v. Beaumont*, 3 Ves. 89; *Gynn v. Gilbard*, 1 Dr. & S. 356.

The married woman may elect to take as personalty a fund in Court representing realty, to which she is absolutely entitled, and upon her being separately examined and consenting, it may be paid out to her husband without any deed being executed: *Standerling v. Hall*, 11 Ch. D. 652; *Re Robins' Estate*, 27 W. R. 705.

Amount of Fund.

Before taking the married woman's consent the amount of the fund must be ascertained, and the actual sum known: *Moss v. Dunlop*, 8 W. R. 39; *Sperling v. Rochfort*, 8 Ves. 180; *Godber v. Laurie*, 10 Pri. 152.

But her consent will be taken if the ascertained amount is liable to diminution by costs only: *Packer v. P.*, 1 Coll. 92.

And where the married woman is only entitled after payment of costs, her consent refers to the residue of the fund after such payment: *Musgrove v. Flood*, 1 Jur. N. S. 1086.

Consent may also be taken as to the parts ascertained from time to time: *Powell v. Merrett*, V.-C. K. B., 1848, B. 61; 1853, B. 22.

In *Macdonald v. Mackenzie*, M. R. at Chambers, 5th March, 1873, B. 532, an order was made for the examination by commission abroad of two married women as to their shares, or the stocks representing the same, or any sums on account of the same, as the same should become payable or divisible (not exceeding in value in respect of each such share the sum of 1,500*l.*).

Sums below 200*l.*, or 10*l.* a year, or a sum likely to be reduced below that amount by costs, may be paid out without taking the married woman's examination: *Elworthy v. Wickstead*, 1 J. & W. 69; *Roberts v. Collett*, 1 Sm. & G. 138; *Wallace v. Greenwood*, 16 Ch. D. 362; not following *Re Shaw*, 49 L. J. Ch. 213; 41 L. T. 670.

This limit has in recent cases, when the husband consents to payment to his wife on her own separate receipt, been raised to 500*l.*: see *Re Morton's Estate*, W. N. (74) 181; *Re Webb*; *Re Shelton*, V.-C. H., 13 July, 1877, B. 2198, 2208 (in which cases V.-C. H. said this was his usual practice): *Andrews v. Tyrell*, 29 Sol. Jo. 622.

And separate examination has been dispensed with when the fund was less than 50*l.* a year; as also an affidavit of no settlement where the shares were very small: see *Veal v. V.*, 4 Eq. 115.

But under special circumstances separate examination was required although the fund to be paid to the wife was under 200*l.*: *White v. Herrick*, 4 Ch. 345.

As against her husband and his mortgagee, payment to a married woman on her separate receipt of part of a fund in Court to which she was entitled was refused, and this part (one-third of the fund) was ordered to be paid to the mortgagee and the remaining two-thirds to be settled on the married woman and her children: *Re Grant*, 14 W. R. 191; 13 L. T. 583.

County Court.

With respect to examination and consent in the County Courts, it is provided by County Court Rules, 1889, O. xxxvii, 5, that where any married woman is interested in any principal money, stock, shares, or securities exceeding in value 200*l.*, or 10*l.* in annual payments, she shall be examined by the Judge apart from her husband to ascertain whether the same shall be paid to him or made the subject of a settlement; and if the Court thinks fit to make a settlement, and in all cases where she is under age, the Court shall by its judgment make a settlement accordingly. The settlement may be ordered to be prepared by counsel and settled by the Judge.

Commission.

When the wife is resident abroad, a commission will be ordered to take her consent before ordering a transfer to the husband: *Ireland v. Trembath*, 14 W. R. 275; 13 L. T. 626; *Gibbons v. Kibbey*, 7 Jur. N. S. 1298; 5 L. T. 416; 10 W. R. 55. For the practice as to taking and authenticating the examination of a married woman resident abroad, see *Minet v. Hyde*, 2 Bro. C. C. 663; *Bourdillon v. Adair*, 3 Bro. C. C. 237; *Campbell v. French*, 3 Ves. 321. For form of summons to appoint commissioners, see D. C. F. 929.

Reversionary Property.

Where from the nature of the property, as in the case of a reversionary interest in personalty before, or not affected by the Married Women's Reversionary Interests Act, 1857 (20 & 21 V. c. 57), the married woman could not dispose of it, the Court would not take her consent: *Whittle v. Henning*, 2 Ph. 731; 11 Beav. 222; *Box v. B.*, Dru. t. Sug. 42; nor allow the acceleration of her interest in order to deal with it, as if in possession: *Brandon v. Woodthorpe*, 10 Beav. 463; *Purdew v. Jackson*, 1 Russ. 1; *Cresswell v. Dewell*, 4 Giff. 460. And see *Fitzgerald v. F.*, L. R. 2 P. C. 83; *Rogers v. Acaster*, 14 Beav. 445, that the inalienable character of the wife's reversionary interest cannot be altered by the husband's release.

As to the effect and operation of 20 & 21 V. c. 57, see *Re Batchelor, Sloper v. Oliver*, 16 Eq. 481; 21 W. R. 901, to the effect that with the concurrence of her husband (except in cases where under 3 & 4 W. IV. c. 74, s. 91, his concurrence may be dispensed with, see *Re Alice Rogers*, L. R. 1 C. P. 47), and by deed duly acknowledged, a wife is enabled to dispose of personal estate to which she is entitled in reversion (not being settled upon her by any settlement or agreement for a settlement on her marriage, sect. 4, see *Clarke v. Green*, 2 H. & M. 474), discharged from her husband's interest in her right as fully and effectually as if she were a *feme sole*—these words pointing to the operation and not to the formalities of the deed; and also to release and extinguish her equity to a settlement, so as to give the assignee for value an absolute title without any deduction in respect of claims upon the husband's interest in the wife's right. And the deed does not operate as that of the husband and wife according to their respective interests; and the concurrence of the husband will be good although there is a right of retainer against him: *Re Batchelor, sup.*; or although he may previously have executed a creditor's deed, or been adjudicated bankrupt: *Re Jakeman's Trusts*, 23 Ch. D. 344; *Cooper v. Macdonald*, 7 Ch. D. 288.

An order for conveyance of a married woman's interest, under 20 & 21 V. c. 57, which has been obtained by fraud or suppression of material facts, may be set aside; but a clear case must be shown for so doing: *Exp. Cockerell*, 4 C. P. D. 39; and see *Fowke v. Draycott*, 29 Ch. D. 996.

The words "any personal estate whatsoever" in the Act are not confined to such equitable choses in action as a legacy or property held in trust for the *feme*, but extend to a legal chose in action, such as a policy of insurance effected in her name: *Witherby v. Rackham*, 60 L. J. Ch. 511; 38 W. R. 363; W. N. (91) 57.

Where a will by which a reversionary interest is bequeathed is republished by codicil, the date of the will is the date of the "instrument" within the Act: *Re Eloom*, (1894) 1 Ch. 303, C. A.

See also upon this statute, 2 L. C. Eq. 917, 918; 1 L. C. Eq. 7th ed. 167 *et seq.*; and see *Nicholson v. Drury Buildings Co.*, 7 Ch. D. 48.

Although a married woman cannot, independently of the Act, alienate her reversionary interest in property not limited to her separate use, and a settlement by her of such interest is void and incapable of confirmation, and can be validated only by some new disposition by her while *sui juris* (*Buckmaster v. B.*, 35 Ch. D. 21, C. A.; *S. C.*, H. L. *nom. Seaton v. S.*, 13 App. Ca. 61; *Druitt v. Willens*, 23 L. R. Ir. 436), yet a compromise of proceedings affecting such interest in her separate property which she is restrained from anticipating may be sanctioned by the Court and will bind her interest: see *Brooke v. L. Mostyn*, 2 D. J. & S. 373; L. R. 4 H. L. 304; *Wilton v. Hill*, 25 L. J. Ch. 156; 4 W. R. 66; *Wall v. Rogers*, 9 Eq. 58.

The share of a married woman in the proceeds of real estate devised upon trust for sale, in terms amounting to a conversion out-and-out, may be dis-

posed of under the Fines and Recoveries Act (3 & 4 W. IV. c. 74), even though reversionary, as being an interest in land: *Briggs v. Chamberlain*, 11 Ha. 69; *Tuer v. Turner*, 20 Beav. 560; *Bowyer v. Woodman*, 3 Eq. 313; *Re Jakeman's Trusts*, 23 Ch. D. 344; and see *Franks v. Bollans*, 3 Ch. 717; and so also in money directed to be laid out in land: *Forbes v. Adams*, 9 Sim. 462; or money properly invested by trustees upon a mortgage of land: *Miller v. Collins*, (1896) 1 Ch. 573, C. A. (Kay, L. J., diss.), overruling *Re Newton's Trusts*, 23 Ch. D. 181; but not, it seems, in money to be laid out in land, or otherwise: *Smithwick v. S.*, 5 L. T. 23 (M. R. Ir.). And although the land was purchased with trust moneys which the trustees had no power so to invest, the reversionary interest of the *feme* is within the Act: *Re Durrant and Stoner*, 18 Ch. D. 106, C. A.

The expression "future interests" in the Act will not extend to mere possibilities or expectancies of interests, but imports interests to which the *feme* at the date of the disposing deed has some existing title at law or in equity: *Allcard v. Walker*, (1896) 2 Ch. 369.

Deed acknowledged.

Acknowledgments of married women are not to be taken by a Master of the Q. B. D., nor by a registrar of the P. D. & A. D.: O. LIV, 12; nor by Masters in the Ch. D.: O. LV, 16.

Except under special circumstances the Ch. D. will not exercise concurrent jurisdiction with the Q. B. D. under sect. 91 of the Fines and Recoveries Act, 1833 (3 & 4 W. IV. c. 74), dispensing with the husband's concurrence in a wife's conveyance: *In re Ellen Giles*, W. N. (94) 73; 70 L. T. 757.

As to acknowledgments sworn in a colony, see *Re Alice Eliza Smith*, 50 L. J. Q. B. 32.

Where by order of a V.-O. a settlement was to be executed by an infant married woman, the Court allowed the certificate of acknowledgment under 3 & 4 W. IV. c. 74, s. 84, to be varied, by omitting the words "of full age": *Re Lacey*, 6 Q. B. 154; *Re Luke*, 1 N. C. 265; and see *Exp. Wallis*, 7 C. B. N. S. 303.

A certificate has been allowed to be filed though not made or signed by a commissioner until more than twenty years after the deed was acknowledged: *Re Chalker*, 47 L. J. C. P. 78; 37 L. T. 502; 26 W. R. 128.

The purchase-money of real estate belonging to a married woman may be paid out to her upon her separate examination without deed acknowledged: *Re Hayes*, 9 W. R. 769; *Re Worthington*, M. R., 16 Dec. 1853, B. 218, *sup.* p. 931; *Re Tyler*, 8 W. R. 540; but in *Re Bell's Estates*, 25 W. R. 901; 37 L. T. 272, a deed acknowledged was required before ordering a transfer, into the joint names of husband and wife, of the proceeds of real estate, sold under the Settled Estates Act, to which the survivor was absolutely entitled.

And where the shares were very small (less than 50*l.*) both examination and deed acknowledged have been dispensed with: *Knapping v. Tomlinson*, 18 W. R. 684; *Re Clarke's Estate*, 13 W. R. 401.

But generally a married woman's interest in land to which she is not entitled for her separate use can only be validly passed by deed acknowledged under the Fines and Recoveries Act: *Franks v. Bollans*, 3 Ch. 717.

A main purpose of the separate examination is to ascertain whether the purchase-money for land sold is to belong to the husband or not, and if the wife refuses a provision out of it she must be treated as having relinquished all her interest, even though part of the money is left outstanding in trustees by way of indemnity against charges: *Tennent v. Welch*, 37 Ch. D. 622.

She cannot bind herself to convey the estate: *Avery v. Griffin*, 6 Eq. 606; *Williams v. Walker*, 9 Q. B. D. 576; nor be compelled to complete a contract with a purchaser made by her husband and herself: *Emery v. Wace*, 8 Ves. 505; *Castle v. Wilkinson*, 5 Ch. 534; *Barker v. Cox*, 4 Ch. D. 464; *Barnes v. Wood*, 8 Eq. 424; *Cahill v. C.*, 8 App. Ca. 420.

An order under 3 & 4 W. IV. c. 74, s. 91, empowering a married woman to dispose of her real estate without the concurrence of her husband, does not affect his right at common law to the rents and profits: *Fowke v. Draycott*, 29 Ch. D. 996; and as to the discretion which the Court exercises in dispensing with the concurrence of the husband, see *Re Clare's Trusts*, 49 L. J. C. P. 557; *Re Caine*, 10 Q. B. D. 284.

Statutory Powers.—A decree for sale instead of partition may be made under the Partition Act, 1868 (31 & 32 V. c. 40), s. 3, at the request of a married woman Plt: *Higgs v. Dorkis*, 13 Eq. 280; but she could not, without her husband joining therein, give the undertaking to purchase mentioned in sect. 5: *Drinkwater v. Ratcliffe*, 20 Eq. 528.

She may, by separate examination in Court, elect to have her share of the proceeds of real estate, sold by order of the Court in a partition action, treated as personalty and paid out to her husband: *Standerling v. Hall*, 11 Ch. D. 652; *Re Robins*, 7 W. R. 705.

By the Partition Act, 1876 (39 & 40 V. c. 17), s. 6, a request for sale may now be made on an undertaking given to purchase on the part of a married woman, &c., by the next friend, &c.; and an order made on such a request operates as a conversion of her share into personalty: *Wallace v. Greenwood*, 16 Ch. D. 362; and as to the form of such request, see *Grange v. White*, 18 Ch. D. 612, and *inf.* Chap. XLVI., "PARTITION," Sect. III.

By the V. & P. Act, 1874 (37 & 38 V. c. 78), s. 5, a married woman in whom any freehold or copyhold hereditament is vested as a bare trustee (see *Re Docwra, D. v. Faith*, 29 Ch. D. 693) may convey or surrender the same as if she were a *feme sole*. See on this section, Dart, V. P. 665.

The separate examination of a married woman applying, or consenting to an application, under the Settled Estates Acts, as to her consent, whether the property, the subject of the application, is settled to her separate use or not, is required by the Settled Estates Act, 1877 (40 & 41 V. c. 18), ss. 50—52, though the woman was married before 1883, unless the property was acquired after 1883: *Re Harris' Settled Estates*, 28 Ch. D. 171; *In re Batt's Settled Estates*, (1897) 2 Ch. 65. For instances in which her separate examination has been dispensed with, see *Halliday's Estates*, 12 Eq. 199; *Marshall's Estates*, 15 Eq. 66; *Thorne's Estates*, 20 W. R. 587; *Re Tesseyman's Settled Estates*, W. N. (97) 167; 77 L. T. 484; *Re Ward's Settled Estates*, W. N. (95) 41; and see *inf.* Chap. XLV., "SETTLEMENT."

A married woman's consent to a transfer to her husband may be retracted so long as the transfer remains incomplete: *Penfold v. Mould*, 4 Eq. 562.

Desertion.—Independently of the protection as against her husband and all creditors and persons claiming under him given by the Matrimonial Causes Acts (20 & 21 V. c. 85, s. 21, and 21 & 22 V. c. 108, ss. 7, 8), to the property and earnings of a deserted wife who has obtained a protection order, which have been acquired since the commencement of such desertion, the Court has long since treated anything acquired by a deserted wife in the absence of her husband as her separate property, and not liable to the disposition of her husband: see *Cecil v. Juxon*, 1 Atk. 278.

Accordingly a wife deserted for more than twenty years has been held entitled to a transfer to herself as a *feme sole* of her share of residue paid into Court under the Trustee Relief Acts: *Re Pope's Trust*, 21 W. R. 646, *sup.* p. 929.

And like orders for payment to a wife who had obtained a protection order were made in *Re Rainsdon*, 7 W. R. 184; 5 Jur. N. S. 55; 28 L. J. Ch. 334; 4 Drew. 446; *Re Insole*, 1 Eq. 470; and in *Heath v. Lewis*, 13 W. R. 129; 11 L. T. 333; 10 Jur. N. S. 1093; to a wife who had been divorced in one of the colonies, as a *feme sole* discharged from any claim by her children to a settlement to which before her divorce she had been declared entitled.

The receipt of a wife who has obtained a protection order under 20 & 21 V. c. 85, s. 21, is a valid discharge for a legacy bequeathed to her before and paid to her after the date of the order: *Coward and Adams' Purchase*, 20 Eq. 179; and see *Nicholson v. Drury Co.*, 7 Ch. D. 48; *Re Emery's Trusts*, 50 L. T. 197; and on resumption of cohabitation subsequent mortgagees of the wife by deed acknowledged have priority over mortgagees of the husband by deed unacknowledged by her made previously to the protection order and the death of the tenant for life: *Re Emery's Trusts*, 50 L. T. 197; 32 W. R. 367.

Administratrix or Executrix.

When a wife is entitled to money in Court as administratrix, or executrix, payment is directed to be made "to B. the wife of A. as the legal pers. represse of C. deceased," and unless, as is now commonly the practice, the

words "on her separate receipt" are added, the Paymaster requires the husband to join in the receipt: *Re Hawksworth*, W. N. (87) 113; see *Kingsman v. K.*, 6 Q. B. D. 122, C. A.; but see the Married Women's Property Act, 1882 (45 & 46 V. c. 75), ss. 1, 2, 5, 24; and Lewin, 540.

HUSBAND OR WIFE OF UNSOUND MIND.

The husband being *non compos*, payment was ordered to the wife, or her solicitor for her, of the dividends of a legacy in Court given to her: *Steed v. Calley*, 2 M. & K. 52; and though the wife had separate property, the estate of her deceased lunatic husband was liable for necessities supplied to her during lunacy: *Davidson v. Wood*, 11 W. R. 561; 1 D. J. & S. 465.

Where the wife is of unsound mind, the surplus income of her separate estate after providing for her maintenance has been paid to the husband: *Edwards v. Abrey*, 2 Ph. 37; and the whole income has been paid to him on his undertaking to apply the same for the maintenance and support of his wife and of the children of the marriage: *Re Spiller*, 6 Jur. N. S. 386; 2 L. T. 74; or to apply the same for her maintenance, where the expense of keeping her at an asylum exceeded the amount of the income: *Re T—*, 15 Ch. D. 78; and her consent to investments was dispensed with upon petition under the Trustee Relief Act: *S. C.*

In the earlier cases the Court would not allow the husband of a lunatic wife any part of the principal in respect of his past payments, and as a rule a fund in Court of a married woman of unsound mind will not be transferred to him unconditionally.

In *Caldecott v. Harrison*, 1840, A. 511, the fund was paid out to the husband on his giving security to refund.

In *Symes v. Lee*, 26 L. J. Ch. 665, payment of the dividends to the husband until further order was at once directed, and, on his giving security either upon property of his own or personally with four competent sureties to re-transfer the stock as the Court should direct, transfer to him of the stock was likewise ordered.

In *Baker's Trusts*, 13 Eq. 168, the accrued dividends on a fund settled to the separate use of a married woman, inmate of a pauper lunatic asylum in Australia (her husband being unable to support her), were ordered to be paid to the colonial Master in Lunacy for her past maintenance, and also future dividends during the lunatic's life, or until further order: see also *Peters v. Grote*, 7 Sim. 238.

When a married woman has obtained an order under the Fines and Recoveries Act (3 & 4 W. IV. c. 74), s. 91, for disposing of her real estate without the concurrence of her husband, in cases where by reason of his absence, incapacity or lunacy, it cannot be obtained, it is not necessary that she should acknowledge the deed: *Goodchild v. Dougal*, 3 Ch. D. 650.

Applications for such an order must be supported by the affidavit of a medical man, and not merely by an affidavit verifying a medical certificate: *Re Reeves*, 24 W. R. 848.

The order under this section will simply give the married woman authority to convey (following the language of the section), without sanctioning any particular form of conveyance: *Re Woodall*, 3 C. B. 639.

And see for the form of order, *Exp. Duffill*, 6 Sc. N. R. 30.

Under the summary jurisdiction given by the Lunacy Regulation Acts, 1853 and 1862 (16 & 17 V. c. 70, 25 & 26 V. c. 86), the L. C., as "the person entrusted, &c.," had no statutory power to pass the legal estate of a married woman of unsound mind, so as to dispense with her acknowledgment under the Fines and Recoveries Act. The order directed a sale and declared all beneficial interest of the married woman bound by the order: see *Re Stables*, 4 D. J. & S. 257. See now the Lunacy Act, 1890 (53 & 54 V. c. 5), ss. 120, 124; *Re Ray*, (1896) 1 Ch. 468, C. A.

AFFIDAVIT OF NO SETTLEMENT.

The affidavit of no settlement should be by husband and wife, or by the widow if she is the survivor, and if there be a settlement it must be identified by their or her affidavit as the only settlement, and produced; and the Court will inspect the deed, or must be satisfied by counsel's certificate, or, if in

Chambers, by the affidavit of the solr, that it does not affect the fund in question, and inspection of the deed itself by the Master.

By the S. C. F. R. 1894, r. 61, where funds in Court are by an order directed to be paid, transferred, or delivered to a woman in her own right who is not married at the date of the order, or who, being married at that date, shall become a widow, and such woman shall marry before payment, transfer or delivery of such funds, they shall be paid, transferred, or delivered to such woman without the intervention or concurrence of her husband, in the same manner as if she had remained unmarried, upon an affidavit by her and her husband of no settlement or agreement; or in case of such settlement or agreement, on their affidavit identifying it, and stating that no other settlement or agreement has been made or entered into, and an affidavit of their solr of his having perused such settlement, &c., and that it does not affect the fund.

An affidavit that the property in question is not settled or is not affected by the settlement is not sufficient. It must be shown either that there is no settlement, or if there be a settlement it must be produced to satisfy the Court (the certificate of counsel to that effect being adopted) that it does not affect the property, as the judgment and belief of the parties as to its effect cannot be relied on: *Britten v. B.*, 9 Beav. 143; *Rose v. Rolls*, 1 Beav. 270.

For the form of the affidavit of no settlement by husband and wife, see 9 Beav. 143, n.; D. C. F. 932, 933.

The affidavit of the wife alone has been allowed when the husband is abroad: *Wilkinson v. Schneider*, 9 Eq. 423; *Elliott v. Remington*, 9 Sim. 502.

And payment to a wife suing as a *feme sole* under a protection order of her share in an admon suit has been made upon her affidavit that the separation continued, and that there was no settlement or agreement for a settlement: *Ewart v. Chubb*, 20 Eq. 454.

Where both husband and wife refuse to make the affidavit the fund may be paid out to the wife's assignee on an affidavit made by some person likely to be well informed: *Timothy v. Crown*, W. N. (00) 51; 82 L. T. 142.

When the husband refuses to make the affidavit, one by her of no settlement, and another as to the husband's refusal, have been admitted: see *Anon.*, 3 Jur. N. S. 839.

And where the affidavit could not be obtained, the fund has been paid out to the husband's assignee after the wife's death, on proof of there having been no children: *Clarke v. Woodward*, 25 Beav. 455.

The affidavit of the solr has also been admitted under special circumstances as sufficient where both husband and wife were abroad: *Woodward v. Pratt*, 16 Eq. 127.

Money in Court to which a widow has become entitled in possession since her husband's death will not be paid out to her without an affidavit of no settlement upon their marriage: *Elrington v. E.*, 4 Drew. 645.

SECTION IV.—ORDER FOR SETTLEMENT—WIFE'S EQUITY.

1. *Where Feme Covert on being examined desires a Settlement.*

AND B., the wife of A., being present in Court and examined, and desiring that the New Consols [*describe funds*] in Court to the credit of [*ledger credit*] should be settled for the benefit of herself, her husband, and her children in such manner as the Court shall approve, Let a proper settlement of the said £— &c. (or of such part thereof as the Judge shall direct) be approved by the Judge [*If on petition*, And Let the further consideration of this petition be adjourned to Chambers, *If at the trial, or on further consideration*, And any of the parties are to

be at liberty to apply in Chambers respecting such settlement, and the disposition of the said fund, as they may be advised].

2. *Further Order in Chambers.*

UPON the petition of &c. [Form 3, Vol. I., p. 386, *or* Upon the application of &c., Form 3, Vol. I., p. 317]; and upon reading &c. [*enter evidence*]; and the Judge being of opinion that the settlement proposed to be effected by the indenture hereinafter mentioned is a proper settlement to be made of the said &c., upon &c., and that the indenture (marked X) intended to be made between &c., and identified by the signature of the Master in the margin of the engrossment thereof, is a proper indenture for giving effect to such settlement, Let, upon the execution of such indenture by the said A. and B. his wife, and such other parties as the Judge shall direct, being certified [*or, and by &c. [name the other parties to execute]*], such execution to be verified by affidavit], the fund in Court be dealt with as directed in the Payment Schedule hereto.

PAYMENT SCHEDULE.

In the High Court of Justice,

20th June, 1900.

Chancery Division.

In the Matter of [*short title*].
Ledger credit [*take from certificate of fund*].
Funds in Court [*take from certificate of fund*].

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Upon the execution of the indenture marked X in the order mentioned by A. and B., his wife, and such other persons as the Judge shall direct being certified, <i>or</i> , upon the execution of the indenture marked X in the order mentioned by A. and B., his wife, and C. and D. being verified by affidavit—			
Transfer New Consols.....	The persons to be named for such purpose in the Master's certificate, <i>or</i> , C. and D. as the trustees of the indenture of settlement.	..	1,000 0 0
Transfer [<i>other stocks</i>].....	The same.		

See S. C. F. R. 1894, r. 18.

3. *Where the Application is made originally in Chambers.*

UPON the application of &c.; and B., the wife of A., being present in Chambers and examined by the Judge, and desiring that the £— &c. should be settled &c. [Form 1, *sup.*]; And the Judge being of opinion &c. [Form 2, *sup.*].

4. *Inquiry, whether any Settlement, and if proper, and if not, Direction for Settlement.*

LET an inquiry be made whether the Plt [*or* Deft] A. has made any and what settlement or provision for the Plt [*or* Deft] B., his wife, and the issue of their marriage, or entered into any and what agreement for that purpose; And if so, whether the same is a fit and proper settlement or provision for the said Plt [*or* Deft] B., and such issue; And if it shall appear that the said Plt [*or* Deft] A. has not made any such settlement or provision, or that such settlement or provision, if any, is not fit and proper, Let a proper settlement, to be made by the said Plt [*or* Deft] A., on &c., be approved by the Judge &c. [Form 1, *sup.*].

For the limitations usual in a settlement directed by the Court, see *inf.* p. 951.

5. *Married Woman Deserted by her Husband—Equity to a Settlement.*

UPON motion for judgment &c., Declare that the Plt A. M. K. (the wife of the Deft W. B. K.) is entitled to an equity to a settlement as against the Deft W. B. K. and the Deft W. W. W. as trustee of an indenture dated &c., and as against the creditors of the Deft W. B. K., and under the events which have happened is entitled to have the whole of the funds in Court hereinafter mentioned paid to her for her own absolute use and benefit.—Tax costs &c.—And Let the funds in Court be dealt with as directed in the Payment Schedule hereto.

PAYMENT SCHEDULE.

In the High Court of Justice,
Chancery Division.

19th March, 1892.

K. v. K. 1891. K. 1000.

Ledger Credit. “*Re* the share of A. M. K. in the estate subject to the settlement dated &c., on the marriage of J. C. C. and R. de L. D.

Funds in Court. £ cash.

£ money on deposit.

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Out of cash and money on deposit— Pay costs to be taxed under this order.			
Pay residue	Plt A. M. K., wife of W. B. K., upon her separate receipt.		
Pay interest	The same.		

—*Kent v. Kent*, Kekewich, J., 19 Mar. 1892, A. 544.

6. *Three-fourths of a Fund belonging to Wife of a Bankrupt directed to be settled by Deed.*

DECLARE that it is fit and proper that out of the sum of £2,000 in the said orders and Chief Clerk's (Master's) certificate mentioned the sum of £1,500 should, subject as hereinafter mentioned as to costs, be settled in trust for the separate use of the Deft E. W. [*wife*] for her life, without power of anticipation, with remainder in trust for her children or other issue by her present or any future marriage as she shall appoint, and in default of appointment to her children equally or their issue, the issue taking only the parent's share [*sons who die under twenty-one and daughters who die under twenty-one unmarried not taking interests transmissible to their representatives*]; and in default of the Deft E. W. having any children, then in trust for the Plt W. S. as assignee of the Deft H. W., the husband of the Deft E. S.; And it is ordered that the residue of the said £2,000 be paid by the Defts S. F. and G. W. H. [*trustees*] to the Plt W. S., first on account of his costs of this suit, and then on account of his claim as assignee of the Deft H. W.—Tax costs, and order Defts S. F. and G. W. H. to retain and pay costs out of the aforesaid £1,500; And it is ordered that a proper settlement be settled by the Judge in Chambers, and executed by all proper parties as the Judge shall direct, of the residue of the said £1,500, according to the aforesaid declaration.—*Liberty to apply.—Spirett v. Willows*, V.-C. Stuart, 17 July, 1865, B. 1922; 1 Ch. 520.

7. *Subsequent Order in last Case.*

THEIR Lordships do hereby approve of the indenture of settlement now produced, and identified by the signature of the registrar in the margin of the engrossment thereof, as a proper settlement to be made in pursuance of the said order dated 17 July, 1865.—*Spirett v. Willows*, L.JJ., 16 April, 1869, B. 1140; 4 Ch. 407.

The words in italics and brackets in Form 6 were directed to be added to the settlement by the L.JJ. on 23 April, 1868; S. C. 4 Ch. 410.

8. *Whole Fund settled by Order—Ultimate Limitation to Husband, following Spirett v. Willows.*

DECLARE that, subject to the provisions hereby made for the payment of costs, the legacy of £1,000, bequeathed by the will of E. T. to the Plt M. S. C. absolutely, as in the bill of complaint mentioned, and the investments for the time being representing the same, are to be held upon trust to pay the income thereof to the said M. S. C. during her life for her separate use, and from and after her death in trust for all the children or any the child of the said M. S. C., whether by her present or by any future husband, who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry under that age, and if more than one as tenants in common in equal shares, with a proviso that it

shall be lawful after the death of the said M. S. C., or in her lifetime with her consent in writing, to raise any part or parts not exceeding altogether one-half of the then expectant or presumptive or vested share of any child of the said M. S. C. under the said trusts, and to pay or apply the same for his or her preferment, advancement, or benefit; and with a proviso that after the death of the said M. S. C. the income of the share to which any child of the said M. S. C. shall for the time being be entitled in expectancy under the trusts aforesaid shall, or any part of such income may, be applied for or towards his or her maintenance or education, and that the same may be either so paid or applied directly, or may be paid to the guardian or guardians of such child for the purposes aforesaid without the application thereof being seen to; and with a further proviso that, during such suspense of absolute vesting as aforesaid, the residue (if any) of the same income shall be accumulated in the way of compound interest by investing the same and the resulting income thereof for the benefit of the person or persons who, under the trusts now being declared, shall become entitled to the principal fund from which the same respectively shall have proceeded, with power to resort to the accumulations of any preceding year or years, and to apply the same for or towards the maintenance or education of the child for the time being presumptively entitled to the same in the same manner as such accumulations might have been applied had they been income arising from the original trust fund in the year in which they shall be so applied. Declare, that if there shall be no such child of the said M. S. C. by any husband, who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or marry under that age, then that from and after the death of the said M. S. C. and such default or failure of children as aforesaid, which shall last happen, the said legacy and the investments representing the same, and the income thereof, or so much thereof respectively as shall not have been vested or applied under any of the trusts or provisos aforesaid, shall go and be held in trust for the Deft G. C., the husband of the said M. S. C., his exors, admors, and assigns. [Then follow directions for Deft W. H. M. (*the trustee*) to pay £—, the amount of the legacy, less duty, into Court to the credit of the cause, and for investment of fund, and, after payment of costs, for payment of dividends to the said M. S. C. (*the wife*) on her separate receipt during her life or until further order, and for general liberty to apply.]—*Croxton v. May*, 9 Eq. 404, V.-C. James, 30 May, 1870, A. 1205.

For orders following *Croxton v. May*, see *Walsh v. Wason*, 8 Ch. 482, 19 Feb. 1873, B. 734, where two-thirds of fund in Court were settled by order without deed as against husband's incumbrances; and *Re Robinson's Settled Estate*, *R. v. R.*, 12 Ch. D. 188 (where whole fund settled by order, husband being bankrupt).

For resettlement of the wife's trust fund after the husband's bankruptcy and disappearance since 1867, upon trust to pay the income to the wife for life without power of anticipation, with remainder to the daughter absolutely, see *De Martana v. D.*, V.-C. B., 1 March, 1875, A. 421; *S. C.*, 24 W. R. 200.

9. *Settlement by Order.*

THIS action coming on for trial &c., in the presence of counsel for the Plt and Defts &c., Declare that one-third of £— in the pleadings mentioned, and all other the share and interest of the Plt A. B. in the personal and real estate of the testator C. D., and the proceeds of the sale thereof, ought (subject to the payment of costs as hereinafter directed) to be settled for the benefit of the Plt, her children, and the Deft E. F., her husband, as follows: that is to say, that the same be held by the trustees for the time being of the will of the testator upon trust for the Deft E. F., during her life for her separate use without power of anticipation, and subject thereto upon trust for the children of the Plt, whether by her present or any future husband, or any one or more of them, in such shares, if more than one, and in such manner as the Plt and the Deft E. F. shall during their joint lives by deed, with or without power of revocation and new appointment, jointly appoint, and in default of such appointment, and so far as any such appointment shall not extend, then as the Plt, if she shall survive the Deft E. F., shall by deed, with or without power of revocation, or by will, appoint, and in default of any such appointment, and so far as any such appointment shall not extend, then in trust for the child or children of the Plt, whether by her present or any future husband, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry under that age with the previous consent of her or their guardian or guardians, and if there shall be more than one of such children, then as tenants in common in equal shares, and so that any child or children to whom an appointment shall be made shall, unless the appointor or appointors shall otherwise direct, bring the share or shares appointed to him, her, or them into hotchpot, and in default of any children of the Plt attaining a vested interest, and subject to the powers and trusts declared by this order, the trust estate shall be held in trust for the Deft E. F., his exors, admors, and assigns, and so also that it shall be lawful for the trustees or trustee for the time being, with the consent of the Plt during her life, and after her death at their or his discretion, to invest the trust estate in or upon securities authorized as investments of money under the control of the Court, with power, with the like consent or at the like discretion, to vary investments; and also that it shall be lawful for the trustees or trustee, with the like consent or at the like discretion, to raise out of the corpus of the trust property any sum or sums not exceeding in the whole one moiety of the share to which any such child or children as aforesaid shall be actually or presumptively entitled under the settlement made by this order, and to pay or apply the same for the advancement or otherwise for the benefit of such child or children as the trustees or trustee shall think fit. Let costs be taxed and paid &c.—*Beales v. Brown*, Pearson, J., 11th June, 1885, A. 1007.

For similar order for settlement of the several shares of two ladies absolutely entitled in equal moieties, see *Re Havers*, H. v. H., Kay, J., 16 Dec. 1884, A. 1862.

10. *Settlement by Order—Another Form—Set-off against Debt due from Husband.*

THIS action coming on &c., for further consideration in the presence of counsel for the Plts and Defts, Declare that out of the share of the Deft S. S. in the estate of the testator R. B., deceased, £500, or the whole of her share if less than that sum, ought (subject to the payment of costs as hereinafter directed) to be settled for the benefit of the said S. S. and her children as follows: that is to say, upon trust for the said S. S. during her life for her separate use without power of anticipation, and subject thereto upon trust for such of the children of the said S. S., whether by her present or any future husband, as she shall appoint by will, and in default of appointment in trust for her said children, being a son or sons at the age of twenty-one years, or being a daughter or daughters at that age or on marriage under that age, and if there shall be more than one of such children, then as tenants in common in equal shares, and, in default of any children of the said S. S. attaining a vested interest, in trust for herself, and that the balance (if any) of her share to which her husband, the Deft E. S., is entitled is to be set off *pro tanto* against the debt due from him to the testator's estate and forms part of the residue payable to the residuary legatees under the testator's will other than S. S.—Refer to taxing master to tax costs of all parties of this action, the costs of the Plts as between solor and client, and to include any charges and expenses properly incurred by them as trustees of the testator's will; And Let the Plts retain and pay the said costs out of any funds in their hands subject to the trusts of the testator's will; And Let the Plts H. G. P., R. J. H., and J. J. L., within ten days after the date of the taxing master's certificate, lodge in Court £500 or the whole of the share of S. S. after payment of costs, if less than £500, as directed in the Lodgment and Payment Schedule hereto.—Directions for division of ultimate residue of testator's estate amongst testator's other five children.—Liberty to apply.

LODGMET AND PAYMENT SCHEDULE.

In the High Court of Justice,
Chancery Division.

25th day of June, 1888.

Re Briant, Poulter v. Shackel. 1887. B. 2154.

Ledger Credit. As above. The account of the settlement on S. S. for life, with remainders over, created by the order dated the 25th June, 1888.

I.—*Lodgment.*

Particulars of Funds to be lodged.	Person to make the Lodgment.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
The share of the Deft S. S. in the estate of R. B. (after payment of costs) not exceeding £500.	H. G. P., R. J. H. and J. J. L.		

II.—*Payment.*

Funds to be dealt with. Funds to be lodged as above.

Particulars of Payments, Transfers, or other operations ordered.	Payees, Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Invest in India £3 per centum Stock.			
Pay interest as it accrues during life of S. S.	S. S., the wife of E. S., on her separate receipt.		

—*Re Briant, Poulter v. Shackel*, Kay, J., 25th June, 1888, A. 2035 ;
39 Ch. 471.

11. *Settlement by Order of whole Fund, the Husband claiming
no Part—Retainer of Costs.*

AND the Plt, by her counsel, desiring that a settlement should be made of the funds hereinafter mentioned, and the Deft S. [*husband*], by his counsel, not claiming to have any part of such funds transferred and paid to him in his marital right, Declare that the whole of the shares and interests of the Plt Frances S. [*wife*] under the respective wills of &c., and also under the indenture of settlement dated &c., in the statement of claim respectively mentioned, of and in the respective estates subject to the trusts and dispositions of these instruments respectively, ought (subject to the payment of costs as hereinafter directed) to be settled for the benefit of the Plt and the said Deft S., her husband and her children, as follows: that is to say, upon trust for the Plt Frances S. during her life for her separate use, without power of anticipation; and subject thereto upon trust for the Deft S. during his life, or until he shall become bankrupt, or shall do or suffer any act or thing which, if his life interest were not so qualified, would have the effect of alienating, charging, or incumbering such life interest; and subject thereto upon trust for such of the children of the Plt Frances S., whether by her present or any future husband, as being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry with the previous consent of her or their guardian or guardians, and if there shall be more than one of such children then as tenants in common in equal shares; and in default of any children of the Plt attaining a vested interest, in trust for the Deft S., his exors, admors, and assigns; And Let any child or children of the Plt be at liberty to apply in Chambers for an order to raise and pay out of the corpus of the trust property any sum or sums not exceeding in the whole one moiety of the share to which such child or children shall be actually or presumptively entitled under the settlement made by this order, for

Particulars of Funds to be lodged.	Person to make the Lodgment.	Amounts.	
		Money.	Securities.
Balance of £— after retaining costs to be certified by the taxing master.	Deft S. G.	£ s. d.	£ s. d.
Balance of £— after retaining costs to be certified by the taxing master.	Deft A. H. G.		
Balance of £— after retaining costs to be certified by the taxing master.	Deft J. H. G.		

II.—*Payment.*

Funds to be dealt with. Funds to be lodged as above.

Particulars of Payments, Transfers, or other operations ordered.	Payees, Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Pay Plt's costs to be taxed under this order.			
Invest residue of funds in India £5 per centum Stock.			
Pay interest as it accrues on said Stock during life of payee or until further order.	Plt F. S., wife of Deft F. O. S., on her separate receipt.		
The said Plt F. S. being restrained from anticipation, such interest is not to be paid to any attorney (following <i>Payment Schedule</i> , Form 18).			

—See *Smithers v. Green*, M. R., 27 April, 1877, B. 1937.

The above form of order was approved by Jessel, M. R., as the proper settlement, in the absence of any special circumstance, such as bankruptcy, or misconduct, or desertion by the husband, and where he assents to the whole fund being settled. It has, however, been remodelled in the present edition and a Lodgment and Payment Schedule added to suit the S. C. F. R. 1894. For a similar order, see *Re Stutely's Trusts*, 9 April, 1884.

Powers of appointment to children were, "for some special reason" (see *Re Gowan, G. v. G.*, 17 Ch. D. 778) omitted (*secus* in *Oliver v. O.*, 10 Ch. D. 765); as well as provisions for maintenance, &c. (inserted in *Croxton v. May*, 9 Eq. 404), but which are unnecessary where the fund is under the control of the Court. And as to statutory powers of maintenance, *v. inf.* Chap. XXXVIII., pp. 1012 *et seq.*

For form of settlement approved by Jessel, M. R., giving a joint power of appointment to husband and wife, see *Re Gowan, G. v. G.*, M. R., 17 Ch. D. 778; and see *Re Parrott, Walter v. P.*, 33 Ch. D. 274, C. A.

12. *Another Form—A Moiety settled—Annual Sum paid to Wife out of Income and Capital.*

UPON the appeal of L. E. G. L. and T. T. [*legal pers. represves of assignee of husband*] &c., and upon hearing counsel for H. C. and her husband S. C., Declare that one moiety of the funds in Court, after payment of costs directed to be paid by order dated &c., ought to be paid to the said L. E. G. L. and T. T. as legal pers. represves of C. L. [*husband's assignee*]; And Declare that the remaining moiety of the said funds, after payment of the costs of this appeal, ought to be settled upon the said H. C. and her children in such a manner that the said H. C. may receive a sum of £20 per ann., to be paid out of income and capital of the said remaining moiety of the funds in Court, and that any portion of the said last-mentioned moiety remaining after the death of the said H. C. ought to be held in trust for such of the children

of the said H. C. living at her death, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, and that in the event of there being no child or children of the said H. C. who shall attain a vested interest in the said fund the same ought to be paid, after the death of the said H. C., to the said L. E. G. L. and T. T. as the legal pers. represves of the said C. L.—Tax costs of all parties.—Let funds in Court be dealt with as directed in the Payment Schedule hereto.

PAYMENT SCHEDULE.

In the High Court of Justice,
Chancery Division.

Date of Order, 13th March, 1891.

Roberts v. Cooper.

Ledger Credit. As above. The account of the exors or admors of C. L. subject to the equity to a settlement of the Petr H. C., if any.

Funds in Court. £501 : 2s. 4d. money on deposit.

£2 : 1s. 9d. cash.

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Pay one moiety of funds in Court after payment of costs directed by the order dated &c.	L. E. G. L. and T. T. as legal pers. represves of C. L.		
Carry over remaining moiety	The account of H. C. and her children and those entitled in remainder.		
Out of moiety so carried over— Pay costs directed to be taxed by this order.			
Out of residue and any interest on money on deposit— Pay during life of H. C. the annual sum of £20 by half-yearly payments of £10 and £10 on the 24th June, 1891, and 25th Dec. 1891, and the same day in each succeeding year, the first payment to be made on the 24th June, 1891. The said H. C. being restrained from anticipation, such annual sum is not to be paid to any attorney [following Payment Schedule, Form 18].	H. C., wife of S. C., on her separate receipt.		

—*Roberts v. Cooper*, C. A., 13 March, 1891, B. 488; (1891) 2 Ch. 335.

In settlements of a female infant's property directed by the Court, a restraint against anticipation is always inserted: see *Dev. Conv.* vol. iii. p. 72.

But the restraint will not be implied from a limitation to the wife, in a settlement of her property pursuant to articles, "for her life, for her own absolute use and benefit, free from all marital control and liability": *Symonds v. Wilkes*, 13 W. R. 1026 (reversing 12 W. R. 341); 11 Jur. N. S. 659; 12 L. T. 598.

In the case of an equitable fee which had descended on the wife during coverture, the husband's possible estate by the curtesy was not interfered with in the settlement directed: see *Smith v. Matthews*, 3 D. F. & J. 139, 154.

It seems now settled that the ultimate limitation in a settlement by the Court of property, subject to the wife's equity, is, after the death of the wife, and failure of her children by the present or any future marriage, for the benefit of the husband, whether he survives the wife or not: see *Croxton v. May*, Form 8, *sup.*, and *Spirett v. Willows*, Forms 6, 7, *sup.*, notwithstanding *Carter v. Taggart*, 1 D. M. & G. 286; 5 Dr. & S. 49; and *Re Suggitt*, 3 Ch. 215.

The wife's fund, that accrued during coverture, was properly settled so as to give the husband an interest determinable on his bankruptcy: see *Montefiore v. Behrens*, 1 Eq. 171.

For order to settle the whole of an undivided third of leasehold property upon the plaintiff (her husband), and her children, such settlement to be executed by such parties as should for that purpose be named in the Master's certificate of approval, see *Clarke v. Marten*, M. R., 20 Feb. 1858, A. 598.

NOTES.

WIFE'S EQUITY TO A SETTLEMENT.

In mitigation of the old common law right of the husband, derived from his liability to maintain his wife, to the enjoyment of his wife's real estate during their joint lives, and to the absolute ownership of the personal property in possession, and of her choses in action when reduced by him into possession, Courts of Equity have long exercised jurisdiction in favour of the wife by giving her a provision for herself and her children out of her own property, both real and personal. For the principles and extent of this right, which is called the wife's equity to a settlement, see *Knight v. K.*, 18 Eq. 487; *Re Briant, Poulter v. Shackel*, 39 Ch. D. 471; *Sturgis v. Champneys*, 5 M. & Cr. 97; 1 L. C. Eq. 493, 501; 7th ed. 621, 633 (*Murray v. L. Elibank*); Lewin on Trusts, 903 *et seq.*

In the case of a woman married after the passing of the Married Women's Property Act, 1870 (9 Aug. 1870), personal property to which she became entitled during coverture as next of kin or one of the next of kin of an intestate, of whatever value, or money, not exceeding 200*l.*, acquired by deed or will, belonged, subject to the trusts of any settlement, to her for her separate use (sect. 7): *Re Voss, King v. V.*, 13 Ch. D. 504.

And by sect. 8 this provision was extended to the rents of freehold, copyhold, or customaryhold property which descended upon any woman married after the passing of the Act as heiress or co-heiress of an intestate.

But now, by the Married Women's Property Act, 1882 (45 & 46 V. c. 75), sects. 2, 5 (stated *sup.* p. 917), as to women married since the 31st of December, 1882, and also, as to property accruing after that date, to women married previously to that date, the rights of the husband are excluded, and, consequently, the doctrine of the wife's equity to a settlement has been rendered inapplicable. It will still, however, be as applicable as it previously was where the reversionary property of a woman married on or before the date last mentioned falls into possession subsequently.

Though it was not usual to direct a settlement of sums under 200*l.*, to which a married woman became entitled during coverture (see *Foden v. Finney*, 4 Russ. 428), there is no binding rule to that effect, and sums below that amount have been settled: see *Re Cutler*, 14 Beav. 220; *Re Kincaid*, 1 Drew. 326; *Re Merriman's Trust*, 10 W. R. 334.

Property subject to the Equity.

The equity to a settlement attaches to such property only as the husband is entitled to receive *jure mariti*, and not upon what the wife takes in her own right, e.g., as equitable tenant in tail (see *Life Assoc. of Scotland v. Siddal*, 3 D. F. & J. 271); and is an obligation which the Court fastens not upon the property itself, but upon the right to receive it: *Knight v. K.*, 18 Eq. 487; *Osborn v. Morgan*, 9 Ha. 432. It does not depend upon any right of property in the wife, and if claimed by her must be claimed for herself and her children, and not for herself alone: *Barrow v. B.*, 5 D. M. & G. 782; 18 Beav. 259; *Giacometti v. Prodgere*, 8 Ch. 338; 14 Eq. 253. Where property is given to husband and wife, they take by entireties, and there is no equity to a settlement: *Atcheson v. A.*, 11 B. 485; *Ward v. W.*, 14 Ch. D. 508; *Re Bryan, Godfrey v. B.*, 14 Ch. D. 516; and the Married Women's Property Act, 1882, has not altered the law in this respect: *Re March, Mander v. Harris*, 27 Ch. D. 166, C. A.; *Re Jupp, J. v. Buckwell*, 39 Ch. D. 148; but see *Thornley v. T.*, (1893) 2 Ch. 229.

The right applies to property vested before or after marriage, if not barred by express contract, and the Court looks not only to what amount of the wife's fortune the husband has received, but to his conduct and all the circumstances: *Barrow v. B.*, *sup.*; *Smith v. S.*, 3 Giff. 121; and see *inf.* p. 954.

Upon the question, how far a life interest is subject to the equity, see *Lewin*, 909; and *Taunton v. Morris*, 11 Ch. D. 779, C. A.; 8 Ch. D. 463, where the Court, in the case of an insolvent debtor who contributed nothing to the support of his wife, gave the whole income to the wife.

As to whether the equity attaches to the wife's chattels real, or equitable interest in lands of freehold or inheritance, see *Lewin*, 912 *et seq.*

When the fund is reversionary, a settlement cannot be directed: *Osborn v. Morgan*, 9 Ha. 432; and as the right attaches only to property which the husband is entitled to receive in his marital right, property in his hands as exor must answer his liabilities in that capacity before a settlement of the wife's residuary share in it can be directed: *Knight v. K.*, 18 Eq. 487; but see *contra*, *Re Briant, Poulter v. Shackel*, 39 Ch. D. 471.

But the right will, it seems, prevail against any right of set-off or retainer, e.g., in respect of the husband's debt to the testator: *M'Cormick v. Garnett*, 5 D. M. & G. 278; 2 Sm. & G. 37; see also 1 L. O. Eq. 652; and the right is paramount to that of the represves of the wife's testator to retain a debt due from the husband: *Re Batchelor, Sloper v. Oliver*, 16 Eq. 481; *Re Cordwell's Estate, White v. C.*, 20 Eq. 644; *Re Briant, sup.*; and see *Carr v. Taylor*, 10 Ves. 574.

Enforcement of Equity.

If the wife is already amply provided for, and no misconduct is proved against the husband, the Court has refused to enforce the right: *Giacometti v. Prodgere*, 8 Ch. 338; 14 Eq. 253; and see *Re Erskine*, 1 K. & J. 302; *Spicer v. S.*, 24 Beav. 365; *Aguilar v. A.*, 5 Madd. 414.

It is, however, a matter of discretion; and where a husband before his bankruptcy had reduced into possession 9,000*l.* of his wife's residuary share, the remaining 1,500*l.* was settled upon her, though she had separate estate of 700*l.* per ann.: *Nicholson v. Carline*, 22 W. R. 820; and see *Scott v. Spashett*, 3 Mac. & G. 599.

Regard will be had to the extent of the wife's fortune and the settlement already made upon her: *Green v. Otte*, 1 S. & S. 250; *Spicer v. S.*, 24 Beav. 365; and her equity may be excluded by an exception of the particular fund or property from the husband's covenant in her marriage settlement to settle her future-acquired property: *Brooks v. Hicks*, 12 W. R. 703; 10 L. T. 404.

L. Elibank v. Montolieu, 5 Ves. 737, establishes the right of a married woman to assert by suit her equity to a settlement against her husband and the admor of the estate under which her title arises, and this right is paramount to the claim of the admor as creditor of the husband.

In an admon action after judgment, but before further consideration, the wife was held, on petition, entitled to an immediate order to enforce her

equity in respect of a share of a fund in Court, though it was not distributable until further consideration, and the amount of her share was unascertained: *Re Robinson, R. v. R.*, 12 Ch. D. 188.

The right is not confined to personal estate, and she might obtain leave to sue in *forma pauperis* without a next friend to enforce as against her husband's assignees in bankruptcy her equity to a settlement out of the rents of real property, the legal estate in which was vested in trustees for her benefit for life: *Barnes v. Robinson*, 32 L. J. Ch. 143.

Murray v. L. Elibank, 13 Ves. 1, extends this right, after decree, to the children, who are entitled under a decree directing a settlement on their mother to a provision out of the property, though she died before the certificate, and though they were not mentioned in the decree: see *Groves v. Clarke*, 6 Sim. 584; 1 Ke. 132; *Lloyd v. Mason*, 5 Ha. 149.

Form of Settlement.

The rule is to direct a settlement for the benefit not only of the wife but of her children by the present, or future, or former marriage, without any particular regard to the rights of husband's assignee (see *Spirett v. Willows*, 4 Ch. 407, 410), and the children's right is irrespective of other fortune they may have: *Conington v. Gilliat*, 25 W. R. 69; 46 L. J. Ch. 61; 35 L. T. 736; *Croxtan v. May*, 9 Eq. 404.

And see *Murray v. L. Elibank*, 1 L. C. Eq. 493, 501; 7th ed. 621, 633; *Lloyd v. Williams*, 1 Madd. 450; *Prid. Conv.* vol. ii., p. 237.

As the rights of the husband are not interfered with further than is necessary to give effect to the equity in favour of the wife and children, the ultimate limitation will in general be in favour of the husband (or his assignees), whether he survives the wife or not: *Croxtan v. May*, 9 Eq. 404; *Spirett v. Willows*, 1 Ch. 520; 4 Ch. 407; *Walsh v. Wason*, 8 Ch. 453; *Re Robinson, R. v. R.*, 12 Ch. D. 188; *Robinson v. Cooper*, (1891) 2 Ch. 335, 348, C. A.; *Re Noakes' Will*, 38 W. R. 762.

But in special circumstances, as where the property is of small amount, the Court has secured the capital as well as the income to the wife: *Boxall v. B.*, 27 Ch. D. 220, 224; *Re Craddock's Trusts*, W. N. (75) 187; and see *Roberts v. Cooper*, (1891) 2 Ch. 335, where the wife and children being in necessitous circumstances and supported by the wife, and the husband having received a large part of a small fund, 20l. a year out of income and capital was ordered to be paid to the wife for life for her separate use, and after her death the remainder for the children or the represes of the assignee: *v. sup.*, Form 12, p. 947.

A power to appoint amongst children has also been inserted in recent cases: see *Beales v. Brown, sup.* Form 9, p. 943; *Re Briant, Poulter v. Shackel, sup.*, Form 10, p. 944; 39 Ch. D. 471; and see *Re Gowan, G. v. G.*, 17 Ch. D. 778 (and form of judgment at p. 781), citing *Cogan v. Duffield*, 2 Ch. D. 44, 49, C. A., and observing on *Oliver v. O.*, 10 Ch. D. 765.

And where the husband has agreed to a settlement of the whole fund, and subject to his not having debarred himself by misconduct, bankruptcy, or insolvency, a life interest has been given to him after the death of the wife: *Smithers v. Green, sup.* Form 11, p. 945; and, *semble*, the power of appointing amongst children may in such case be to the husband and wife or survivor: see *Re Gowan, G. v. G., sup.*

And see *Walford v. Gray*, 13 W. R. 335, 761; 11 Jur. N. S. 473; 12 L. T. 437; and *inf.* Chap. XLV., "SETTLEMENT" that children are entitled to enforce a contract for a settlement on the faith of which the marriage took place.

Rights of Children.

Except by contract, or under the judgment, the children have no equity independently of their mother: *Lloyd v. Williams*, 1 Madd. 450; *Hodgens v. H.*, 11 Bli. N. S. 62; *De la Garde v. Lemprière*, 6 Beav. 344.

Their right does not attach on the mere institution of an action: *Baker v. Baydon*, 8 Ha. 210; *De la Garde v. Lemprière, sup.* (overruling *Steinmetz v. Halthin*, 1 Gl. & J. 64); and if the wife died before obtaining a decree in her

suit claiming a settlement, the children could not enforce a settlement by supplemental bill: *Wallace v. Auldjo*, 1 D. J. & S. 643; 2 Dr. & Sm. 216.

The inchoate right of the children (which is said to be dependent upon the will of the mother, see *Murray v. L. Elibank*, 10 Ves. 84) may also be defeated by her waiving the equity for herself and her children: *Fenner v. Taylor*, 2 Russ. & M. 190 (reversing 1 Sim. 169); *Murray v. L. Elibank*, *sup.*; and after the reference to approve of a settlement and the certificate, but not after the final order, she may withdraw from the proposed settlement: *Baldwin v. B.*, 5 Dr. & S. 319; *Re Walker*, Ll. & G. temp. Sug. 324; *Barrow v. B.*, 4 K. & J. 409, 424.

But an infant *feme covert* is not capable of waiving her equity: *Shipway v. Ball*, 16 Ch. D. 376.

As to the power of the wife to bind herself by consent out of Court, see *Re Swan*, 2 H. & M. 34; *Re Roberts' Trusts*, 38 L. J. Ch. 708; 17 W. R. 639.

The equity has also been defeated by the divorce of the mother after she has been declared on petition entitled to a settlement out of her fund in Court to the separate account of her husband and herself, but before any decree or settlement made: *Heath v. Lewis*, 13 W. R. 129; 10 Jur. N. S. 1093; 11 L. T. 333.

If the wife has died without exercising her right to call for a settlement for the benefit of herself and her children, the fund will belong to her husband as her legal pers. represve to the exclusion of her children: *Lovett v. L.*, Joh. 118.

Infant Wife.

There is no jurisdiction to direct a settlement against her wish of the property of an infant wife not a ward of Court: *Re Potter*, 7 Eq. 484 (not following *Wortham v. Pemberton*, 1 Dr. & S. 644); and see *inf. Chap. XXXVIII.*, p. 1060.

Assignees of Husband.

The equity to a settlement out of both real and personal estate will be enforced as against the husband's general assignees, *i.e.*, his assignees in bankruptcy (or insolvency): *Sturgis v. Champneys*, 5 M. & Cr. 97; *Barnes v. Robinson*, 11 W. R. 276; *Wilkinson v. Charlesworth*, 10 Beav. 324; *Koeber v. Sturgis*, 22 Beav. 588.

As against the particular assignee for value, a distinction has been taken between an assignment by the husband of his wife's life interest, and of her absolute interest.

In the former case the question is between husband and wife independently of the children; and, on the ground that the husband is entitled to the fund for the purpose of maintaining his wife, the marital right prevails over the wife's equity, and he has full power to deal with the income which he is entitled to receive in her right: see *Vaughan v. Buck*, 13 Sim. 404; *Life Ass. of Scotland v. Siddal*, 3 D. F. & J. 271. And though the Court will not help him to get at the fund without securing for the wife, whom he has deserted or does not maintain, a portion of the income, his misconduct in not maintaining his wife subsequently to the assignment will not affect the title of his assignee for value: see *Tidd v. Lister*, 3 D. M. & G. 857; 10 Ha. 140; *Re Duffy*, 28 Beav. 386; *Re Carr's Trusts*, 12 Eq. 609; *Durham v. Crackles*, 11 W. R. 138; 32 L. J. Ch. 111; 8 Jur. N. S. 1174; *Stanton v. Hall*, 2 Russ. & M. 175; *Elliott v. Cordell*, 5 Mad. 149; *Wright v. Morley*, 11 Ves. 12; but see *Taunton v. Morris*, 8 Ch. D. 453, where the wife's whole life interest was settled as against the husband's assignees in insolvency: and *In re Dixon's Trusts*, 48 L. J. Ch. 592; 9 Ch. D. 587.

As against the husband himself, she is not, it seems, entitled so long as he is maintaining her, though inadequately: *Vaughan v. Buck*, 13 Sim. 404.

But if she has been deserted by her husband she is entitled to a settlement or maintenance out of her equitable life interest: *Re Ford*, 32 Beav. 621; *Gilchrist v. Cator*, 1 D. & S. 188; *viz.*, of the income of so much of her interest as has not been specifically assigned by the husband for value: see *Wright v. Morley*, 11 Ves. 12; and cases cited 1 L. O. Eq. 532, 533; 7th ed. 652.

In the case of the wife's absolute interest, the Court, acting for the benefit and with a view to the interests not of the wife only, but also of her children, will not allow their rights to be defeated, even by an assignment for value by the husband: *Tidd v. Lister*, 3 D. M. & G. 857; *Hanson v. Keating*, 4 Ha. 1.

But even in the case of the wife's estate of inheritance, the husband's assignment by way of mortgage has prevailed to the extent of his life interest: *Durham v. Crackles*, 11 W. R. 138.

And, as against the particular assignee for value, she has no equity to a settlement out of the accumulated arrears of past income of real or leasehold property: *Re Carr's Trusts*, 12 Eq. 609; *Newman v. Wilson*, 31 Beav. 34; but see *Life Ass. of Scotland v. Siddal*, 3 D. F. & J. 271.

The wife's equity may also be defeated by her joining by deed acknowledged in assigning her interest in a debt secured on land, to secure her husband's debt: *Cooke v. Williams*, 11 W. R. 504; and see *Carr's Trusts*, *sup.*

And her right to any separate property, on its falling into possession, acquired by her under the Married Women's Property Act, 1870, s. 7, might be divested by an order, on the joint petition of her husband and herself, for payment of the fund to the husband in her right, and the fund would pass to the husband and his assignees: *Lane v. Oakes*, 22 W. R. 709; 30 L. T. 726.

But if there has been no act amounting to a reduction into possession by the husband of the wife's chose in action, a mortgage of it by husband and wife, though based upon an ante-nuptial negotiation by the wife for the loan, will not bind her right by survivorship: *Prole v. Soady*, 3 Ch. 220; and see *Re Insole*, 1 Eq. 470.

As to what does and does not constitute a reduction into possession by the husband of the wife's choses in action, see Dav. Conv. vol. ii. p. 226 (4th ed.), and cases there collected. See also Lewin, pp. 903 *et seq.*; *Parker v. Lechmere*, 12 Ch. D. 256; *Re Barber, Dardier v. Chapman*, 11 Ch. D. 442; *Spence*, Eq. Jur. vol. ii. 478; *Nicholson v. Drury Buildings Co.*, 7 Ch. D. 48.

If a *feme* is joint tenant of a chose in action, and marries, the joint tenancy is not thereby severed: *Re Butler's Trusts, Hughes v. Anderson*, 38 Ch. D. 286, C. A., overruling *Baillie v. Treharne*, 17 Ch. D. 388; and so of freeholds or leaseholds: *Palmer v. Rich*, (1897) 1 Ch. 134; and the granting of a lease by the husband and the other joint tenant, reserving the rent to the lessors jointly, does not necessarily effect a severance of the wife's joint tenancy: *S. C.*; and where, being under age, she settled her joint share of personalty by a deed containing a covenant for settlement of after-acquired property, and died without doing an act to avoid the deed, it was held that a severance of the joint tenancy was effected: *Burnaby v. Equit. Rev. Int. Soc.*, 28 Ch. D. 416; but a covenant by an intended husband and wife to settle the wife's after-acquired property will sever the wife's joint interest in personal estate created by a subsequent instrument: *Re Hewett, H. v. Hallett*, (1894) 1 Ch. 362.

The right to the personal property of the wife being governed by the law of the matrimonial domicile (see Story, Conf. § 180; *Duncan v. Cannan*, 18 Beav. 128; and see *Harvey v. Farnie*, 8 App. Ca. 43; *De Nicols v. Curlier*, (1900) A. C. 21, H. L.), she has no equity to a settlement where *lege loci*, as in Scotland, there is no such right: *Hitchcock v. Clendinen*, 12 Beav. 534; *McCormick v. Garnett*, 5 D. M. & G. 278; and see *Re Marsland*, 55 L. J. Ch. 581; 54 L. T. 635; 34 W. R. 540; unless, though domiciled abroad, she is a ward of Court, in which case (either under the general jurisdiction or under the Infants' Settlement Act (18 & 19 V. c. 43), see *Powell v. Oakley*, 34 Beav. 575; *Re Potter*, 7 Eq. 484) the Court, before parting with the fund to the husband, will require a settlement or some proper provision to be made for her benefit: *Re Tweedale*, Joh. 109.

The Court will not allow the right to be made an engine of fraud, and the equity to a settlement cannot be enforced until the wife's debts before marriage are provided for: *Barnard v. Ford*, 4 Ch. 247.

If guilty of a fraud (as, for instance, by holding out to a purchaser for value that an assignment made after marriage was made before), she may preclude herself from claiming her equity: *Re Lush's Trusts*, 4 Ch. 591; *Cahill v. C.*, 8 App. Ca. 437; *S. C. nom. Cahill v. Martin*, 5 L. R. Ir. 227; 7 Ib. 361.

Adultery of the wife bars her equity to a settlement: *Carr v. Eastbrooke*,

4 Ves. 146; *Duncan v. Campbell*, 12 Sim. 616; except under very special circumstances: see *Re Lewin*, 20 Beav. 378; unless she be a ward of Court married without its consent: *Ball v. Coutts*, 1 V. & B. 302; or her husband is also living in adultery: *Greedy v. Lavender*, 13 Beav. 62.

But living apart from her husband, if not in adultery, has been held under the circumstances not to bar her equity: *Eedes v. E.*, 11 Sim. 569; especially when the separation was occasioned by the husband's, and not by her, misconduct: *Barrow v. B.*, 5 D. M. & G. 782.

Amount.

The old rule of the Court was not to settle more than one-half; the other half being left to go to the husband or his assigns: *Beresford v. Hobson*, 1 Madd. 376; *Napier v. N.*, 1 Dr. & War. 407; *Bagshaw v. Winter*, 5 Dr. & S. 466; *Brown v. Clark*, 3 Ves. 100.

The rule has since been relaxed, and in the discretion of the Judge, having regard to what is just and reasonable under the circumstances of each case, and especially to the amount of fortune already received by the husband and to any previous settlement, a larger proportion has been settled upon the wife: *Green v. Otte*, 1 Sim. & S. 250; *Re Suggitt's Trusts*, 3 Ch. 215; *Conington v. Gilliat*, 25 W. R. 69; 46 L. J. Ch. 61; 35 L. T. 736; *Merriman's Trusts*, 10 W. R. 234; *Gardner v. Marshall*, 14 Sim. 575.

Under special circumstances, the whole fund has been settled on the wife as against the husband's assignees in bankruptcy or insolvency or a purchaser from them, and even against his assignee for value in exclusion of the marital right, as in the following cases under the following circumstances:—

(a) Inability of husband, from poverty or insolvency, to maintain his wife: *Cordwell's Estate*, *White v. C.*, 20 Eq. 644; *Koeber v. Sturgis*, 22 Beav. 588; *Duncombe v. Greenacre*, 29 Beav. 578; and see cases on the subject collected *Ib.* 582, n.; *Re Hooper's Trust*, 6 W. R. 824; *Re Kincaid*, 1 Dr. 326; *Brett v. Greenwell*, 3 Y. & C. Ex. 230; *Taunton v. Morris*, 8 Ch. D. 453; 11 Ch. D. 779, C. A.; *Re Howard*, *H. v. H.*, W. N. (95) 4; *Lewin*, 907 *et seq.*

(b) Present insolvency of husband and past receipt of wife's fortune: *Nicholson v. Carline*, 22 W. R. 819; without appropriation for her benefit: *Ward v. Yates*, 1 Dr. & S. 80; *Conington v. Gilliat*, 25 W. R. 69; *Gardner v. Marshall*, 14 Sim. 575; *Scott v. Spashett*, 3 Mac. & G. 599; or absence of any provision for the wife by settlement: *Smith v. S.*, 3 Giff. 121.

(c) Misconduct on part of husband, as desertion, adultery, cruelty, or marriage from merely interested motives: *Dunkley v. D.*, 2 D. M. & G. 390; *Barrow v. B.*, 5 D. M. & G. 782; *Re Cutler*, 14 Beav. 220; *Gilchrist v. Cator*, 1 Dr. & S. 188. And see *Re Ford*, 32 Beav. 621; *Boxall v. B.*, 27 Ch. D. 220; *Reid v. R.*, 33 Ch. D. 220.

(d) Mere separation, caused by the wife's ill-health, the husband not contributing to her support: *Croxton v. May*, 18 W. R. 375; 9 Eq. 404; 39 L. J. Ch. 155; *Fowke v. Draycott*, 29 Ch. D. 996.

(e) The smallness of the fund is also an element which will justify the Court in settling the whole on the wife: see *Re Kincaid*, 1 Dr. 326.

Three-fourths were settled in *Spirett v. Willows*, 1 Ch. 520; Form 6, *sup.* p. 941 (not one-half as stated in head-note): *Coster v. C.*, 3 Sim. 697.

Three-fifths in *Napier v. N.*, 1 Dr. & War. 407 (600l. out of 1,000l.).

Two-thirds in *Re Suggitt's Trusts*, 3 Ch. 215; *Carter v. Taggart*, 5 Dr. & S. 49; *Callow v. C.*, 55 L. T. 154.

But in the absence of such special circumstances, one-half will be settled, and one-half given to the husband and those claiming under him: see *Spirett v. Willows*, 1 Ch. 520; *Re Suggitt's Trusts*, *sup.*; *Re Grove's Trusts*, 3 Giff. 575, 583; and see *Watts v. Shrimpton*, 21 Beav. 97.

The same principles have been applied in ordering maintenance for a wife who is deserted and not provided for: see *Watson*, Comp. Eq. 370.

Upon the form of the settlement, see *sup.* p. 951.

SECTION V.—DOWER AND JOINTURE.

(I.)—DOWER.

1. *Inquiries as to Lands subject to Dower—Dower assigned.*

LET the following inquiries be made :—1. An inquiry what freehold lands the said M. died seised of, wherein the Plt is dowable; 2. An inquiry what copyhold or customary lands the said M. died seised of, wherein the Plt is entitled to dower, or any other estate, by the custom of the manor wherein the said copyhold or customary lands or any of them do lie; 3. And Let the Plt be assigned her dower in such freehold lands and tenements, and also her dower or widow's estate in such copyhold or customary lands and tenements; And Let particular lands and tenements be assigned and set out for that purpose; And after the lands and tenements shall be set out and ascertained, Let the Deft deliver possession to the Plt of the lands and tenements that shall be so set out and ascertained for the said dower or widow's estate of the Plt; and the tenants thereof are to attorn and pay their rents to the Plt; 4. And Let an account be taken of the rents and profits of the said freehold and copyhold or customary lands and tenements whereof the said M. died seised, accrued since the death of the said M., received by the Deft, or by any other &c.; And Let one-third part of what shall be coming on the said account of rents and profits of such freehold lands and tenements be paid to the Plt by the Deft, in respect of her dower out of such lands and tenements; And Let such part of what shall be coming on the said account of rents and profits of the said copyhold or customary lands and tenements, as the Plt shall be certified to be entitled to in respect of her dower or other widow's estate in such copyhold or customary lands and tenements, be paid to the Plt by the Deft.—Deft. to pay Plt's &c. costs of action to this time.—Adjourn &c. —*Meggott v. M.*, L. C., 15 Oct. 1742, B. 543; 2 Dick. 794; 2 Ves. 127; Mitf. Pl. 98, n.

If the judgment directs payment of what should be certified to be due on the account, it would now limit a time for that purpose, after the date of the certificate; and see Form 2.

2. *Inquiry and Commission to assign Dower and Freebench.*

LET &c., an inquiry what freehold manors, messuages, lands, tenements, and hereditaments, B. deceased was seised of or entitled to at the time of his marriage with Plt, or at any time afterwards, wherein Plt is dowable, or wherein Plt is entitled to freebench or any other estate by the custom of the manor wherein such copyhold or customary lands or hereditaments, or any of them, do lie; And Let a commission issue directed to certain commrs to be therein named, to assign to Plt her dower in such freehold manors &c., and also her dower, freebench, or widow's estate in such copyhold or customary manors &c., as the said

B. shall appear to have died seised of.—Account of rents and profits accrued since death of B. received by Deft.—Adjourn &c.

For form of order for commission, see R. S. C. Appx. K. 36; and for form of commission, see R. S. C. Appx. J. 13.

For decree for commission to assign Plt's dower, and possession of the lands assigned to be delivered, and tenants to attorn and pay rents to Plt, inquiry as to freehold lands, and account of the rents and profits, and Plt to be paid her thirds during her life; and inquiry whether the whole or how much of a sum of stock transferred to the National Debt Commrs, in redemption of land tax, was in respect of the settled estates; and declaration that so much of such stock was a charge on the estate, in favour of the pers. represves of testator, with interest; amount of land tax so redeemed to be ascertained, see *Gregory v. G.*, M. R., 17 Feb. 1810, A. 340.

3. *Account of Rents—Occupation Rent charged.*

LET an inquiry be made what freehold estates B., the grandson of &c., the testator, became seised of under the will of the testator wherein the Plt [*widow*] is entitled to dower; And Let the Plt be assigned her dower in such estates; And Let particular lands or tenements be assigned and set out for that purpose; And after the said lands or tenements shall be set out and ascertained, Let the Defts deliver possession to the Plt of the lands or tenements that shall be so set out and ascertained for the dower of the Plt; and the tenants thereof are to attorn and pay their rents to the Plt; 2. And Let an account be taken of the rents and profits of the estates whereof the said B. became so seised, accrued from the — day of —, being six years prior to the time of (filing the Plt's bill), to such time as such lands and tenements shall be so set out and assigned, received by the Defts or any of them, or by any other &c.; 3. And Let an inquiry be made, whether any and which of the Defts has or have been in the occupation of any of the said estates; and if so, Let an annual sum (value) by way of occupation rent be set thereon (and Let such Defts be charged therewith); And Let the Defts respectively (within &c., after the date of the chief clerk's certificate) pay to the Plt one-third part of the amount of such rents and profits which shall be certified to have been received by them respectively.—No costs on either side.—Liberty to apply.—*Bamford v. B.*, V.-C. W., 21 July, 1845, B. 2302; 5 Ha. 203.

4. *Inquiries as to Lands of which Testator died seised, and as to Dower.*

LET the following &c.:—1. An inquiry when L. in the pleadings named was married to the Deft A., now the wife of the Deft S., and when the said L. died; 2. An inquiry whether the said L. was at the time of such marriage, or whether he became at any and what time subsequent thereto, seised or possessed of, or entitled to any, and if any what, lands, tenements, and hereditaments for any and what estates of inheritance, and whether he was at the time of his death

seised or possessed of or entitled to (such lands &c. for) the same estates, or any and which of them; 3. An inquiry whether the Deft A. was at the time of the death of the said L. entitled to dower or freebench out of all, or any and which of the lands, tenements and hereditaments of or to which the said L. died so seised or possessed or entitled as aforesaid; 4. An inquiry what, if anything, is due to the said Deft A., or to her husband the Deft S. in her right, for and in respect of such dower or freebench or any part thereof.—*Lloyd v. Smith*, M. R., 22 May, 1861, B. 916.

For decree for inquiry as to lands subject to dower, with account of rents, and adjourning further consideration, see *Sheaf v. Cave*, V.-C. K., 26 July, 1851, B. 1200; *S. C.*, 24 Beav. 259.

For decree for widow to elect between a disposition of property in her favour by husband's will and her dower thereout, but not out of the rest of his estate, see *Birmingham v. Kirwan*, 2 Sc. & L. 455.

For order for payment of the ascertained value of dower out of a fund in Court representing the purchase-money of an infant's property, subject to his mother's right of dower, see *Re Hall's Estate*, V.-C. M., 21 Jan. 1870, A. 115; *S. C.*, 9 Eq. 179.

5. *Sale subject to Dower.*

Upon the application of the Plt and upon hearing solrs for the Plt and Deft (Usual admon accounts and inquiries in creditor's action), Let real estate be sold with approbation &c., And Let the said sale be also subject to the widow's dower (if any) unless she shall come in and consent to have a valuation set thereon, and in that case let the said sale be free from such dower.—Direction for payment of purchase-money into Court.—Directions for application of purchase-money of real estate sold with consent of incumbrancers and widow.—*Re Jacobson, J. v. J.*, Chitty, J., 24 March, 1884, A. 774.

NOTES.

By the Common Law Procedure Act, 1860 (23 & 24 V. c. 126), s. 26, the ordinary writ of summons from the Common Pleas was substituted for the writ of right of dower, writ of dower *unde nihil habet*, or plaint for freebench or dower in the nature of any such writ.

And by R. S. C. Appx. A, Part III. Section IV., a writ of summons may be indorsed with a claim for dower.

Formerly, if the legal title was disputed, the practice was to direct an issue: Mitf. 98; *Mundy v. M.*, 2 Ves. 122, 5; 4 Bro. C. C. 295;

—or to order the bill to be retained, with liberty to Plt to bring a writ of dower: Mitf. 98, n.; *D'Arcy v. Blake*, 2 Sc. & L. 390, 1.

As to directing issues and trials of questions of fact by jury under the new procedure, see *sup.*, vol. i., p. 369 *et seq.*

Under the former practice a commission was sometimes directed, and possession ordered to be delivered: *Wild v. Wells*, 1 Dick. 3; *Huddleston v. H.*, 1 Ch. Rep. 38; *Lucas v. Calcraft*, 1 Bro. C. C. 134; 2 Dick. 594; 1 V. & B. 20, n.; *Mundy v. M.*, *sup.*; or an inquiry: *Goodenough v. G.*, 2 Dick. 795; *Tinney v. T.*, 1743, B. 52; 3 Atk. 8; 1 Ves. 54.

Directions as to a commission will, as in partition, be given in Chambers. Possession will be ordered as part of the judgment after the lands shall have been set out and ascertained: *sup.* Forms 1, 3.

Account.—In equity the dowress was entitled to an account of rents and profits from her husband's death; and generally, as to the assistance given to her towards establishing her right (at law), and obtaining complete relief when the right was ascertained, see *Curtis v. C.*, 2 Bro. O. C. 622; *Pulteney v. Warren*, 6 Ves. 89.

Though she die before she has established her right, the account will be ordered in favour of her pers. represve; but interest will not be allowed thereon: *Lindsay v. Gibbon*, cited 3 Bro. C. C. 495; *Wakefield v. Childs*, 1 Fonb. Eq. 23.

Dower is subject to abatement in respect of the widow's charge of 500*l.* imposed on the intestate's estate by the Intestates' Estates Act, 1890: *In re Charriere, Duret v. C.*, (1896) 1 Ch. 912.

Limitation.—Under the old law, before the Real Property Limitation Act, 1833 (3 & 4 W. IV. c. 27), there was no limitation to a claim for arrears of dower: *Oliver v. Richardson*, 9 Ves. 222. But by s. 41, arrears of dower are not to be recovered for more than six years before the commencement of proceedings: see Form 3.

And if dower is not claimed within the time limited by the Acts for bringing an action to recover land (as to the limitation of such actions, see Real Prop. Limitation Act, 1874), it will be barred: *Marshall v. Smith*, 13 W. R. 198; 5 Giff. 37.

Costs.—On bill to assign dower (following the practice in a writ of dower), no costs were given when the right was admitted: *Lucas v. Calcraft*, 1 Bro. C. C. 133; *Mundy v. M.*, 2 Ves. 122, 128; but where the title had been disputed, or Deft had set up a defence which failed, or unnecessarily gone into evidence, he might have to pay the costs thereby occasioned: *Fry v. Noble*, 20 Beav. 598; *Harris v. H.*, 11 W. R. 62; 7 L. T. 411; *Stormont v. Wickens*, 14 W. R. 192; 13 L. T. 533. And see *Bamford v. B.*, 5 Ha. 203, and cases there cited; *Morgan and Wurtzburg*, 217.

And in case of forfeiture, damages were given by the Statute of Merton, and costs by the Statute of Gloucester: see *William v. Gwyn*, 2 Wms. Saund. 45, n.

For form of judgment in writ of dower, see *William v. Gwyn*, 2 Wms. Saund. 45, n.; *Dennis v. D.*, *Ib.* 331; *Coke's Entries*, 171.

Forfeiture and Extinguishment.—Under 13 Edw. I. c. 34 (Westr. 2nd), dower is forfeited by wife's adultery without reconciliation, although the conduct of the husband may have originally compelled her to leave him: *Woodward v. Dowse*, 10 O. B. N. S. 722; *Bostock v. Smith*, 34 Beav. 57.

When land subject to dower has been compulsorily taken, the widow is entitled to payment of the ascertained value of her right of dower out of the proceeds in Court: *Re Hall's Estate*, 9 Eq. 179, and *sup.* Form 5 (and see *Gleeson v. Byrne*, 25 L. R. Ir. 361, where the land having been sold in an admon action, the dowress was held entitled to the capitalized value of her dower out of the purchase-money paid into Court); or, as in *Harrop v. Wilson*, 34 Beav. 166, to payment for life of the dividends of one-third of the proceeds in respect of her dower, and after her death to an apportionment of the half-year's dividends.

The right to dower is not affected by mere debts of the husband not charged upon his lands: *Spyer v. Hyatt*, 20 Beav. 621.

But a mortgage by the husband bars dower *pro tanto*: *Jones v. J.*, 4 K. & J. 361.

Under the old law, dower did not attach to an equity of redemption where the mortgage was in fee: *Dixon v. Saville*, 1 Bro. C. C. 326; *Tudor, L. C. Conv.* 71; and therefore a woman married before the Dower Act who has joined her husband in conveying his freeholds by deed acknowledged to a mortgagee free from dower, has thereby extinguished her dower; and, notwithstanding the *dicta* in *Jackson v. Parker*, Amb. 687; *Jackson v. Innes*, 1 Bli. 126, is not entitled to redeem in respect of her right to dower: *Dawson v. Whitehaven Bank*, 6 Ch. D. 218, O. A. (reversing 4 Ch. D. 639). And see *Byth. & Jarm. Conv.* vol. iv. p. 173 (2nd ed.).

The right to dower may be extinguished by a deed conveying the equity of redemption duly acknowledged by her, and reciting her agreement to join her husband in the conveyance, though her name was not inserted in the operative part of the deed as a co-grantor: *Dent v. Clayton*, 12 W. R. 903; 33 L. J. Ch. 535; 10 Jur. N. S. 675; 10 L. T. 865.

When, however, a wife joins her husband in mortgaging property out of which she is entitled to a rent-charge for life in the event of her surviving, and the husband after a reconveyance of the mortgaged property re-mortgages it, the wife's equity of redemption as to her rent-charge is not released in the absence of express contract on her part: *Re Betton's Estate*, 12 Eq. 553.

And see *Pigott v. P.*, 4 Eq. 549, that a mortgage by husband of the wife's land tax, with reservation of the equity of redemption to himself alone, does not, subject to payment of the mortgage debt, affect the right of the wife surviving to the property.

And where the dowress joined with her son, the owner in fee, in a mortgage by him of the land "discharged" from the dower, her right was merely suspended, and on his paying off the mortgage and taking a reconveyance, revived: *Meek v. Chamberlain*, 8 Q. B. D. 31.

Barring Dower.—The usual uses to bar dower in a conveyance prior to the Dower Act will not bar a second wife married after the Act: *Fry v. Noble*, 20 Beav. 598; 7 D. M. & G. 687; *Clarke v. Franklin*, 4 K. & J. 266.

The Act does not apply to the widow's right to freebench or to copyholds: *Smith v. Adams*, 5 D. M. & G. 712; *Powdrell v. Jones*, 2 Sm. & G. 407; but does to gavelkind: *Farley v. Bonham*, 2 J. & H. 177.

Freebench in copyholds of which the husband died intestate is not barred by a settlement upon the marriage of other copyholds "in order to make some provision" for the widow after his death: *Willis v. W.*, 34 Beav. 340.

See also *Sambourne v. S.*, 1 R. 6 Eq. 28, where the wife's dower and distributive share were held barred as to the real and personal estate comprised in the settlement, but not as to other real and personal estate of which the husband died intestate.

A provision "in lieu of dower or thirds at common law or otherwise" has been held to bar the widow's freebench: *Nottley v. Palmer*, 2 Drew. 93; *Gurly v. G.*, 8 Cl. & F. 743.

So also a provision out of mixed real and personal estate expressed to be made "in lieu of dower or thirds," was held to bar both the widow's dower out of the real and her distributive share in the personal estate: *Thompson v. Watts*, 2 J. & H. 291.

But looking to the fund out of which a similar provision was made, the term "thirds" was held to refer exclusively to realty, and not to bar the distributive share in personality: *Colleton v. Garth*, 6 Sim. 19.

The right to dower is barred by a decree for dissolution of marriage obtained by the wife on the ground of the adultery and cruelty of the husband: *Frampton v. Stephens*, 21 Ch. D. 164.

In cases governed by the law prior to the Dower Act (3 & 4 W. IV. c. 105), it has been held that a devise by a testator to his widow of part of the lands of which she was dowable did not bar her claim to dower out of the remainder, and that she was entitled to both: *Lawrence v. L.*, 2 Vern. 365; 3 Bro. P. C. 483.

So also a devise of land in trust for sale was a devise subject to dower, and the widow's right was not affected by the mode of applying the proceeds directed by testator: *Ellis v. Lewis*, 3 Ha. 314; *Bending v. B.*, 3 K. & J. 257; *Gibson v. G.*, 1 Drew. 42.

But where the will contained provisions inconsistent with the widow's right to have one-third of the land set out by metes and bounds (e.g., powers to lease or manage and cut timber), the widow was put to her election: *Parker v. Sowerby*, 4 D. M. & G. 321 (overruling *Warbuton v. W.*, 2 Sm. & G. 163); *Linley v. Taylor*, 1 Giff. 67; *Birmingham v. Kirwan*, 2 Sch. & Lef. 444; *Hall v. Hill*, 1 Dr. & War. 94; *Thompson v. Burra*, 16 Eq. 592.

Under a general devise of "all my real estate" by a testator married after the Dower Act, upon trust out of the income of the invested proceeds to pay an annuity to the widow, and subject to such annuity in trust for the children, the widow is barred of her right to dower by sect. 4 as well as by sect. 9; it being a disposition of every interest in real estate over which testator had a disposing testamentary power: *Lacey v. Hill*, 19 Eq. 346 (disapproving the narrower construction of sect. 4 adopted in *Rowland v. Cuthbertson*, 8 Eq. 466). And a gift of the income of proceeds of land is a gift of "an interest in land" within sect. 7: *Re Thomas, T. v. Howell*, 34 Ch. D. 166.

A married woman may contract herself out of her dower by agreeing before

marriage to accept a jointure. And even though that provision fails by the death of the husband without executing the settlement agreed upon by the marriage articles, her right to dower will be barred by the articles: *Pennefather v. P.*, 1 R. 6 Eq. 171; and see *Dyke v. Rendall*, 2 D. M. & G. 209.

But in order to bar her right of dower, the provision for her jointure must have been made for her before marriage, and in such case will bind her, if at the time an infant, as if she were an adult: 27 Hen. VIII. c. 10. If the jointure is made after marriage, she may, after the death of her husband, but not during coverture, make her election between dower and jointure: *Frank v. F.*, 3 M. & Cr. 171.

Election.—The gift by the husband of an annuity or rent-charge to his widow charged upon the property out of which she is dowable is not inconsistent with her claim to dower, and will not of itself alone put her to her election: *Holdich v. H.*, 2 Y. & C. C. 18.

If put to her election, she is entitled first to have the account of the testator's personal estate taken and a statement of the real estate out of which she is dowable: *Boynton v. B.*, 1 Bro. C. C. 445.

And generally, in the case of a married woman, an inquiry will be directed "whether it will be for the benefit of (the married woman) and her children to take under the provisions of the said will and codicils or against the same": *Cooper v. C.*, L. R. 7 H. L. 53.

Election will not be presumed from the acts of the widow where she was ignorant of her rights. Accordingly, the receipt of an annuity or benefits under the will for three years (*Wake v. W.*, 1 Ves. jun. 335); five years (*Reynard v. Spence*, 4 Beav. 103); or even sixteen years (*Sopwith v. Maughan*, 30 Beav. 235), in ignorance of her right to dower, has been held not to prevent her making her election to take against or under the will.

As to presuming election, see *Harris v. Watkins*, 2 K. & J. 473; and generally on the doctrine of election, see 1 L. C. Eq. 397, 7th ed. 416; and cases there cited, and *inf.* Chap. XLIV., "ADMINISTRATION."

(II.)—JOINTURE.

1. Jointure confirmed—Deeds to be produced.

AND the Plt now offering to confirm the jointure of the Deft C. in the several estates settled upon her by the deeds dated &c., or either of them, Let the Plt confirm the jointure of the Deft C. in all the said estates by such deeds or assurances as (the Judge) shall direct; And Let such deeds or assurances be settled by (the Judge), in case the parties differ; And after such jointure shall be confirmed in manner aforesaid, Let the Deft C. produce and leave at the Central Office, upon oath, all deeds and writings in her custody or power relating to the several estates comprised in the settlements dated &c., or any of them, or any part thereof; And Let the Deft C. also produce and leave with &c. [*as above*], upon oath, all deeds and writings in her custody or power relating to the lands, manors &c. comprised in the settlement made by &c., dated &c., or any part thereof.—Any of the parties to be at liberty to inspect the deeds, and take copies &c.—Adjourn &c. until after the said deeds and writings shall have been produced.—Liberty to apply.—See *Aston v. A.*, L. C., 4 Dec. 1747, A. 152; 3 Atk. 302.

2. Jointure to be made good—Deeds—Account.

"DECLARE, that the Plt is entitled in equity to have a jointure of £— per ann. made good to her out of the estate in question, according

to the power reserved to H. deceased, her late husband, by the settlement dated &c. ; And Let so much of the lands &c., comprised in the said settlement dated &c., and in the said settlement dated &c., as shall amount to and not exceed the value of £— per ann., subject to taxes and repairs, be set out and allotted for the Plt's jointure for her life; And Let the Deft M. settle and convey such lands &c., so to be set out and allotted as aforesaid, to the Plt for her life, for her jointure, by such conveyances and assurances as (the Judge) shall approve, free from all incumbrances done by the Deft M.; And Let all proper parties join in such conveyances &c. ; And Let the Deft M. deliver possession to the Plt of the lands &c., which shall be so allotted and set out, with the appurtenances; And Let the tenants of such parts thereof as are in the possession of tenants attorn and pay their rents to the Plt; And Let the Plt hold and enjoy the same during her life against the Deft M., and all persons claiming under him or the said H.; And Let all deeds and writings &c. be produced and left &c. upon oath; And Let an account be taken of the rents and profits of the lands &c. which shall be set out and allotted for the Plt's jointure, accrued since the death of the said H., received by Deft M.; And Let the Deft M. (within &c. after the date of the Master's certificate) pay unto the Plt H. what shall be certified to be due to her on the balance of the said account."—Adjourn &c.—*Harvey v. H.*, L. C., 12 Nov. 1739, A. 278; 1 Atk. 561.

NOTES.

A jointress was not obliged to bring her jointure deed into Court, nor to produce deeds until her jointure had been confirmed; and when confirmed, which was by order on further consideration (*L. Portsmouth v. L. Effingham*, 1 Vez. 430; *Belt's Supp.* 28), she was ordered to deliver up the deeds in her possession: *Petre v. P.*, 3 Atk. 511; *Towers v. Davys*, 1 Ver. 479; *Ford v. Peering*, 1 Ves. jun. 72; *Pyncent v. P.*, 3 Atk. 571. And see *Dan.* 487, 583.

Where she pleaded her jointure deed in bar of discovery of deeds in her possession, the plea must have stated the date of the deed, and the particular lands comprised: *Chamberlain v. Knapp*, 1 Atk. 52; and it must be produced: *Senhouse v. Earl*, 2 Vez. 450.

Prima facie a jointure is an estate to the wife for life, to take effect on the death of the husband: *Re De Hoghton, De H. v. De H.*, (1896) 2 Ch. 385 (explaining *Jamieson v. Trevelyan*, 10 Ex. 269). A power to jointure does not authorize an appointment to a wife to take effect in the lifetime of her husband: *S. C.*

A jointure is not forfeitable either by adultery or elopement: *Sidney v. S.*, 3 P. Wms. 269; as the liability of the husband to perform the condition of his bond is not thereby put an end to, or a performance of marriage articles prevented: *Seagrave v. S.*, 13 Ves. 439.

Secus, in the case of dower, which is forfeited by adultery under 13 Edw. I. c. 34.

On a sale, with the concurrence of the jointress, of a part of lands charged with a jointure under a power in the settlement to sell with the consent of the tenant for life, the lands sold would be sold free from the succession duty which would be payable on the death of the jointress: *Dugdale v. Meadows*, 6 Ch. 501; 9 Eq. 212; and see *Cooper v. Trewby*, 28 Beav. 194; *sup.* Vol. I., p. 242.

A power to jointure is not illegal because it enables the donee to make provision for the events of divorce and remarriage: *Marlborough (Duchess) v. Marlborough (D.)*, (1901) 1 Ch. 165, C. A.

A release of a jointure must be according to the statutory formalities, and an agreement for compromise cannot be treated as a release in equity: *Cahill v. C.*, 8 App. Ca. 420.

And see Vaizey on Settlements, Chap. XL., s. 24, p. 974.

SECTION VI.—SEPARATION AND DIVORCE.

(I.)—VOLUNTARY SEPARATION.

1. Decree for Specific Performance of Articles of Separation.

[Covenant to put an end to suit in Ecclesiastical Court, to pay husband an annuity, and his existing debts, was sufficient consideration.]

“DECREE that a proper deed of conveyance for the purpose of carrying into effect the articles of separation of the 1st day of June, 1843, in the pleadings mentioned, be settled &c.; And Let there be inserted in such deed a joint and several covenant by the Plts N. and F. (*trustees*) with the Deft J. W. (*husband*) to indemnify the said Deft against all debts and liabilities of the Plt Mary W. (*wife*) which existed on the 1st day of June, 1843, and all subsequent and future debts and liabilities of the said Mary W.; And Let such deed be executed by the Plts Mary W., N., and F., and by the Deft J. W.; And Let one part thereof, when executed, be delivered to the Plts N. and F.; And Let the other part thereof, when executed, be delivered to the Deft J. W.”—Directions that the Deft J. W. deliver up to the Plt Mary W., for her separate use, possession of the mansion-house &c., and household furniture, and all other effects therein, and all her wearing apparel and ornaments of the person, and all books, papers, letters, and documents, which on the 1st day of June, 1843, were in the mansion, other than such books as belonged to the Deft J. W. in his own right, and which by the said articles he was authorized to remove—1. Inquiry as to the value of the mansion-house and furniture to let since the said 24th day of June, 1843, and an occupation rent to be set thereon, and Deft. J. W. to be charged therewith to the day on which possession shall be delivered, the amount thereof, when ascertained, to be paid by the Deft J. W. to the Plts N. and F. for the separate use of the Plt Mary W.; 2. Inquiry by whom the rents and profits of the several estates in &c., accrued since the 24th day of June, 1843, have been received; 3. Account of all such parts thereof as have been received by the Deft J. W.; And the Deft to be charged with the amount thereof; 4. Inquiry what has become due to the Deft J. W. in respect of the annuity of £1,000 per ann. under the said articles.—Direction for set-off, and to state the balance.—Injunction to restrain the Deft J. W. from receiving the rents of the estates (and also to restrain him, until the execution of the deed, from taking any proceedings in the suit instituted by the Plt

Mary W. in the Consistory Court, for the purpose of compelling her to proceed in or to continue the same, and from obtaining any order dismissing that suit, or making her liable for the costs of it).—Cross suit dismissed with costs, to be taxed.—Costs of the Plts of the original suits up to the hearing to be taxed and paid by Deft J. W.—Further consideration and subsequent costs reserved.—*Wilson v. W.*, V.-C. E., 11 Feb. 1845, B. 469; S. C., 14 Sim. 405.—Affirmed, 1 H. L. C. 538, and 5 H. L. C. 40.

2. Specific Performance of Agreement for Separation.

DECLARE that the agreement dated &c. in the pleadings mentioned ought to be specifically performed and carried into execution, and decree the same accordingly; And the Plt G., the next friend of the Plt A. H. [*wife*], by his counsel undertaking that the Plt A. H. shall duly execute such deed as hereinafter mentioned, Let a proper deed of separation, containing all usual and proper clauses, and to secure the sum of £— a year for the life of the Plt A. H., to commence from the date of the said agreement, and to be paid by the Deft H. [*husband*] by equal quarterly payments for the maintenance of his wife and child, be settled &c., the costs of such deed to be borne by the Plt G. and by the Deft H. in equal moieties; And Let such deed be executed by the Plt G. and the Deft H. respectively; And Let an account be taken of the amount due in respect of the said annuity; And Let the Deft H. within fourteen days from the date of the Master's certificate pay to the said G., the next friend of the Plt, what shall be certified to be due on taking the said account.—Deft H. to pay the Plt's costs of suit, and the costs of the infant Deft, such costs to be taxed.—Liberty to apply.—*Gibbs v. Harding*, V.-C. S., 27 July, 1869, A. 2687; as varied on appeal, 25 Jan. 1870, A. 181, 5 Ch. 336.

For interlocutory order restraining Deft (the wife) until the hearing &c., from taking any proceedings against Plt (the husband), under a petition in the Divorce Court, and from commencing or prosecuting any suit or other proceeding whatever to compel, and from requiring, or by any means or in any manner whatever endeavouring to compel, the Plt to cohabit or live with the Deft (the wife), and from endeavouring to compel any restitution of conjugal rights against the Plt (in breach of the covenant on her behalf by Deft the trustee contained in a separation deed), with liberty for the wife to (file any cross bill) impeach the separation deed, or otherwise as she might be advised, and without being obliged to (file it) by a next friend, see *Kitchin v. K.*, V.-C. J., 28 Jan. 1869, A. 248; 19 L. T. 674.

NOTES.

SEPARATION DEEDS.

Validity and Effect.

It is now established that a deed of separation is binding on the wife as well as the husband, though entered into without the intervention of a trustee: *McGregor v. M.*, 21 Q. B. D. 424, C. A.; *Rose v. R.*, 8 P. D. 98, C. A.; *Gandy v. G.*, 30 Ch. D. 57; *Rowley v. R.*, L. R. 1 H. L. 63; *Sweet*

v. S., (1895) 1 Q. B. 12; and the wife is bound by a covenant not to sue for restitution of conjugal rights: *Marshall v. M.*, 5 P. D. 19; though entered into by the trustee only, if she has taken benefits under the deed: *Clark v. C.*, 10 P. D. 188, C. A.

The agreement, however, must be for an immediate and not for a future or possible separation: see Poll. Contr. 294, and cases there cited on this distinction.

The agreement must be based upon sufficient consideration, and not be merely voluntary: *Walrond v. W.*, Joh. 18.

As to the consideration which will be held sufficient to support a separation deed, see May, Vol. Conv. 301 *et seq.*; *McGregor v. M.*, 21 Q. B. D. 424, C. A.; *Re Weston*, (1900) 2 Ch. 164.

A covenant by the wife to live apart may be presumed from a recital in the deed: *Re Weston*, *sup.*

There must have been an unqualified acceptance by the wife of its provisions before she, as distinguished from her trustees, will be bound by it: *Williams v. Baily*, 2 Eq. 731; but the wife having accepted benefits under the deed cannot be heard to say that she had not contracted, because the covenant not to sue was entered into by the trustee, and not by her: *Clark v. C.*, 10 P. D. 188, C. A.

As to the invalidity of gifts in contemplation of future separation between husband and wife, see *Re Moore, Trafford v. Machonochie*, 39 Ch. D. 116, C. A., and cases there cited.

Specific Performance and Enforcement.

Effect will be given in Equity to deeds of separation between husband and wife:

(a) By decreeing specific performance of an agreement, based upon sufficient consideration, to execute a deed of immediate separation: *Wilson v. W.*, 1 H. L. C. 538; 5 H. L. C. 40; *Gibbs v. Harding*, 5 Ch. 336; 8 Eq. 490; *sup.* Forms 1, 2.

The Chancery Division can enforce specific performance of an agreement for a separation deed and for a compromise of divorce proceedings: *Hart v. H.*, 18 Ch. D. 670.

(b) By restraining, before the Judicature Acts, proceedings in the Divorce Court to obtain a restitution of conjugal rights, or a dissolution of the marriage, or to recover alimony in breach of covenants to that effect in the deed: *Hunt v. H.*, 4 D. F. & J. 221; *Vansittart v. V.*, 2 D. & J. 249; 4 K. & J. 62; *Kitchin v. K.*, 19 L. T. 674; *Flower v. F.*, 20 W. R. 231; 25 L. T. 902; and see *Williams v. Baily*, 2 Eq. 731; *Brown v. B.*, 7 Eq. 185; *Besant v. Wood*, 12 Ch. D. 605.

And although an injunction will no longer be granted against proceedings in the Divorce or any other Division of the High Court (see Jud. Act, 1873, s. 24 (5)), it will be open to the Divorce Division to deal with the whole question of the validity of the deed of separation as an equitable defence to proceedings in that Division to enforce a return to cohabitation or to dissolve the marriage contract: see *Marshall v. M.*, 5 P. D. 19; *Clark v. C.*, 10 P. D. 188, C. A.; *Cahill v. C.*, 8 App. Ca. 420; *Besant v. Wood*, 12 Ch. D. 605; *Hart v. H.*, 18 Ch. D. 670; *Rose v. R.*, 8 P. D. 98, C. A. Formerly, however, the Divorce Court regarded all agreements for voluntary separation, present or future, as a breach of religious obligation (see *Hunt v. H.*, 4 D. F. & J. 221; *Crawley*, 250); and rejected the covenants of such a deed as insufficient to support a plea in bar to suits for restitution of conjugal rights or separation: *Mortimer v. M.*, 2 Hayes, Conv. 318; *Warrender v. W.*, 2 Cl. & Fin. 528; *Spering v. S.*, 32 L. J. P. & M. 116; 3 Sw. & Tr. 211; 9 L. T. 24; 11 W. R. 810; *Williams v. W.*, L. R. 1 P. & M. 178; and see *Moore v. M.*, 12 P. D. 193; *Tress v. T.*, 12 P. D. 128.

(c) By restraining husband or wife from personally molesting the other of them in breach of covenant in the separation deed: *Sanders v. Rodway*, 16 Beav. 207; *Flower v. F.*, 20 W. R. 231; 25 L. T. 902.

A suit by a wife for a judicial separation is no breach of a covenant not to "molest or disturb" the husband: see *Thomas v. Everard*, 6 H. & N. 448; and the taking of proceedings in a foreign Court to procure a divorce, without evidence of an intention to annoy, is not *per se* a breach of a covenant

by the husband not to molest the wife: *Hunt v. H.*, (1897) 2 Q. B. 547, C. A.; (1897) 2 Q. B. 304.

In order to constitute molestation there must be some act done with intent to annoy; and neither adultery of the wife, nor such adultery followed by the birth of a spurious child, is "molestation": *Fearon v. Earl of Aylesford*, 14 Q. B. D. 792, C. A.

And covenants against molestation by wife, and for payment of an annuity to her, are *prima facie* to be construed as independent: *Fearon v. Earl of Aylesford*, *sup.*

Although a deed of separation does not (in the absence of a covenant not to sue for a larger allowance: see *Gandy v. G.*, 7 P. D. 168, C. A., assuming such covenant to be valid, as to which *quare*, see *Bishop v. B.*; *Judkin v. J.*, (1897) P. 138, C. A.) necessarily preclude a wife from petitioning for alimony, the mere fact of proceedings for dissolution of marriage does not give her the right to an increased allowance: *Powell v. P.*, L. R. 3 P. & M. 55, 186; and see *Williams v. Bailly*, 2 Eq. 731; but although the deed is only to become void if the marriage is "dissolved," the Court has power to order the payment of permanent alimony to the wife after a decree for judicial separation by reason of the husband's misconduct if there has been such an alteration of circumstances as renders it unjust that the wife should be bound by the deed: *Bishop v. B.*; *Judkins v. J.*, (1897) P. 138, C. A.

And that children or third persons not named as parties to the contract cannot sue the contracting parties unless possessing an actual beneficial right which places them in the position of *cs. q. t.* under the contract, see *Gandy v. G.*, 30 Ch. D. 57, C. A., where, however, liberty was given to the Plt to amend by adding the trustees, wife and other children, or any of them, as Plts; and, on the general point, cf. *Re Flavell*, *Murray v. F.*, 25 Ch. D. 89; *Cleaver v. Mutual Reserve Fund*, (1892) 1 Q. B. 147, C. A.

A separation deed may be partially enforced, rejecting stipulations which are illegal and improper, *e.g.*, previously to the Custody of Infants Act (36 V. c. 12), s. 2, a clause giving the wife the sole custody of the children: see *Hamilton v. Hector*, 6 Ch. 701; 13 Eq. 511; *Swift v. S.*, 34 Beav. 266; *Bruton v. Dixon*, W. N. (92) 105; but an agreement to execute a deed of separation must be enforced in its entirety, if at all: see *Vansittart v. V.*, 2 D. & J. 249; 4 K. & J. 62.

The Court will not refuse to grant specific performance because the deed provides for the wife having the custody of the children: *Hart v. H.*, 18 Ch. D. 670; nor by reason of an arbitration clause: *S. C.*

And specific performance will not be refused because of trifling breaches of covenant on the part of the Plt: *Besant v. Wood*, 12 Ch. D. 605.

A *dum casta* clause was held not within the term "usual covenants" in an agreement for a separation deed by way of compromise of divorce proceedings: *Hart v. H.*, *sup.*; and see *Fearon v. Earl of Aylesford*, *sup.*; *Bradley v. B.*, 51 L. J. P. & M. 87; 3 P. D. 47; 29 L. T. 203; 26 W. R. 831.

Where the agreement provided that the deed should contain "the usual terms as to access to children," &c., and the arbitrator had settled the deed giving the mother custody during certain periods, the Court rectified the deed by giving access on certain specified occasions: *Evershed v. E.*, 30 W. R. 732; 46 L. T. 690.

A covenant by the husband to allow the infant child to reside with the mother was held not to be broken by his concurring, as next friend, in a petition under the Infants' Custody Act (36 V. c. 12), on which an order was made, for removal of the child from the wife's custody: *Besant v. Wood*, 12 Ch. D. 605.

And a covenant to allow the wife access does not preclude him from taking the children with him to any place to which he may be ordered in the course of his duties: *Hunt v. H.*, 28 Ch. D. 606, C. A.; and whether such a covenant will be enforced by the Court unless it is satisfied that it is for the benefit of the children to do so, *quare*: *S. C.*; and see *Jump v. J.*, 8 P. D. 159.

Avoidance of Deed—Renewal of Cohabitation.

A renewal of cohabitation will *prima facie* avoid the provisions of a separation deed: *Nicol v. N.*, 30 Ch. D. 143; 31 Ch. D. 524, C. A.; *Besant v. Wood*,

12 Ch. D. 605; *Haddon v. H.*, 18 Q. B. D. 778; *Bateman v. Ross*, 1 Dow, 235; *Westmeath v. W.*, 1 Dow & Cl. 519; *O'Malley v. Blease*, 17 W. R. 952; but the question whether it has that effect is one of construction, depending on the circumstances of the particular case: *Nicol v. N.* (questioning *dictum* in *Randle v. Gould*, 8 E. & B. 457); and thus a provision for the wife which is so expressed as to be independent of reconciliation will not be affected: *Randle v. Gould*, *sup.*; *Crouch v. Waller*, 4 D. & J. 302; and an annuity secured to a woman who has been living in concubinage will not cease by implication upon the parties resuming cohabitation: *Re Abby*; *Rubbeth v. Donaldson*, (1895) 1 Ch. 455, C. A.; and acts of connubial intercourse while they are living separate from one another may not amount to a renewal of cohabitation so as to avoid the deed: *Rowell v. R.*, (1900) 1 Q. B. 9, C. A.

And renewal of cohabitation will not destroy the wife's right of action for arrears due under the deed: *Macan v. M.*, 70 L. J. K. B. 90.

And in *Webster v. W.*, 3 Jur. N. S. 655; 4 D. G. M. & G. 437; 22 L. J. Ch. 837; 1 W. R. 509, a parol agreement by the husband, in consideration of the wife returning to live with him, to charge on his real estate an annuity by the separation deed covenanted to be paid to her, was upheld.

A separation deed containing independent provisions for the benefit of the issue of the marriage may, notwithstanding a return to cohabitation, have effect given to it as a settlement: *Ruffles v. Alston*, 19 Eq. 539.

But where no separation takes place, a deed which in effect provides for future separation is void, and cannot be supported as a voluntary settlement: *Bindley v. Mulloney*, 7 Eq. 343.

Subsequent dissolution of the marriage on the ground of adultery does not, in the absence of express provision to that effect, or unless the separation was fraudulently procured to afford facilities for misconduct, avoid the deed: *Evans v. Carrington*, 2 D. F. & J. 481; nor release the husband from his covenant to pay an annuity without a *dum casta* clause: *Fearon v. Earl of Aylesford*, 14 Q. B. D. 792, C. A.; or an annuity for the wife's support "during their joint lives and as long as they should live separate and apart": *Charlesworth v. Holt*, L. R. 9 Ex. 38; and a covenant not to sue for a larger allowance is binding on the wife notwithstanding the subsequent adultery of the husband and judicial separation consequent thereon: *Gandy v. G.*, 7 P. D. 168, C. A. (but *v. sup.* p. 965); the Court having no power to alter the separation deed, as it has in the case of a dissolution of the marriage: see *Morrall v. M.*, 6 P. D. 98; *Jump v. J.*, 8 P. D. 159; *Clifford v. C.*, 9 P. D. 76, C. A.; and the adultery of the wife resulting in the birth of a child affords no defence to an action by her to recover arrears of the annuity: *Sweet v. S.*, (1895) 1 Q. B. 12.

For a covenant by each party not to take proceedings against the other for any cause of complaint anterior to the deed, see *Rose v. R.*, 7 P. D. 225; 8 P. D. 98, C. A.

For a covenant by the wife not to sue for a larger alimony than that provided by the deed, see *Gandy v. G.*, 7 P. D. 168.

The deed will not be set aside because the wife made fraudulent representations as to her innocence, which the husband did not believe, or on the ground of subsequent adultery by her, if there is no *dum casta* clause: *Wasteney v. W.*, (1900) A. C. 446, P. C.

And generally as to contracts for separation, see *Stapilton v. S.*, 2 L. C. Eq. 920, 945; *Wilson v. W.*, 1 L. C. Eq. 7th ed. 577.

(II.)—JUDICIAL SEPARATION—DISSOLUTION OF MARRIAGE.

1. *Dealing with Wife's Reversionary Interest after Judicial Separation.*

"DECLARE that the Plt Mary J. became, by virtue of the decree for judicial separation in the pleadings mentioned, and now is, entitled to one third part of the trust fund in the pleadings mentioned absolutely as a *feme sole*, and to another third part thereof as the administratrix of B. deceased, and that the Defts W. L. and J. M., exors of M. deceased, are entitled to the remaining third part thereof."—Liberty to apply.—[Add Payment Schedule containing directions to pay costs.]—See *Johnson v. Lander*, M. R., 15 Jan. 1869, A. 129; 7 Eq. 228.

NOTES.

EFFECT OF JUDICIAL SEPARATION OR DISSOLUTION OF MARRIAGE.

By the Matrimonial Causes Act, 1857 (20 & 21 V. c. 85), ss. 21, 25, 26, in case of a protection order or judicial separation, the wife acquires the rights of and is to be treated as a *feme sole*, subject as therein mentioned: *Re Emery's Trusts*, 32 W. R. 357; 50 L. T. 197; so that her execution by will since the M. W. P. Act, 1882, of a general power of appointment created subsequently to the order makes the property appointed liable, under s. 4 of the Act, for debts or liabilities incurred by her while under the protection, even though they may have been incurred before that Act: *In re Hughes, Brandon v. H.*, (1898) 1 Ch. 529, C. A.; but her status continues as to property to which she was entitled before the desertion of her by her husband, and a restraint on anticipation still attaches: *Hill v. Cooper*, (1893) 2 Q. B. 85, C. A. Sect. 25 does not apply to property to which the wife was entitled in possession at the date of the decree for judicial separation, but only to property acquired subsequently: *Waite v. Morland*, 38 Ch. D. 135, C. A.; and consequently a life interest subject to restraint on anticipation devolving on her before the desertion cannot be taken in equitable execution (notwithstanding sect. 26): *Hill v. Cooper*, (1893) 2 Q. B. 85, C. A.; but as the wife is to be considered as a *feme sole* while the separation lasts, property devolving on her during the separation will not be bound by a covenant to settle property acquired by her "during coverture": *Dawes v. Creyke*, 30 Ch. D. 500.

By sect. 45, after sentence of divorce or judicial separation, the Court may settle any property to which the wife is entitled either in possession or reversion for the benefit of the innocent party and the children.

Alteration of Settlement.—In order to meet the case of property in settlement (see *Norris v. N.*, 1 Sw. & Tr. 174), it is provided by the Matrimonial Causes Act, 1859 (22 & 23 V. c. 61), s. 5, that after final decree of nullity or dissolution the Court may inquire as to ante-nuptial or post-nuptial settlements, and make orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents.

By the Rules and Regulations of 1865, No. 95, applications to the Divorce Court for the exercise of jurisdiction under this section, and under 20 & 21 V. c. 85, s. 45, are to be made by a separate petition.

Power of Divorce Court.—The power of the Divorce Court to deal with marriage settlements under 22 & 23 V. c. 61, s. 5, was confined to cases where there was issue of the dissolved marriage, who must be living at the date of the application for the order, and not merely at the date of the dissolution: *Graham v. G.*, L. R. 1 P. & M. 711; *Bird v. B.*, *Ib.* 231; *Corrance v. C.*, *Ib.* 495; *Bell v. B.*, 1 Sw. & Tr. 565; and was not to be exercised otherwise than for the benefit of the issue of the marriage and the innocent parent: *March v. M.*, L. R. 1 P. & M. 437; *Sykes v. S.*, 2 P. & M. 163; *Maudslay v. M.*, 2 P. D. 256; who would not, even for the benefit of the children, be deprived of any benefit derived from the settlement: *Thompson v. T.*, 2 Sw. & Tr. 649; and similarly the infant child would not be deprived of any interest thereby secured: *Crisp v. C.*, 2 P. & M. 426; nor postponed by the exercise of a power of appointment by the (divorced) wife in favour of a second husband: *Evered v. E.*, 22 W. R. 845; 43 L. J. P. & M. 86; 31 L. T. 101.

By the Matrimonial Causes Act, 1878 (41 V. c. 19), s. 3, the power of the Court under 22 & 23 V. c. 61, s. 5, was extended to cases where there are no children of the marriage. As to the retrospective effect of the section, see *Yglesias v. Y.*, 4 P. D. 71; *Ansdell v. A.*, 5 P. D. 138.

Under these enactments, the Court has a wide discretion, and though the power is for purposes of provision, and not of punishment, may exclude a guilty party, either partially or wholly, from the benefit of property settled upon the marriage: *Wigney v. W.*, 7 P. D. 177, C. A.; and may deal with the capital as well as the income: *Ponsonby v. P.*, 9 P. D. 122, C. A.; 9 P. D. 58; *Hipwell v. H.*, (1892) P. 147; and after a decree for dissolution against the husband, the Court has power to disregard an agreement for separation made on the withdrawal of a previous petition, and order permanent alimony at a rate exceeding the amount specified in the agreement if the

husband's means permit: *Bishop v. B.*; *Judkins v. J.*, (1897) P. 138, C. A.; but the power is limited to such alterations as are for the personal benefit of the husband, wife, or children of the marriage, and therefore, where the petitioner dies after decree absolute, and there are no children of the marriage, a petition for variation abates by his death, and proceedings cannot be continued by his representatives: *Thomson v. T.*, (1896) P. 263, C. A. And the Court of Appeal will not, in general, interfere with the discretion of the Court below: *Ponsonby v. P.*, 9 P. D. 122, C. A.

The Court has jurisdiction to direct an inquiry as to the wife's property, so that it may be in a position to order a settlement as soon as the final decree against her is pronounced, and thus prevent her from immediately marrying again, and so sheltering herself under a restraint against anticipation: *Midwinter v. M.*, (1892) P. 28, C. A.

This jurisdiction to vary the settlement extends to depriving the divorced wife of her power to appoint new trustees: *Oppenheim v. O.*, 9 P. D. 60; *Boaville v. B.*, 13 P. D. 76; *Tupper v. T.*, 62 L. T. 665; *Hope v. H.*, 3 P. & M. 228.

And she will not be allowed to exercise her power of appointment so as to postpone the interest under the settlement of a child of the dissolved marriage: *Evered v. E.*, 22 W. R. 845; 43 L. J. P. & M. 86; 31 L. T. 101.

The Court has no power under the Acts to make provision for the maintenance of children over the age of sixteen: *Blandford v. B.*, (1892) P. 149. But see *contra*, *Midwinter v. M.*, (1893) P. 93, where the Court, in making a settlement out of the property of the adulterous wife under sect. 45 of 20 & 21 V. c. 85, refused to order that the allowance to children should cease at the age of sixteen, and distinguished *Blandford v. B.* (assuming it to be good law) as having been decided under sect. 35.

The statutory power of the Court in relation to the maintenance and education of the children after a decree for judicial separation or for dissolution of marriage is not affected by any previous agreement between the parents: *Bishop v. B.*; *Judkins v. J.*, (1897) P. 138, C. A.

How exercised.—In general, the guilty party has been deprived of his or her interest under the settlement as if he or she were dead, and the children have taken the life interest so forfeited, so that the life interest under the settlement of the innocent parent is not anticipated: *Paul v. P.*, L. R. 2 P. & M. 93; *Boynton v. B.*, 2 Sw. & Tr. 275; *Johnson v. J.*, 31 L. J. P. & M. 29; *Gladstone v. G.*, 1 P. D. 442.

But the Court will respect the interests of mortgagees, or of creditors of the guilty party of whose money the innocent party has had the benefit: *Wigney v. W.*, 7 P. D. 228; 7 P. D. 177, C. A.; and a charge in favour of the solrs of the guilty party was respected where the circumstances were such as to justify the belief that their client had a defence: *Wigney v. W.*, *sup.*

The conduct and pecuniary position of the parties will be taken into consideration: see *Chetwynd v. C.*, L. R. 1 P. & M. 39.

The power is to be exercised once for all, and an order made is not liable to be varied on the ground of a change of circumstances since its date: *Benyon v. B.*, 15 P. D. 54, C. A.

The settlement has been varied by relieving the innocent husband from his covenant to appoint in favour of the wife; and his own income being 200*l.*, and that of his divorced wife 1,350*l.* per annum, he was allowed 300*l.* per annum for life out of her income, and 100*l.* for maintenance of the child of the marriage during minority: *Benyon v. B.*, 1 P. D. 447 (and see *Farington v. F.*, 11 P. D. 84, where a like order was made); and by reducing or increasing the amount of an allowance under a separation deed: *Clifford v. C.*, 9 P. D. 76, C. A.; *Jump v. J.*, 8 P. D. 159; but not by extinguishing the trusts to the detriment of the next of kin, or children by a second marriage, or further than is necessary for the purpose of doing justice: *Smith v. S.*, 12 P. D. 102; *Ponsonby v. P.*, 9 P. D. 122, C. A.; 9 P. D. 58.

As to the inalienable character of permanent alimony allowed to a wife on a judicial separation from her husband, see *Re Robinson*, 27 Ch. D. 160.

In making an allowance for the wife out of the income of settled property during the life of the husband (the respondent), the condition *dum sola et casta viveret* has been imposed: *Chetwynd v. C.*, L. R. 1 P. & M. 39; *Fisher v. F.*,

2 Sw. & Tr. 410; and see *Marsh v. M.*, 26 W. R. 467; but not where the effect of the order is to put the innocent wife into immediate possession of her own income: *Gladstone v. G.*, 1 P. D. 442. Nor, except under extraordinary circumstances, will the Court vary the original order by introducing this condition: *Narracott v. N.*, 4 Sw. & Tr. 76.

Proceedings in the Chancery Division to administer the trusts of the settlement are not a ground for refusing an order in the Probate Division to deal with the settlement: *Marsh v. M.*, 26 W. R. 467.

Jurisdiction in Equity.—When the authority of the Divorce Court to deal with marriage settlements was limited to cases in which there was issue of the dissolved marriage living at the time when the order was applied for, the equitable jurisdiction of the Court of Chancery was called in aid when there was no issue.

In *Pratt v. Jenner*, 1 Ch. 493, effect was given to an order of the Divorce Court—that a fund, the property of the divorced wife, paid in by the trustees of the settlement, should be held in trust for the persons who would be entitled if she were dead—by ordering payment of the income to the husband, who, under the settlement, took a life interest after his wife's death. But see *Burton v. Sturgeon*, 2 Ch. D. 318; *Fitzgerald v. Chapman*, 1 Ch. D. 565, *inf.*

Where a consent order was made varying the settlement of the adulterous wife, and it afterwards appeared that property which had been assumed by all parties to be bound by the settlement was not so bound, the Court granted relief upon the terms that any application to the Divorce Court, under sect. 45 of the Act 20 & 21 V. c. 85, for a further settlement upon the husband and child of the marriage should be dealt with in all respects as if it had been made before the date of the consent order, and was being considered by the Court on that date: *Allcard v. Walker*, (1896) 2 Ch. 369.

Until a decree has been made for dissolution of marriage, there is no *lis pendens* with reference to the property included in the marriage settlement: *Wigney v. W.*, 7 P. D. 228.

On the application of a wife who was suing in the Probate Division for divorce or judicial separation, the Chancery Division granted an interim injunction to restrain the husband from using a house belonging to her, and in which she resided, not for the purpose of consorting with her, but for his own purposes: *Symonds v. Hallett*, 24 Ch. D. 348, C. A.

In the Court of Chancery the effect of a decree for dissolution, judicial separation, or protection order, has been to destroy, from the date of the order *nisi*, the husband's marital right to reversionary property or choses in action of the wife not then reduced into possession, and to give the wife the same rights over them as if she were a *feme sole* (even as against assignees from husband and wife of such reversionary interest): *Prole v. Soady*, 3 Ch. 220; *Re Insole*, 1 Eq. 470; *Wilkinson v. Gibson*, 4 Eq. 162; *Johnson v. Lander*, 7 Eq. 228, *sup.* p. 966; *Wells v. Malbon*, 31 Beav. 48; *Re Emery's Trusts*, 50 L. T. 197; 32 W. R. 357.

But the decree for dissolution does not operate as a forfeiture of the interest under the marriage settlement of the offending party: *Evans v. Carrington*, 1 J. & H. 598; 2 D. F. & J. 481; *Burton v. Sturgeon*, 2 Ch. D. 318; and accordingly a bill by a woman, upon dissolution of the marriage by reason of her husband's adultery and misconduct, for a transfer to herself of property to which by the marriage settlement she was entitled if she survived her husband was dismissed with costs: *Fitzgerald v. Chapman*, 1 Ch. D. 565 (overruling *Fussell v. Dowding*, 14 Eq. 421; *Swift v. Wenman*, 10 Eq. 15; *Jessop v. Blake*, 3 Giff. 639).

As to the effect of dissolution of marriage upon a gift of an annuity of 150*l.* to husband and wife jointly, reducible to 100*l.* for the life of the husband if he survive, and to 50*l.* for the life of the wife if she survive—that the divorced widow as against the husband's incumbrancers took nothing—see *Knox v. Wells*, 2 H. & M. 674.

Status.—Although for certain purposes the decree absolute for dissolution takes effect from the date of the decree *nisi* (see *Prole v. Soady*, 3 Ch. 220), the marriage is not dissolved: *Hulse v. Tavernor*, L. R. 2 P. & M. 259; and the status of the wife is not changed by the decree *nisi* so as to enable her to maintain an action as a *feme sole*: *Norman v. Villars*, 2 Ex. D. 359, C. A. (reversing 25 W. R. 558).

So also a decree for dissolution of marriage, by merely terminating the relation of husband and wife from the time of the divorce, does not enable a wife after divorce to bring an action against the husband for an assault upon her during coverture: *Phillips v. Barnet*, 1 Q. B. D. 436.

The effect of the decree is to convert a tenancy of the husband and wife by entireties into a joint tenancy: *Thornley v. T.*, (1893) 2 Ch. 229.

RESTITUTION OF CONJUGAL RIGHTS.

By the Matrimonial Causes Act, 1884 (47 & 48 V. c. 68), s. 2, a decree for restitution of conjugal rights is not in future to be enforced by attachment, but where the application is by the wife, the Court may order the respondent to make to her such periodical payments as may be just, which order may be enforced as though for alimony in a suit for judicial separation; and the Court may order that the husband shall, to the satisfaction of the Court, secure to the wife such periodical payment, and for that purpose may refer it to any one of the conveyancing counsel to settle a proper deed. By s. 3, where the application is by the husband, and the wife is entitled to any property, either in possession or reversion, or is in receipt of any profits of trade or earnings, the Court may order a settlement of such property or any part thereof for the benefit of the petitioner and of the children of the marriage, or order part of such profits or earnings to be periodically paid to the petitioner, or for the benefit of the children. By s. 4 full power is given to the Court to vary its order from time to time. Under s. 3 the Court, in exercising its discretion, will take into consideration the general conduct of the parties: *Swift v. S.*, (1891) P. 129; 15 P. D. 118; but it has no power to order a settlement of property which is subject to a restraint on anticipation: *Michell v. M.*, (1891) P. 208, C. A.

The Court will not, in order to protect the wife's right to alimony, restrain the husband from removing his property out of the jurisdiction before the order has been made: *Newton v. N.*, 11 P. D. 11; but where the order had been made, and it had been referred to one of the conveyancing counsel of the Chancery Division to draw the necessary deed, an injunction was granted restraining the husband, his servants and agents, from dealing with certain of his property until the execution of the deed: *Newton v. N.*, (1896) P. 36.

CHAPTER XXXVIII.

INFANTS.

SECTION I.—ACTIONS BY OR AGAINST INFANTS.

1. *Next Friend of Infant Plt in room of one deceased.*

LET the Plt be at liberty to amend his writ of summons by inserting the name of B. as his next friend [*or if after judgment, to name B. as his next friend*] in the room of A. deceased.

For the like order, upon the Master's certificate finding that the original next friend ought to be removed, to amend the writ of summons by inserting the name of X. as the next friend of the infant Plts in the place of the above-named Y., see *Hetherington v. Durant*, V.-C. B., 3 May, 1877, A. 969.

For form of application, see D. C. F. 49.

2. *New Next Friend in room of one living, on giving Security for Costs.*

LET, upon B. [*the new next friend*] giving security to answer the Deft's costs up to this time, in case the Court should think fit to award any, such security to be approved by the Judge, the Plt be at liberty to amend his writ of summons by inserting [*as in Form 1, sup.*].

For orders, on notice of motion by the infant Plt's solr, for new next friend in the room of one living, he having neglected to proceed with the cause, but without security for costs, see *Furtado v. F.*, 9 July, 1841, A. 1046; 6 Jur. 227; *Cox v. Wright*, 11 W. R. 870; 2 N. R. 436.

For order for removal of next friend, see *Russell v. Sharpe*, 1 Jac. & W. 482; *Ward v. W.*, 3 Mer. 706; *Peyton v. Bond*, 1 Sim. 391; *Du Puy v. Welsford*, V.-C. B., 11 June, 1880, A.; 28 W. R. 762; 42 L. T. 730.

And as to consent by next friend, and that he is not required to give security for costs, see *Simpson on Infants*, 2nd ed., p. 470; and *Fellows v. Barrett*, 1 Keen, 119.

For form of application, see D. C. F. 48.

3. *Guardian ad litem assigned to Lunatic, on his Application, where Committee is interested—O. XVI, 17.*

UPON the petition of &c., who alleged that the said Deft A. is a lunatic, found so by inquisition, and that the Deft B., his committee, is

an interested party in the said suit, and that C. is a fit and proper person to be appointed guardian of the said lunatic, and has no interest in the subject-matter of this action [*or the matters in the said petition referred to*] adverse to the said Deft A., as by an affidavit &c. appears; and upon reading the said affidavit, This Court doth order, that the said B. be assigned guardian of the said Deft A., by whom he may defend this action [*or appear upon the said petition*].

For order directing an inquiry as to competency where Plt moved to discharge guardian *ad litem*, appointed to *non compos*, on the ground that he was really *compos*, see *Lee v. Ryder*, 1 Feb. 1822, B. 435.

For order, on Plt's motion, to appoint guardian *ad litem* of a Deft found lunatic by inquisition, where his committee, by whom he had defended, had died, and a new committee had not been appointed, see *Snook v. Watts*, M. R., 20 Dec. 1860, B. 2654.

For form of application, see D. C. F. 66.

4. Guardian assigned to Infant or Non-compos on Plt's Application where no Appearance entered—O. XIII, 1.

UPON the petition of the Plt, It was alleged that the Deft A. is an infant [*or a person of weak or unsound mind not so found by inquisition*], and hath been duly served with the writ of summons issued in this action and notice of this application, as by the affidavit &c. appears; that the said Deft hath not entered an appearance to the said writ, as by the certificate of the Central Office appears, although his time for so doing expired upon the — day of —; and upon reading the said petition, the said affidavit, and an affidavit &c. of service of the said petition on B., the person with whom the Deft A. was living at the time of the service of the said writ [*If infant not residing with his father, or guardian, and on the father or guardian of the said infant*], This Court doth order, that Mr. —, one of the solrs of the Supreme Court, be assigned guardian to the said Deft A., by whom he may appear and defend this action.

An infant Deft can only enter an appearance by his guardian *ad litem*, and no order for his appointment is necessary (see *post*, pp. 977, 978), except in cases where the infant fails to appear: O. XVI, 18; Dan. 126.

For order discharging guardian *ad litem* to Deft of unsound mind, he having become sane, and directing the receiver in the cause to pay his costs as between solr and client, see *Blyth v. Green*, M. R., 30 June, 1876, A. 1176.

The order for assignment of guardian *ad litem* to a defendant found lunatic is usually obtained on petition of course, but may be made in Chambers, or on motion; see D. C. F. 66 *et seq.*

Cons. Ord. 7, r. 3, which was substantially identical with O. XIII, 1, applied where the infant was out of the jurisdiction: see *O'Brien v. Maitland*, 4 D. F. & J. 331; and in *Lambert v. Turner*, 10 W. R. 335; 31 L. J. Ch. 494; (followed in *Turner v. Snowden*, 2 Dr. & Sm. 265), V.-C. K., where the infant had been served *ex jur.*, and the Plt had at the same time served a notice on the father, that if no appearance was entered for the infant in due time an application would be made to the Court to assign a guardian, the Vice-Chancellor allowed the order to be drawn up without any further notice. In *Cookson v. Lee*, 15 Sim. 302, where the Deft had appeared, the Court allowed service of the six days' notice, required then as now by the order (*v. inf.* p. 978), on the Deft's solr.

And see Dan. 126 *et seq.*; Simpson, 488; D. C. F. 56.

5. *Inquiry whether Action proper and for the Infant's Benefit.*

LET an inquiry &c., whether this action was properly instituted, and whether it would be fit and proper and for the benefit of the infant Plts that this action should be further prosecuted; and in case it shall appear that it would be for the benefit of the infant Plts that further proceedings should be taken in this action, then Let an inquiry be made whether D. is a proper person to be their next friend; And if it shall be certified that D. is not a proper person, then Let some other person be appointed as the next friend of the said infants to have the conduct of this action in the place of D.; And in the meantime Let all further proceedings in this action be stayed.—See *Fox v. Suverkrop*, 1 Beav. 583; and see *Sale v. S.*, 1 Beav. 586, where the suit was dismissed without reference.

This application is made by a next friend *pro hac vice*. For form, see D. C. F. 50.

For order staying proceedings in a suit improperly instituted by a stranger, after reference on father's application, see *Vertue v. Miller*, V.-C. B., 11 Feb. 1871, B. 715; *S. C.*, 19 W. R. 406.

For order, on certificate that it was not fit and proper, or for the benefit of the infant Plt, that the action should be further prosecuted, dismissing the action with costs, to be paid by the next friend, see *Re Elsom, Thomas v. Elsom*, V.-C. H., 5 July, 1877, A. 1287; W. N. (77) 177.

6. *Inquiry which of Two Actions is for the Benefit of the Infant.*

LET the following &c.: 1. An inquiry whether these actions are touching the same matters; 2. And if so, An inquiry which of these actions it will be most for the benefit of the infant Plts to prosecute. And after such inquiries shall have been made, such further order shall be made as shall be just.—And Let in the meantime all further proceedings in both actions be stayed.—See *Mackett v. Baylis*, and *Stockman v. Baylis*, V.-C. B., 13 Jan. 1872, B. 66.

For form of application, see D. C. F. 51.

7. *Order for Stay upon Terms of the less beneficial of Two Actions instituted in an Infant's Name.*

UPON the application &c., and the Judge being of opinion that it is not for the benefit of the infant Plt that the action of *F. v. S.*, 1874, F. 42, should be continued, Let the Plts in the said action of *F. v. S.*, &c., forthwith take the necessary proceedings for staying the said action upon the terms that the next friend of the Plts in the said action of *F. v. S.* pay to the Defts their costs in that action, such costs to be taxed by the taxing master, and the said [*next friend*] is to be at liberty to apply in this action to provide for such costs and his own costs in that action.—See *Frost v. Ward*, V.-C. H. in Chambers, 5 Feb. 1877, A. 387.

For form of application, see D. C. F. 52.

8. *Proceedings in Stranger's Action stayed on Payment of his Costs—
Next Friend in Second Action discharged, and appointment of
New Next Friend directed.*

UPON the application &c., Let all further proceedings in the first-mentioned action be stayed; And Let the Deft pay to W., the next friend of the infant Plt, the said Plt's costs of the first-mentioned action and of and relating to this application, and of the application in Chambers to appoint a new next friend hereinafter directed, to be taxed &c.; And Let the Deft be allowed such payment of the said costs on passing his accounts in the secondly-mentioned action; And Let the costs of the Deft of the first-mentioned action be costs in the secondly-mentioned action; And Let the Plt M. be discharged from being the next friend of the infant Plts in the secondly-mentioned action; And Let application be made in Chambers for leave to name a new next friend of the infant Plts in the secondly-mentioned action in the place of the said M.—See *Staniland v. S.*, M. R., 21 Jan. 1864, B. 109.

It is convenient and less costly to give leave by the same order to nominate a new next friend.

For order staying proceedings in the first of two suits on behalf of infants, for the same purpose, and giving conduct of the second, in which a decree had been obtained, to next friend in first suit, see *Kenyon v. Gregson*, M. R., Feb. 8, 1866, A. 341, reported as *Kenyon v. K.*, 35 Beav. 300.

For form of application, see D. C. F. 52.

9. *Infant Plaintiff coming of Age and repudiating Action, made
Defendant.*

UPON the application of the Plt B., Let the name of the Plt B. be omitted in all future proceedings in this action as a party co-Plt therein; And on the application of counsel for the remaining Plts, Let the name of the said B. be inserted as a Deft in all future proceedings in this action.—Costs of all parties to be costs in the action.—See *Bicknell v. B.*, M. R., 30 April, 1863, A. 1017; 32 Beav. 381; *Grove v. Snowden*, M. R. 19 Dec. 1871, A. 3304.

10. *Amendment by striking out late Infant Plaintiff, who, on coming
of Age, repudiates the Action.*

UPON the application of the Plt A., late an infant, but now of full age, and upon reading an affidavit of the said A., and an affidavit of service of notice of this motion on the Plts, other than the said Plt A. [or and upon hearing counsel for the Plts other than the Plt A.], This Court doth order that the name of the Plt A. be struck out as a co-Plt in this action.—See *Rawlings v. Pearson*, M. R., 10 July, 1862, B. 1403.

For form of application, see D. C. F. 53.

NOTES.

ACTION BY INFANT—NEXT FRIEND.

By O. XVI, 16, infants may sue as Plts by their next friend, in the manner heretofore practised in the Ch. Div.; and may in like manner defend any action by their guardians appointed for that purpose.

By O. xvi, 20, before the name of any person is used as the next friend of an infant he must sign a written authority to the solr for that purpose; and such authority is to be filed in the Central Office or in the district registry, if the cause or matter is proceeding therein.

For instances in which, under special circumstances, the written authority was allowed to be filed subsequently, see *A. G. v. Murray*, 13 W. R. 65; 11 L. T. 332; 1 Ch. D. 89; *A. G. v. Willshire*, 45 L. J. Ch. 53.

The name of a next friend, which has been used without his consent, may be struck out on his application: *Ward v. W.*, 6 Beav. 251, n.

As to such person's liability for costs, see *S. C.*; *Bligh v. Tredgett*, 5 Dr. & S. 74.

Every application on behalf of an infant must be made by a next friend: *Cox v. Wright*, 9 Jur. N. S. 981; 32 L. J. Ch. 770; 8 L. T. 631; 2 N. R. 436; 11 W. R. 870.

An infant's next friend is not required to give security for costs: *Hind v. Whitmore*, 2 K. & J. 458; *Pennington v. Alvin*, 1 Sim. N. S. 265; *Fellows v. Barrett*, 1 Ke. 119; but in the case of an appeal by an insolvent next friend security may be required: *Swain v. Follows*, 18 Q. B. D. 588.

An infant who cannot procure a solvent next friend may, it seems, on special application, obtain an order for leave to sue by a next friend *in forma pauperis*: *Lindsay v. Tyrrell*, 2 D. & J. 7; 24 Beav. 124.

Persons proper to be appointed.—The next friend or guardian *ad litem* must not have any interest in the proceedings adverse to the infant: *Gee v. G.*, 12 W. R. 187; 9 L. T. 557; *Leese v. Knight*, 10 W. R. 711; and must be an independent person, and therefore connection with the exors against whom an admon action has been brought on behalf of the infant is a ground for removing him: *Re Burgess, B. v. Bottomley*, 25 Ch. D. 243, C. A.

A Deft, though his interests are identical with those of the infant Plt, cannot act as next friend: *Anon.*, 11 Jur. 258; 8 Ch. D. 591; *Lewis v. Nobbs*, 26 W. R. 631; though a co-Deft may be appointed guardian *ad litem*, provided he has no conflicting interest: *Bonsfield v. Grant*, 11 W. R. 275; and see *Newman v. Selfe*, *Ib.* 764.

The next friend of the Plt is not a proper person to be guardian *ad litem* to the infant Deft: *Re Quirk, Q. v. Q.*, North, J., 21 Dec. 1889, Reg. Minutes, fo. 187; nor the nominee of the Deft to be next friend of the Plt: *Re Burgess, sup.*

A married woman is incapable of being next friend or guardian *ad litem* to an infant: *Re Duke of Somerset, Thynne v. St. Maur*, 34 Ch. D. 465; and so is a person out of the jurisdiction: *Anon.*, 18 Jur. 770.

Powers of Next Friend generally.—By O. xvi, 21, "In all causes or matters to which any infant or person of unsound mind, whether so found by inquisition or not, or person under any other disability, is a party, any consent as to the mode of taking evidence or as to any other procedure shall, if given with the consent of the Court or a Judge by the next friend, guardian, committee, or other person acting on behalf of the person under disability, have the same force and effect as if such party were under no disability and had given such consent. Provided that no such consent by any committee of a lunatic shall be valid as between him and the lunatic unless given with the sanction of the L. C. or Lords Justices sitting in Lunacy."

Where an action has been commenced in the name of a person alleged to be of unsound mind not so found, by a next friend, and such person denies that he is of unsound mind, and applies to have his name removed from the record, the Court will direct an inquiry as to the competency of the person alleged to be of unsound mind: *Howell v. Lewis*, 40 W. R. 88; 61 L. J. Ch. 89; 65 L. T. 672.

The next friend of an infant Plt or guardian *ad litem* of an infant Deft was not a party to the action within O. xxxi, 12, and was therefore not compellable to make discovery as to documents: *Re Corsellis, Lawton v. Elwes*, 52 L. J. Ch. 399; 31 W. R. 414; 48 L. T. 425; *Dyke v. Stephens*, 30 Ch. D. 189; or to answer interrogatories: *Ingram v. Little*, 11 Q. B. D. 251. And an infant Plt or Deft could not be compelled to answer interrogatories: *Mayor v. Collins*, 24 Q. B. D. 361; but see now O. xxxi, 29, *sup.* Vol. I. p. 66.

A next friend is not allowed to appear in person on appeal: *Re Hurst, Addison v. Tapp*, 36 Sol. Jo. 41; C. A. 1892.

Inquiry as to, and stay of, Proceedings.—An inquiry may be directed, on the application of the Deft or of any person acting as next friend *pro hac vice*, whether the action is fit and proper and for the benefit of the infant, and whether the next friend should be continued: *Towsey v. Groves*, 11 W. R. 252; 1 N. R. 226; 32 L. J. Ch. 225; 9 Jur. N. S. 194; *Richardson v. Miller*, 1 Sim. 133; *Da Costa v. D.*, 1731, A. 272; 3 P. Wms. 140.

And the discretion of the Judge of first instance in directing the inquiry will not be interfered with by the Court of Appeal: *Pensotti v. P.*, 22 W. R. 461; 20 L. T. 438.

But although there is full jurisdiction to stay an action which has been improperly instituted on behalf of an infant, the inquiry should not be directed with the judgment (*e.g.*, for accounts), so as to make the answer to the inquiry dependent on the result of the judgment: *Clayton v. Clarke*, 3 D. F. & J. 682; and an objection that the proceedings are not for the infant's benefit must be made before the hearing: *Lacy v. Burchnall*, 10 L. T. 408; 3 N. R. 293.

If on the result of the inquiry it appears that the action is unnecessary or improper it will be stayed; or if beneficial to the infant, but the person instituting it as next friend be unfit to conduct it, he will be removed, and a new next friend will be substituted in his place: see *Nalder v. Hawkins*, 2 M. & K. 243; *Hetherington v. Durant*, *sup.* p. 971.

It will not, however, be stayed upon a mere allegation of improper motives, especially where the next friend is a nominee of the infant's father: *Gravatt v. Tann*, 15 W. R. 83.

As to the form of order where proceedings have been taken in an action after it has become defective by the birth of an infant Deft who is a necessary party, see *Peter v. Thomas P.*, 26 Ch. D. 181; *sup.* Vol. I., p. 114.

In an admon action, where some of the Defts, partners of the testator, offered to pay the Plt's claim and costs, the Court refused to stay proceedings, there being an infant Deft, whose rights must be provided for: *Clegg v. C.*, L. R., Ir. 118.

In the P. Div., before appointing a guardian to an infant for the purpose of instituting proceedings on his behalf, the matter has been referred to the registrar to ascertain whether the proceedings are for his benefit: *Re Chaplin*, L. R. 1 P. & M. 328; and where the proceedings affected the mother the order was not made until she had been cited to show cause against the order: *The Goods of Jenkins*, L. R. 1 P. & M. 690.

When an infant, on attaining twenty-one, repudiates an action, his repudiation relates back to the commencement of the action, and overrides everything done in it: *Dunn v. D.*, 7 D. M. & G. 25; 3 Drew. 17.

On his application after attaining twenty-one, the record may be altered by striking out his name as Plt, and (on the application of the remaining Plts) by inserting his name as a Deft in all future proceedings: see *Bicknell v. B.*, 32 Beav. 381; *Rawlings v. Pearson*, *sup.* Forms 9, 10, p. 974.

If more than one action has been instituted for the same purpose on behalf of an infant, an inquiry which of such actions is most for the infant's benefit will, before decree, be directed: see *Sullivan v. S.*, 2 Mer. 40; *Mortimer v. West*, 1 Swa. 358; and Forms 6, 7, *sup.*

And generally the action in which the mother or a relative is a next friend will be preferred to that of a stranger, and allowed to proceed while the other is stayed: *Harris v. Lightfoot*, 10 W. R. 31; *Virtue v. Miller*, 19 W. R. 406; *Staniland v. S.*, *sup.* Form 8, p. 974; or the conduct of the stranger next friend's action, in which judgment has been first obtained, may be given to the relative next friend: *Frost v. Ward*, 2 D. J. & S. 70.

It is often for the infant's benefit that proceedings should not be carried on by a next friend who is friendly to the accounting Deft, and leave was given to the next friend in another action to apply for the conduct of the friendly action in which a judgment had first been obtained: *Kenyon v. K.*, 35 Beav. 300; *Virtue v. Miller*, *sup.*

And see *sup.* Chap. XXXIV., "TRANSFER, CONSOLIDATION, AND REMOVAL," pp. 825 *et seq.*

Removal of Next Friend.—A next friend will not be removed merely because he is connected with the Defts by being clerk to their solr: *Lloyd v.*

Davies, 10 Jur. N. S. 1041; 3 N. R. 700; 10 L. T. 183; nor because he is nearly related to the Deft: *Piffard v. Beeby*, 14 W. R. 948; nor is relationship to an accounting party in the suit *per se* a ground for his removal: *Sandford v. S.*, 11 W. R. 336; 9 Jur. N. S. 298; 8 L. T. 194; but see *Piffard v. Beeby*, *sup.*

The Court has jurisdiction to remove a next friend for improperly conducting the action, but he is entitled to an opportunity of being heard: *Re Correllis, Lawton v. Elwes*, 32 W. R. 965; 50 L. T. 703; and he may be removed if he improperly refuses to appeal: *Du Puy v. Welsford*, 28 W. R. 762; 42 L. T. 730.

The fact that an action has been brought on behalf of an infant without communication with the father, and without his knowledge, is sufficient ground for removing the next friend: *Woolf v. Pemberton*, 6 Ch. D. 19; 37 L. T. 328; 25 W. R. 873; but even though the action was brought with the authority of the father, the next friend, not having acted improperly, was removed after the father's death, and the mother of the infant substituted as next friend on her application: *Hutchinson v. Norwood*, 31 Ch. D. 237.

New Next Friend.—Upon the death of a next friend the infant's nearest paternal relative is entitled to nominate a new next friend, and the order is obtained of course without any affidavit of fitness: *Talbot v. T.*, 17 Eq. 347; and see *Dan.* 122; *D. C. F.* 48.

On the marriage of a Plt, sister and next friend of the infant co-Plts, the Court ordered a new next friend (not the husband) to be appointed, and the former next friend and her husband to be made Defts: *Jones v. J.*, 17 W. R. 1003.

Costs of Next Friend.—Though the next friend of an infant is *prima facie* entitled to recover his costs against the infant if the action is proper, or for such part of it as is proper, a next friend instituting an action which is not for the benefit of the infant may be deprived of his costs up to judgment: *Clayton v. Clarke*, 3 D. F. & J. 682; *Pritchard v. Roberts*, 17 Eq. 222; or if the action is unnecessary and improper, and the next friend might with reasonable care have known it to be so, he is liable to pay the costs personally: *Campbell v. C.*, 2 My. & Cr. 25; *Pearce v. P.*, 9 Ves. 548; *Re Elsom, Thomas v. Elsom*, W. N. (77) 177; *Simpson, Infants*, 483; and see *Palmer v. Walesby*, 3 Ch. 732; *Re Fish, Bennett v. B.*, (1893) 2 Ch. 413, 422, C. A.; *Re Hicks, Lindon v. Hemery*, W. N. (93) 138.

The order for the next friend to pay costs is final against him personally, unless the question how they are to be borne is reserved in the order: *Caley v. C.*, 25 W. R. 528.

The next friend of an infant cannot have costs as between solr and client out of a fund to which the infant is only entitled in reversion; in such a case party and party costs only will be allowed, and the next friend will be at liberty to apply for the difference when the reversion falls in: *Damant v. Hennell*, 33 Ch. D. 224; *Re Burton, B. v. B.*, W. N. (87) 106.

Though a next friend of an infant is not required to give security for costs, a retiring next friend may be required to give security or to satisfy the Court that the new next friend is of substance and respectability: *Davenport v. D.*, 1 S. & S. 101; *Harrison v. H.*, 5 Beav. 130.

ACTION AGAINST INFANT—GUARDIAN AD LITEM.

By O. IX, 4, in the case of an infant Deft, service on his father or guardian, or, if none, then upon the person with whom the infant resides, or under whose care he is, shall, unless otherwise ordered, be deemed good service on the infant; provided that the Court or Judge may order that service made or to be made on the infant shall be deemed good service.

Service at the house of an infant's mother and stepfather (see *Hitch v. Wells*, 8 Beav. 576), and in the case of an undergraduate, service on the head of his college, have been held sufficient: *Christie v. Cameron*, 2 Jur. N. S. 635; 25 L. J. Ch. 488; 4 W. R. 589.

By O. XVI, 18, "An infant shall not enter an appearance except by his guardian *ad litem*. No order for the appointment of such guardian shall be necessary, but the solr applying to enter such appearance shall make and

file an affidavit in the Form No. 8 in Appendix A. Part II., with such variations as circumstances may require."

By r. 19, "Every infant served with a petition or notice of motion, or summons in a matter, shall appear on the hearing thereof by a guardian *ad litem* in all cases in which the appointment of a special guardian is not provided for. No order for the appointment of such guardian shall be necessary, but the solr by whom he appears shall previously make and file an affidavit as in the last rule mentioned."

By O. XIII, 1, "Where no appearance has been entered to a writ of summons for a Deft who is an infant, or a person of unsound mind not so found by inquisition, the Plt shall, before further proceeding with the action against the Deft, apply to the Court or a Judge for an order that some proper person be assigned guardian of such Deft, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of the application was, after the expiration of the time for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such Deft was at the time of serving such writ of summons; and also (in the case of such Deft being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian, if any, of such infant, unless the Court or Judge at the time of hearing such application shall dispense with such last-mentioned service." As to mode of application, *v. sup.* p. 972.

By analogy to this rule, a guardian *ad litem* to a Deft may, if necessary, be appointed at the instance of a co-Deft: *Re Dawson, Johnston v. Hill*, 41 Ch. D. 415.

And the rule is applicable to procedure by originating summons: *Re Pepper*, 53 L. J. Ch. 1054; 50 L. T. 580; 32 W. R. 765.

It is to be observed that under this rule the Plt is compelled to apply for the appointment of a guardian. The old rule was permissive: see *Taylor v. Pede*, 29 W. R. 627; 44 L. T. 514.

Where the Plt signs judgment for default of appearance, not knowing that the Deft is an infant, it is a matter entirely for the discretion of the Court whether such judgment should be set aside: *Furnival v. Brooke*, 49 L. T. 134.

As to procedure by motion for judgment or notice of trial against an infant Deft, *v. sup.* Vol. I., p. 180.

SECTION II.—SHOWING CAUSE AGAINST JUDGMENT.

1. Judgment Nisi against Infant.

AND this judgment is to be binding on the Deft, the infant, unless on being served, after he shall have attained the age of twenty-one years, with subpoena to show cause against this judgment, he shall within six months from the service of such subpoena show unto this Court good cause to the contrary.—*Lucas v. Clark*, V.-C. W., 5 Nov. 1864, B. 2507.

2. Judgment Absolute against late Infant.

UPON motion &c., by counsel for the Plt, who alleged that the Deft A. attained the age of twenty-one years on the — day of —, and that

the said Deft was on the — day of — duly served with a subpoena to show cause against the judgment dated &c., as by the affidavit of &c., filed &c., appears, and no cause having been shown to the contrary thereof, as by the registrar's certificate also appears, and upon reading the said judgment, affidavit, and certificate [*Enter usual evidence of age*], This Court doth order that the said judgment be made absolute against the Deft A. [*and if for foreclosure, that the Deft A. from henceforth stand absolutely debarred and foreclosed &c.*].—See *Steward v. Fish*, M. R., 18 Jan. 1872, B. 202; *Fell v. Jackson*, V.-C. E., 27 Nov. 1823, A. 143.

For order on motion by infant on coming of age for leave to put in new answer, see *Kelsall v. K.*, L. C. 1833, A. 913; 2 M. & K. 409; and see *Codrington v. Johnstone*, V.-C. E., 26 Nov. 1834, A. 351.

For forms of subpoena to show cause, and of præcipe, see D. C. F. 59, 60. The subpoena is not to be served till the infant is twenty-one.

3. *Judgment for immediate Foreclosure Absolute against Infant and Married Woman, Plaintiff paying their Costs, and Court declaring it for their Benefit.*

AND the Plt by his counsel offering to pay unto the Defts S., and L. his wife, and G. the infant, their costs of this action as between solr and client, upon an absolute judgment of foreclosure being now made as against them; And the Deft S. by his counsel disclaiming all interest in the estate comprised in the indenture of mortgage in the pleadings mentioned, dated &c., and consenting to an absolute judgment; And counsel for the Deft L., the wife of the said S., and for the Deft G., the infant, not asking for liberty to redeem the mortgaged hereditaments, or for any account of what is due to the Plt, Declare that it will be for the benefit of the Defts L., and of G., the infant, to accept the said offer; And Let the Defts S., and L. his wife, and G., the infant, from henceforth stand absolutely debarred and foreclosed &c.; And Let the Plt B. pay unto the Defts &c. respectively their costs of this action to be taxed &c.—See *Billson v. Scott*, V.-C. W., 19 April, 1856, A. 1017; *Crozon v. Lever*, 12 W. R. 237; *Bennett v. Harfoot*, V.-C. S. 1871, A. 948; 19 W. R. 428; 24 L. T. 86; *Barnard v. Bowyer*, North, J., 1 Aug. 1887, A. 1961; *Wolverhampton and Staffordshire Banking Co. v. George*, North, J., 25 Oct. 1883, B. 1450; 24 Ch. D. 707.

4. *Foreclosure Absolute against Infant on Payment of his Costs.*

UPON motion &c., by counsel for the Plt, who alleged &c., and upon hearing counsel for the Deft A. B., an infant, by C. D., his guardian, and upon reading &c., the Plt, by his counsel, offering to pay to the guardian of the said infant Deft, £— for his costs of this action, and £— towards the said infant's costs of the plan and terrier of the B.

Estates, upon an order being now made absolutely foreclosing the said infant Deft as if he were of age, and without reserving to him the right to show cause against the said judgment within six months after service of notice of the said judgment on him, after he shall have attained the age of twenty-one years; And this Court being of opinion that it will be for the benefit of the said infant Deft that the said offer should be accepted, and that such order absolutely foreclosing him without reserving to him such right as aforesaid should now be made, Doth Declare that it will be for the benefit of the said Infant to accept such offer, and that such order absolutely foreclosing him should now be made without reserving such right as aforesaid; And Let the Defts henceforth stand absolutely foreclosed, &c.—*Barnard v. Bowyer*, North, J., 1 Aug. 1887, A. 1961.

5. *Foreclosure Nisi—Conveyance when Infant attains Twenty-one—Day to show Cause.*

UPON motion for judgment &c., by counsel for Plt, Declare as in ordinary equitable mortgage action.—Take usual account.—Declare that what shall be certified to be due is a charge upon the said hereditaments.—Usual redemption provision—in default foreclosure, and, in case of foreclosure, Declare Plt will be absolutely entitled to the said hereditaments, and to have an absolute conveyance, Direct Defts to deliver up possession, and also (as to infant Deft on attaining twenty-one) to execute conveyance.—Usual provision for infant Deft to show cause against judgment within six months after service of subpoena &c.—*Mellor v. Porter*, Kay, J., 14 Dec. 1883, B. 1763; S. C., 25 Ch. D. 158.

6. *Foreclosure of Equitable Mortgage against unborn Infant Children of Third Mortgagee—Such unborn Infants declared Trustees—Person appointed to Convey.*

THIS action &c., and Defts W. P. and W. J. H. (*mortgagors*) by their counsel not desiring to redeem the premises assigned by the deed of 30 June, 1870, in the pleadings mentioned, and submitting to an immediate foreclosure order, Direct foreclosure of Defts W. P. and W. J. H.—Direct Deft J. L. (*second mortgagee*) to redeem in six months or be foreclosed.—Direct Defts A. W. C. W. and C. W. (*third mortgagees*) to redeem in three months or be foreclosed.—But in default of such last-mentioned payment being made, This Court doth declare that the Plts (*first mortgagees*) will be entitled to the said hereditaments free and clear of and from all right, title, interest and equity of redemption of the last-named Defts of and into the same, and in that case This Court doth declare that the interests of all and every child hereafter to be born of the Deft A. W. C. W. will be interests of a trustee within

the meaning of the Trustee Act, 1850 (*now* 1893), And doth hereby appoint H. H., of the N. P. Bank of England in the city of G— to convey on their behalf such interests accordingly to the Plts free from all right or equity of redemption of any such child or children.—See *Coleman v. Llewellyn*, Pearson, J., 14 May, 1884, A. 1575.

**7. Foreclosure of Equitable Mortgage against Infant Heir-at-Law—
Infant declared a Trustee—Person appointed to convey.**

USUAL account; And upon the Defts paying to the Plts what shall be certified to be due to them &c. within &c., the Plts to deliver up all deeds &c.; Declare, that in default of such payment by the time aforesaid the Plts will be entitled to the said hereditaments free and clear of and from all right, title, interest, and equity of redemption of, in, and to the same, and to have an absolute conveyance thereof accordingly; And in that case, declare that the infant Deft P. will be a trustee within the meaning of the Trustee Act, 1850 (*now Trustee Act*, 1893), for the Plts of the hereditaments in the statement of claim mentioned; And thereupon Let the Deft C. (*executrix of deceased mortgagor and mother of Infant*), on her own behalf and on behalf of the said infant Deft, execute a conveyance thereof to the Plts, such conveyance to be settled by the Judge in case the parties differ.—Liberty to apply.—*Foster v. Parker*, M. R., 25 Jan, 1878, A. 147; 8 Ch. D. 147.

In this case the legal estate had descended on the infant heir by reason of the disclaimer of the trustees of the will; but in *Backhouse v. Hornsey*, M. R., 20 Dec. 1880, A. 1459 (referred to in *Mellor v. Porter*, *sup.* p. 980), which was the case of an equitable mortgage where the legal estate was vested in the infant heirs of the mortgagor, the judgment contained a direction that the infant Defts, upon attaining twenty-one, should execute a proper conveyance to be settled by the Judge, and gave a day to show cause.

Where the devolution of the mortgagee's estate has occurred subsequently to the Land Transfer Act, 1897 (60 & 61 V. c. 65), this form will generally be inapplicable: *v. inf.* pp. 1220, 1397, 1398.

For orders for mortgage of a lunatic's estate, and for the exercise by the committee on behalf of a lunatic mortgagee of the power of sale contained in the mortgage and realization of the amount, see *Elmer*, Lunacy, 209, 210.

NOTES.

IMPEACHING AND SHOWING CAUSE AGAINST JUDGMENT.

Infant Plaintiff.

In general, an infant, either Plt or Deft, is as much bound by a judgment as an adult: *Gregory v. Molesworth*, 3 Atk. 626; *Sheffield v. D. Buckingham*, West, 684; *Bennet v. Lee*, 2 Atk. 531; *Simpson*, 501, 502; even though it has been irregularly obtained, especially when acquiesced in for some time and acted upon in subsequent proceedings: see *Morison v. M.*, 4 My. & Cr. 216.

But under extraordinary circumstances (as of fraud, gross negligence, error, or new matter), an infant Plt has been allowed to show cause against a decree dismissing his bill: see *Napier v. L. Effingham*, 2 P. Wms. 402;

4 Bro. P. C. 340; *Carew v. Johnston*, 2 Sch. & Lef. 280, 292; and this applies to infant Defts also.

He is not to suffer by negligence or want of knowledge on the part of his next friend, and may impeach a judgment founded on error in the facts, without being required to produce the usual evidence that the facts relied on were not known, and could not have been discovered with reasonable diligence: *Re Hoghton, H. v. Fiddey*, 18 Eq. 573.

Though in general bound by the acts of his solicitor (*Tillotson v. Hargrave*, 3 Madd. 495), an infant has been held not bound by a submission or offer contained in his bill by the mistake of persons acting on his behalf: *Serie v. St. Eloy*, 2 P. Wms. 386; nor, it has been said, is he to be prejudiced by the prayer being improperly framed: *Walker v. Taylor*, 8 Jur. N. S. 681, 682.

In matters relating merely to procedure, or to the conduct of the action, the next friend or guardian is competent, with the consent of the Court, to act so as to bind the infant: O. XVI, 21, *sup.* p. 975.

An infant Plt coming of age during the progress of the action, and disapproving of the proceedings, cannot appear by counsel separately from his co-Plts, and can only repudiate by making a special application for the purpose: *Ballard v. White*, 2 Ha. 158.

Infant Defendant—Day to show Cause.

Independently of the right of an infant Deft, without waiting till he came of age, to impeach by original bill a decree obtained against him by fraud and collusion, or error (*Richmond v. Tayleur*, 1 P. Wms. 734; *Loyd v. Mansell*, 2 P. Wms. 73; *Carew v. Johnston*, 2 Sch. & Lef. 292; *Shepherd v. D. Buckingham*, West, 685), a day six months after he came of age was given to him to show cause against a decree: *Simpson*, 502; *Dan.* 128, 129.

Although, according to the general rule, an infant on coming of age was entitled to put in a new answer raising a different case; and under special circumstances leave has been given to the infant before coming of age to put in a new answer, and make a better defence (see *Bennet v. Lee*, 2 Atk. 529; *Savage v. Carroll*, 1 Ba. & Be. 548); this was not allowed in foreclosure suits (see *Kelsall v. K.*, 2 M. & K. 409, 414), and the infant was not permitted at twenty-one to unravel the account, nor even to redeem, but was confined to showing errors in the decree: *Mallack v. Galton*, 3 P. Wms. 352; and see *Lyne v. Willis*, *Id.* n.; *Bp. Winton v. Beavor*, 3 Ves. 317; *Williamson v. Gordon*, 19 Ves. 114.

In actions by or against an infant, and also in actions against him as heir to any deceased ancestor, a dilatory plea might be put in by either party praying that the parol might demur, *i.e.*, that proceedings be stayed until the infant had attained his full age: see *Plasket v. Beeby*, 4 East, 485; *Price v. Carver*, 3 My. & Cr. 157, 161, 162.

By the Debts Recovery Act, 1830 (11 G. IV. & 1 W. IV. c. 47), s. 10, it is provided that, in any action, suit, or other proceeding by or against an infant, "the parol shall not demur," and the action, &c., shall be prosecuted in the same manner as "where, according to law, the parol did not demur;" by s. 11, under decree for sale for payment of debts, the Court may direct and compel infants to convey absolutely; and by s. 12, life tenants or persons having limited interests may be directed to convey the fee simple or other the whole interest.

For orders under s. 11, upon an infant heir to convey, see *Mitchell v. Reynolds*, V.-C. P., 21 Nov. 1851, B. 67; and under the Debts Recovery Act, 1839 (2 & 3 V. c. 60), s. 1 (extending the provisions of 11 G. IV. & 1 W. IV. c. 47, ss. 11, 12, to authorizing mortgages as well as sales of the estates of infant devisees), see *Powell v. Lewis*, V.-C. P., 20 Dec. 1851, B. 164.

But the "parol demurring," and giving a day to show cause, not being synonymous terms, s. 11 of 1 W. IV. c. 47, has been held not to affect the infant's right to a day to show cause against the decree (including a decree of foreclosure) except in cases where the legal estate of property was by the decree taken from the infant and ordered to be sold for payment of debts due to the general creditors of a deceased: *Price v. Carver*, 3 My. & Cr. 157, 163

(a case of equitable mortgage); *Kelsall v. K.*, 2 M. & K. 409; *Scholefield v. Heafield*, 7 Sim. 670; 8 Sim. 470.

And accordingly the right to a day to show cause was held to remain unaffected in suits in which the decree required some act to be performed by the infant, e.g., the execution of a conveyance, as in a suit for foreclosure of an equitable mortgage: *Walsh v. Trevanion*, 16 Sim. 181; *Fish. Mort. s. 2025*; *Robbins*, 1055.

Where a sum had been directed in a creditor's suit to be raised by mortgage by an infant for payment of his ancestor's debts, the Court held it had not jurisdiction, under 1 W. IV. c. 47, and 2 & 3 V. c. 60, to extend the sum so as to include money for repairs, though necessary in order to obtain an advance upon mortgage, which was more beneficial to the infant than a sale: *Hill v. Maurice*, 1 Dr. & S. 214. The costs of an action to execute a will may be raised by mortgage or sale: *Mandeno v. M.*, Kay, ii.

For cases in which, under the above Acts, a sale or mortgage to pay debts and conveyance has been directed, and conveyance by infant enforced, or directed to be made on his behalf, see *Scholefield v. Heafield*, *Holme v. Williams*, 8 Sim. 470, 557; *Penny v. Pretor*, 9 Sim. 135; *Smethurst v. Longworth*, 2 Ke. 603; *Price v. Carver*, 3 My. & Cr. 157, 163; *Mahon v. Dawson*, 2 Dr. & W. 286; *Miller v. Knight*, 1 Ke. 129; *Thomas v. Gwynne*, 8 Beav. 312; 9 Beav. 275; *Walters v. Jackson*, 12 Sim. 278.

The Acts 11 G. IV. & 1 W. IV. c. 47; 2 & 3 V. c. 60; 11 & 12 V. c. 87, though not repealed by the Trustee Acts, 1850 and 1852 (now replaced by the Trustee Act, 1893), have been so extended or superseded by them that resort to them will seldom be necessary.

For the provisions of the Trustee Act, 1893, and for the forms and cases thereunder, see *inf.* Chap. XLII., "TRUSTEES." The effect of the Act being to bind the infant's right, both legal and equitable, by the judgment, the right to the day to show cause should, it has been suggested, accordingly cease: see *Fish. Mort. s. 2025*; but see *Robbins*, 1053 *et seq.*

Although in the case of foreclosure of a legal mortgage a conveyance from the infant is not required, the right of the infant to a day to show cause was, in *Newbury v. Marten*, 15 Jur. 166; 46 L. T. 521; W. N. (82) 78, held to be unaffected by the Trustee Act, 1850; and, notwithstanding what is said by V.-C. Stuart in *Bennett v. Harfoot*, *inf.*, this has been followed in practice; and in *Gray v. Bell*, 30 W. R. 606, Fry, J., in the case of foreclosure of a legal mortgage, gave the infant Deft a day to show cause; and in *Mellor v. Porter*, 25 Ch. D. 158, explaining *Foster v. Parker*, Form 7, *sup.*, and following *Price v. Carver*, *sup.*, and *Backhouse v. Horneay*, *sup.* p. 981, in the case of an equitable mortgage by deposit, a day to show cause was similarly given by Kay, J., and it was said that sect. 30 of the Trustee Act, 1850 (now replaced by sect. 31 of the Trustee Act, 1893), ought to be held to apply in all cases where there was a judgment against an infant for an immediate conveyance, but that that was not the form of a judgment for foreclosure in the case of an equitable mortgage; and see *Simpson*, 503.

In *Boura v. Wright*, 4 Dr. & S. 265 (a partition suit), instead of giving the infant a day to show cause, the Court declared that after the making of the partition the infant would be a trustee within the Trustee Act, s. 30, of such parts of the property as should have been allotted in severalty to the other parties; and this is the present practice.

But where it is clearly for the benefit of the infant so to do, the Court has made a decree without giving a day to show cause. Thus, in *Crozon v. Lever*, 12 W. R. 237; 9 L. T. 597; 10 Jur. N. S. 87; 3 N. R. 238, where at the hearing of a foreclosure suit against the infant heir-at-law it appeared that the mortgaged property was not worth the amount due on mortgage, and that from the insufficient value of the property as a security it would be for the benefit of the infant to direct an immediate foreclosure, the decree was for foreclosure absolute in the first instance, on the Plt undertaking to pay the costs of the infant; and this was followed in *Wolverhampton Banking Co. v. George*, 26 Ch. D. 707; and see *Younge v. Cocker*, 32 W. R. 359; *Barnard v. Bouvier*, Form 4, *sup.*; *Bennett v. Harfoot*, 19 W. R. 428; 24 L. T. 86; *Simpson*, 504 (where it was said by V.-C. S. that it was no longer the practice to give a day to show cause).

"If a decree is for the benefit of an infant and he dies, his executor shall never dispute that decree, though it may be for the advantage of the executor so to do:" *Sheffield v. D. Buckingham*, 1 Atk. 628, 631 (per Lord Hardwicke).

SECTION III.—ADOPTION OF PROCEEDINGS—INFANTS' CONTRACTS.

1. *Inquiry as to adopting Contracts.*

AN inquiry whether it will be for the benefit of the Plts, the infants, and such other children of the Plt W. as may hereafter be born, and may live to become entitled to the benefit of the devises contained in the will of the testator B., that the contracts in the pleadings mentioned for the sale of the estate of the testator should be carried into execution; And if so, Let such contracts be carried into execution accordingly.—See *Watson v. L. Teignmouth*, M. R., 2 July, 1802, B. 762.

For inquiry whether it will be for the benefit of infant Plts that certain accounts should be taken of testator's estate, or to abide by the account as settled by Defts, the exors, with the other legatees under the will, see *Harris v. Hyem*, M. R., 16 Feb. 1801, A. 271.

2. *Infant declared not bound by Judgment, but former Accounts to be adopted if beneficial.*

"DECLARE, that the Plts are entitled to the benefit of the judgment dated &c., and the several proceedings under the same, and subsequent or previous thereto, against all the Defts to this (*supplemental*) action, except the infant Deft H. (*first tenant in tail in esse*) under the will; And Declare that the said judgment and orders, and the accounts taken under the same, are not binding on the said Deft, the infant."—Usual accounts of personalty, and inquiries as to realty, any accounts settled in the testator's lifetime not to be disturbed.—"And if it shall appear to be for the benefit of the infant Deft H. to adopt any of the accounts already taken under the said judgment and orders in the original action, Let such accounts be adopted to such extent, or in such respects, as shall appear to be for the benefit of the said infant Deft."—And this judgment is to be without prejudice, as between the Plts and all the Defts, except the said infant, to any of the judgments and orders, proceedings and arrangements made prior to the date hereof.—Adjourn &c.—See *Baillie v. Jackson*, V.-C. E., 11 June, 1839, A. 1267; 10 Sim. 167.

For inquiry as to adopting sale of infant's property, see *Garmstone v. Gaunt*, 1 Col. 582; and see *Allan v. Backhouse*, 2 V. & B. 65.

For inquiry if for infant's benefit, in taking the accounts of the testator's personal estate, to adopt an account, settled by persons beneficially interested, from time to time, with the exors and trustees, see *Barnard v. Acklom*, L. C., 10 Dec. 1812, A. 88.

For order approving compromise, without previous inquiry, see *Lippiat v. Holley*, 1 Beav. 424; and for declaration that arrangements or undertakings are for the benefit of infants, and direction that they be carried into effect, *Ashton v. Dalton*, 2 Col. 567.

3. *Inquiry waived.*

AND all parties, except the Defts, the infants, (by their counsel) waiving any inquiry with respect to the sum of £— hereinafter mentioned, and with respect to the question of notice, and counsel for the infant Defts not asking such inquiry, Let &c.—*Buckell v. Blenkhorn*, V.-C. W., 24 Jan. 1846, A. 630; 5 Ha. 147.

4. *Proceedings adopted.*

UPON motion &c., Let the proceedings under the said judgment dated &c., be adopted on behalf of the infant Defts F. E. F. and N. F. in Chambers, if the Judge shall so direct.—*Finch v. Goutiere*, V.-C. J., 8 July, 1869, A. 1892; S. C., W. N. (69) 191.

The order was made in this form to avoid the circuitry of directing a reference to inquire whether it would be for the infant's benefit to adopt the proceedings: see *Copley v. Smithson*, 5 Dr. & S. 583.

5. *Conditional Agreement for a Sale in a Partition Action approved on behalf of an Infant Plt.*

DECLARE that the piece of ground situate at &c. is divisible between the Plt and the Deft S. A. G. in equal moieties subject to the dower therein of the Deft M. D. C., or of the Deft S. E. C. in her right; And it appearing to the Court that by reason of the nature of the property a sale of the said property and a distribution of the proceeds thereof will be more beneficial to the parties interested than a division thereof between or amongst them; and the infant Plt and the infant Deft S. A. G. by their counsel requesting that the said hereditaments may be sold; And this Court being of opinion that the conditional agreement dated &c. in the Plt's bill mentioned is a proper agreement for carrying such sale into effect, Doth order that the said conditional agreement dated &c., entered into between &c. for the price of £—, be carried into effect. And it is ordered that the money to arise by such sale be paid into Court to the credit of this action, *G. v. C.*—"Proceeds of sale of the intestate's real estate at N— H—."—Liberty to apply.—*Grove v. Comyn*, V.-C. M., 23 May, 1874, A. 1287; S. C., 18 Eq. 387.

In *France v. F.*, 13 Eq. 173; *Young v. Y.*, *ib.* 175, n., the costs of the infants were first declared to be a charge upon their respective shares, and

then, after a declaration that "for the purpose of raising the said costs, and by reason of the nature of the property, a sale would be more beneficial for the parties interested than a partition," a sale was directed. And see *inf.* Chap. XLVI., "PARTITION."

For the like declaration and order, see also *Hubbard v. H.*, V.-C. W., 1863, A. 2542; *S. C.*, 2 H. & M. 38, 40; *Richards v. R.*, V.-C. W., 26 Jan. 1867, B. 546; 15 W. R. 380; *Smith v. Birch*, V.-C. M., 22 Feb. 1868, B. 538; 18 L. T. 174; *Thackeray v. Parker*, 1 N. B. 567; 1863, B. 897.

6. *Infant's Contract for Necessaries—Account and Inquiry.*

UPON motion &c., Let &c.: 1. An account of all moneys advanced by the Plt to or on account of the Deft G. (before such Deft attained the age of twenty-one years) and expended by the Deft G. in necessaries, or in paying for necessaries, and the dates of such advances; 2. An inquiry whether any, and which, of such sums have been repaid, and, if so, when; And Let the Deft G., within twenty-eight days from the date of the Master's certificate, pay to the Plt the amount which shall be certified to have been advanced by and to be still due to the Plt as aforesaid on taking the said account and making the said inquiry, together with interest from the date of such advance, or respective advances, at the rate of £4 p. c. per ann.—See *Martin v. Gale*, M. R., 15 Dec. 1876, B. 2194; 4 Ch. D. 428.

NOTES.

COMPROMISE ON BEHALF OF INFANT.

The Court has power to sanction a compromise on behalf of infants and persons under disabilities: *Brooke v. L. Mostyn*, 2 D. J. & S. 373, 415; 33 Beav. 457; *Bennett v. Merriman*, 6 Beav. 360; and though reluctant to sanction such a compromise on behalf of infants, when adults in the same interest refuse it (*Norton v. Steinkopf*, Kay, 45), has refused, at the instance of one of the consenting parties, misstated at the time to have been an adult, to disturb a compromise which was shown to have been for the benefit of another infant interested: *Fadelle v. Bernard*, 19 W. R. 55.

If the compromise is of an action in the subject-matter of which infants are interested, a petition stating the terms proposed may be presented: *Gray v. Paull*, 25 W. R. 874; 46 L. J. Ch. 818; W. N. (82) 78; but the more usual application is by summons.

The Court will not sanction a compromise without the consent of the next friend or guardian *ad litem* of the infant, and there should be an affidavit by the solr of the infant that he believes the compromise to be beneficial to the infant, and the opinion of the infant's counsel to the same effect: *Re Birchall*, *Wilson v. B.*, 16 Ch. D. 41, O. A.; *Gray v. Paull*, *sup.*

A next friend has no authority to bind the infant by a compromise which is for the benefit of the next friend only, *e.g.*, by agreeing after nonsuit not to appeal in consideration of the Deft not asking for costs: *Rhodes v. Swithenbank*, 22 Q. B. D. 577.

For instances in which compromises have been sanctioned by the Court on behalf of infants, see *Simpson*, 516.

INFANT'S CONTRACT—NECESSARIES—INFANTS' RELIEF ACT.

In general, a contract by an infant, if it is for his benefit, is not void, but voidable only, *i.e.*, good until it is repudiated, and if he desires when adult to repudiate it he must do so within a reasonable time after he comes of

age: *Edwards v. Carter*, (1893) A. C. 360 H. L.; and see *Viditz v. O'Hagan*, (1899) 2 Ch. 569; *S. C.*, (1900) 2 Ch. 87, C. A.

In considering whether a contract is beneficial to the infant, and therefore binding on him, regard must be had to it taken as a whole: *Clements v. L. & N. W. Ry. Co.*, (1894) 2 Q. B. 482, C. A., where a railway porter, who was an infant, was held bound by a contract to become a member of an insurance society and conform to its rules, which, though restrictive, were reasonable for the protection of the funds.

And a provision in an apprenticeship deed, in effect exempting the master from paying wages to the apprentice during periods when men were on strike, was held not so disadvantageous to her as to render the deed incapable of being enforced against her under the Employers and Workmen Act, 1875: *Green v. Thompson*, (1899) 2 Q. B. 1; distinguishing *Corn v. Matthews*, (1893) 1 Q. B. 310, C. A.; and see *Evans v. Ware*, (1893) 3 Ch. 502, where an injunction was granted to restrain breach of a restrictive covenant by a quondam infant under a beneficial contract of service. But, on the other hand, a contract by an infant with a railway co. relieving them from liability to him for negligence was held to be unfair to him, and therefore not binding: *Flower v. L. & N. W. Ry. Co.*, (1894) 2 Q. B. 65, C. A.

By the Infants' Relief Act, 1874 (37 & 38 V. c. 62), s. 1, "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void; provided always, that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable;" and by sect. 2, "no action shall be brought whereby to charge any person upon any promise, made after full age, to pay any debt contracted during infancy, or upon any ratification, made after full age, of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

Although the infant's contract is declared by sect. 1 of the Act to be absolutely void, yet if he has consumed the goods and paid for them he cannot recover back the amount paid: *Valentini v. Canali*, 24 Q. B. D. 166; and see *Simpson*, 75.

An infant cannot bind himself by the acceptance of a bill of exchange, though for the price of necessities supplied to him during infancy: *Re Soltykoff, Exp. Margrett*, (1891) 1 Q. B. 413, C. A.

Where an infant is sued for the price of goods sold he may, for the purpose of showing that they were not necessities, give evidence to show that at the time of sale he was sufficiently provided with goods of the kind supplied: *Johnstone v. Marks*, 19 Q. B. D. 509, dissenting from *Ryder v. Wombwell, sup.*, and confirming *Barnes v. Toye*, 13 Q. B. D. 410; and on the question of "necessaries" for an infant, see *Simpson*, 87—93; *Hewling v. Graham*, 70 L. J. Ch. 568; *W. N.* (01) 81.

The Act applies to the trading contracts of an infant: *Exp. Jones*, 18 Ch. D. 109, C. A.; but an infant who has traded cannot be adjudicated bankrupt on the petition of a person who has supplied him with goods on credit, but to whom he has made no representation that he is of full age: *S. C.* (overruling *Exp. Lynch*, 2 Ch. D. 227); and whether he can be so adjudicated, even if he has made such representation, *quære*: *S. C.*

The Court, acting for the benefit of the infant, has charged the infant's freehold estate with the expenses of his past maintenance: *Re Howarth*, 8 Ch. 415; *Re Allen*, V.-C. E., 1849, A. 760; 8 Ch. 417, n.; Form 4, p. 1004; and see *Nottley v. Palmer*, 11 Jur. N. S. 968; 13 L. T. 647; 14 W. R. 170; but see *Cadman v. C.*, 33 Ch. D. 397, 400; *Simpson on Infants*, 307; to the effect that there is no power to charge even past maintenance upon an estate tail in remainder.

But an assignment by the infant himself of his reversionary interest as a security for repayment of moneys advanced, though partly for necessities, is voidable; and the creditor, though entitled to an account and repayment of moneys advanced for necessities, is not entitled to a charge on the reversionary interest for the amount: *Martin v. Gale*, 4 Ch. D. 428, *sup.* Form 6.

And a charge by an infant of his reversionary interest, though accompanied by a statutory declaration that he was of age, has been held to be avoided by his subsequent mortgage after full age to a mortgagee without notice: *Inman v. I.*, 15 Eq. 260.

Where an infant was liable to be sued in tort for money misappropriated, a charge for the amount given by him on attaining his majority upon a legacy due to him was held to be a contract given on good consideration and enforceable: *Re Seager, Seeley v. Briggs*, 60 L. T. 665.

An infant may bind herself by employing a solicitor for the preparation of her marriage settlement, the expenses of which may be recovered, as a debt for necessities before marriage, from herself and husband: *Helps v. Clayton*, 17 C. B. N. S. 553.

Although a fraudulent representation by an infant at the time of contracting that he was of age has been held no answer, either at law, or as an equitable replication under the C. L. P. Act, 1854, to a plea of infancy (*Bartlett v. Wells*, 1 B. & S. 836), an infant who by his false assertion has obtained credit as an adult would not in equity be allowed to avail himself of his non-age in derogation of his contract: *Exp. Unity Bank*, 3 D. & J. 63; *Wright v. Snowe*, 2 Dr. & S. 321; and see *Esrone v. Nicholas*, 1 Dr. & S. 118, n.; but see Infants' Relief Act, 1874, *sup.* p. 987.

But to deprive the infant of his legal privilege there must have been false assertion, or actual misrepresentation, on his part: *Stikeman v. Dawson*, 1 Dr. & S. 90; and the party contracting with him must have been misled by the misrepresentation: *Nelson v. Stocker*, 4 D. & J. 458.

And no representation that an infant is of full age arises from the mere fact of his trading: *Exp. Jones*, 18 Ch. D. 109, C. A.

SHARES IN NAME OF INFANT.

The transfer of shares into the name of an infant, though not void, is voidable at the option either of the infant or of the co.: *Symons' Case*, 5 Ch. 298; *Castello's Case*, 8 Eq. 504; and see *Lumsden's Case*, 4 Ch. 31.

An infant transferee of shares may, if he chooses, repudiate the shares either during minority or after twenty-one, and, if he has derived no advantage under the contract, may prove in the subsequent liquidation of the co. for the amount paid by him in respect of the shares: *Hamilton v. Vaughan-Sherrin Electrical Co.*, (1894) 3 Ch. 589; but if he does not repudiate he remains liable, and must pay calls like any other shareholder: *Lindl.* 83, 1388; *Simpson*, Infants, 49; and see *Pollock*, Contr. 36, 44; and similarly the co. will be bound if it has with knowledge allowed the infant's name to remain on the register: *Parsons' Case*, 8 Eq. 656; *Mitchell's Case*, 9 Eq. 363; or allowed the infant to transfer shares: *Gooch's Case*, 8 Ch. 266.

If there has been a winding-up order before the infant transferee comes of age, then some distinct act must be shown on his part after attaining twenty-one, and after notice of his liability, of acquiescence and confirmation, sufficient to make him liable as a contributory: *Wilson's Case*, 8 Eq. 240; *Lumsden's Case*, 4 Ch. 31; *Hart's Case*, 6 Eq. 512; *Delmar's Case*, 17 W. R. 21.

But in this case also acquiescence alone may be of such a nature, or for so long a period after full notice of liability by applications for calls, as to bind him: see *Mitchell's Case*, 9 Eq. 363; *Ebbett's Case*, 5 Ch. 302.

And see *Buckley*, 48, 84, 162.

RATIFICATION.

A ratification after the Act of 1874 of a debt contracted by an infant before the Act is void, and affords no cause of action: *Exp. Kibble*, 10 Ch. 373; and see *Belfast Banking Co. v. Doherty*, 4 L. R. Ir. 124; *Smith v. King*, (1892) 2 Q. B. 543.

The words "promise or contract" are general, and include a promise to marry: *Coxhead v. Mullis*, 3 C. P. D. 439; *Ditcham v. Worrall*, 5 C. P. D. 410; but it is a question of fact in such case whether there was a fresh promise or merely a ratification of a former promise: *S. C.*, *Northcote v. Doughty*, 4 C. P. D. 385; and direct words of promise on coming of age may amount to a fresh absolute promise, and not merely to a ratification of a promise made during infancy: *Northcote v. Doughty*, 4 C. P. D. 385; and see *Ditcham v. Worrall*, 5 C. P. D. 410.

As to the effect of a bill of exchange or promissory note renewed or given by an infant after majority in respect of a debt contracted during infancy, see *Nevill v. Snelling*, 15 Ch. D. 679; *Belfast Banking Co. v. Doherty*, 4 L. R. Ir. 124; *Infants' Relief Act*, 1874, *sup.* p. 987.

An infant cannot be sued upon his contract of service in an apprenticeship deed, and the Court will not grant an injunction to restrain him from committing a breach of a negative stipulation contained in a deed of apprenticeship executed by him: *De Francesco v. Barnum*, 43 Ch. D. 165; 45 Ch. D. 430, C. A.; and generally as to the effect and enforcement of contracts of service entered into by an infant, see *Simpson*, 94 *et seq.*; and that a contract of apprenticeship is not necessarily invalid because the infant is bound apprentice to a corporation, see *Burnley Equitable Soc. v. Casson*, (1891) 1 Q. B. 75.

As to the form of account against a quondam infant trustee so as to bring out all the facts and enable the Court to decide as to his liability for moneys received during infancy, see *Re Garnes, G. v. Applin*, 31 Ch. D. 147, C. A.; *post*, Chap. XLII., "TRUSTEES"; and as to the position and liability of an infant trustee, see *Simpson*, 107.

In cases not within the *Infants' Relief Act*, 1874, an ante-nuptial settlement dealing with funds to which the wife, an infant, is contingently entitled in reversion, may by her acts and conduct, when of full age, be confirmed, so as to bind her, without formal confirmation: *White v. Coz*, 2 Ch. D. 387; *Ashton v. McDougall*, 5 Beav. 56; *Davies v. D.*, 9 Eq. 468; but no acts of acquiescence or confirmation can make a post-nuptial settlement by an infant wife of her reversionary interest in personality binding on her, unless they amount to an actual disposition of the property by her while discoverd to the trustees of the settlement: *Seaton v. S.*, 13 App. Cas. 61; *Simpson*, 36, 37; and see *Greenhill v. North British, &c. Ins. Co.*, (1893) 3 Ch. 474, and *sup.* p. 901.

And as sect. 1 of the *Infants' Relief Act*, 1874 (*v. sup.* p. 987), is confined to the three specified classes of contracts—viz., (1) for repayment of money lent; (2) for goods supplied; and (3) account stated—a settlement of property made by an infant on her marriage is still, as regards the infant, voidable and not void: *Duncan v. Dixon*, 44 Ch. D. 211; and whether such a settlement is within sect. 2 of the same Act, *quære*: *S. C.*

An infant may consent to the exercise by the trustees of her marriage settlement of a power, with consent of her husband and self, of varying the investments: *Re Cardross*, 7 Ch. D. 728; and as donee of a power may appoint personal estate by deed during infancy: *Re D'Angibau, Andrews v. A.*, 15 Ch. D. 228, C. A.

A post-nuptial settlement, comprising other property, and settling it in a manner different, is no ratification of an infant's ante-nuptial agreement: *Trouell v. Shenton*, 8 Ch. D. 318.

Where a settlement, being for the benefit of an infant, is voidable only and not void, he is bound to repudiate it, if at all, within a reasonable time after his coming of age, irrespectively of knowledge of his rights, as in cases of waiver, acquiescence, or election: *Carter v. Silber*, (1892) 2 Ch. 278, C. A.; affirmed *H. L.*, (1893) A. C. 360; and see *Viditz v. O'Hagan*, (1899) 2 Ch. 569; reversed on other grounds, (1900) 2 Ch. 87, C. A.; (*nom. Edwards v. Carter*), or within a reasonable time after the settlement takes effect, where the settled property is reversionary only: *Stevens v. Trevor-Garrick*, (1893) 2 Ch. 307; *Re Jones, Farrington v. Forrester*, (1893) 2 Ch. 461.

As to the revocable character of such a settlement where the infant wife marries an Austrian, see *Viditz v. O'Hagan, sup.*

INJUNCTION—MISREPRESENTATION.

After acquiescence for eighteen months after attaining twenty-one, a contract by an infant, who represented himself as of full age, not to set up in business within a prescribed limit for two years after leaving his employer's service, has been enforced by injunction: *Cornwall v. Hawkins*, 41 L. J. Ch. 435; 20 W. R. 653; 26 L. T. 607; W. N. (72) 97; and see *Evans v. Ware*, (1893) 3 Ch. 502; and an injunction was granted to restrain an infant defendant from representing that the business carried on by him was connected with the business carried on by the Plt: *Woolf v. W.*, (1899), 1 Ch.

343; and where an infant obtained a lease of a furnished house on the implied representation that he was of full age, the lessor could not at the same time avoid the lease and make the infant liable for use and occupation, but the Court declared the lease void, and ordered possession to be given up, and restrained the infant from parting with the furniture: *Lemprière v. Lange*, 12 Ch. D. 675.

Where an injunction is granted against an infant in such a case, the Court has jurisdiction to order him to pay costs: *Woolf v. W.*, (1899) 1 Ch. 343, following *Chubb v. Griffiths*, 33 Beav. 127, and *Lemprière v. Lange*, *sup.*

SECTION IV.—GUARDIANSHIP, MAINTENANCE, AND EDUCATION.

(I.) ORDERS FOR APPOINTMENT OF GUARDIAN WITH OR WITHOUT MAINTENANCE.

1. *Appointment of Guardian of Infant's Person.*

UPON the application of &c., and the Judge having approved of B. of &c. as a proper person to be appointed guardian of the person of A. the infant, doth hereby appoint the said B. guardian of the person of (the Plt or Deft) A., the infant, during his minority, or until further order.

For forms of application, see D. C. F. 679 *et seq.*

2. *Reference to Chambers to appoint Guardians of the Person.*

THE application of A. B., an infant, by C. D., her next friend, which upon hearing &c. in Chambers, was adjourned to be heard in Court, coming on this day to be heard before this Court accordingly, Let proper persons be appointed guardians of the person of A. B. during her minority or until further order.—Costs reserved to be dealt with by Judge in Chambers.—*Re Willoughby*, Kay, J., 12 May, 1885, B. 770; *S. C.*, 30 Ch. D. 324, C. A.

3. *Fund applied for Maintenance of Non-Compos.*

AND Let the funds in Court be dealt with as directed &c., the said D. B. by his counsel undertaking to apply the dividends thereby directed to be paid to him for the maintenance, comfort, and support of the Petr. (*a person of unsound mind not so found*).—*Re Brandon's Trust*, M. R., 20 Dec. 1879, A. 3897; *S. C.*, 13 Ch. D. 773. [N.B.—This form has been remodelled to suit S. O. F. R. 1894, r. 6.]

(Insert in Payment Schedule.)

		£ s. d.	£ s. d.
Pay the dividends as they accrue on the above (New Consols) and on the residue thereof during the life of the Petr J. J. B. or until further order.	D. B., of &c., the next friend of the Petr.		

Though an order to the above effect may be made, there is no jurisdiction in a Judge of the Ch. Div. to appoint a guardian of the person and estate of a person of unsound mind: *Re Bligh*, 12 Ch. D. 364, C. A.

For order for payment of the entire income of a person of unsound mind for his maintenance without appointing a guardian, see *Re Silva's Trusts*, Chitty, J., 14 Jan. 1888, B. 75; 36 W. R. 366; W. N. (88) 3; 57 L. J. Ch. 281; 58 L. T. 46.

4. *Maintenance Order out of Fund not in Court.*

Let the sum of £— a year be allowed for the maintenance and education of the infant Plt L. A. S. from the — day of —, 19—, and for the time to come during her minority or until further order; And Let the said T. S., the Deft N. S., and the Deft R. B. J., the trustees of the indenture of settlement dated &c., out of the income of trust funds to which the said infant Plt is entitled, pay to the said T. S., the Deft R. B. J., and the Deft M. A. S., the guardians of the person of the infant Plt, the said sum of £— a year; And Let the said T. S., the Deft R. B. J., and the Deft M. A. S., as such guardians be at liberty to apply the sum of £— a year for the maintenance and education of the infant Plt L. A. S.—*Re Strickland, S. v. S.*, Kekewich, J., 14 May, 1900, A. 2335.

5. *Maintenance Order out of Fund in Court.*

Upon the application &c., Let the sum of £14 10s. be allowed for the past maintenance of the infant Deft A. G. H. down to the 28th January, 1900, and the sum of £29 per annum be allowed for the maintenance of the said infant Deft A. G. H. for the time to come as from the 28th January, 1900, during the minority of the said infant Deft A. G. H., or until further order; And Let the said sum be paid and the funds in Court dealt with as directed in the Payment Schedule hereto.

PAYMENT SCHEDULE.

In the High Court of Justice, 14th May, 1900.
Chancery Division.

Re H., H. v. B. 1899. H. 148.

Ledger Credit. As above. "The account of A. G. H., an infant born 3rd October, 1882. Duty paid."

Funds in Court £— New Consols.
£— Cash.

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Out of cash :— Pay (for maintenance to 28th January, 1900).	Plt G. P., wife of W. H. P., as the mother and guardian of the infant Deft A. G. H. on her separate receipt.	14 10 0	
Thereout also and out of interest as it accrues on New Consols :— Pay on or after the — day of —, 1900, and the — day of —, 1901, and on or after the same days in each succeeding year during minority of A. G. H., or until further order.	The same.	14 10 0	

Re Hocking, Hocking v. Benmore, Kekewich, J., 14 May, 1900, A. 702.

6. *Appointment of Guardian of Person and Estate—Maintenance.*

UPON the application of &c. ; And the Judge having approved of B., of &c., as a proper person to be appointed guardian of the person and estate of A., the infant [jointly with C., the mother of the said infant] ; And the said B. having given security pursuant to the said order by entering into a recognizance, with his sureties, dated &c., which has been approved by the Judge and duly enrolled ; The Judge doth hereby appoint B. [jointly with the said C.] guardian of the person and estate of the said A., the infant, during his minority, or until further order ; And Let the sum of £— a year [or the whole of the rents and profits of the infant's estate not exceeding £— a year] be allowed for the maintenance and education of the said infant, from the — day of —, and for the time to come, during his minority, or until further order ; and be retained by the said guardian out of the rents and profits of the said infant's estate, at &c.

For inquiry whether Defts, the testamentary guardians, were willing to act, or desirous to relinquish the guardianship, and if so, to appoint a person to have the care of the maintenance and education of the infant, and for allowance, see *Shirley v. Smallwood*, M. R., 2 Dec. 1794, B. 86.

7. *Appointment of Guardian of Estate—Direction to account annually—Maintenance.*

UPON the application &c. [*Recital as in Form 6, sup.*], The Judge doth hereby appoint the said L. guardian of the estate of the said infant A. ; And Let the said L. be at liberty to pay to M., the guardian of the person of the said infant A., the sum of £— per ann. for the maintenance and education of the said infant A., as from the — day of —, and for the time to come during his minority, or until further order, out of the rents and profits of the said estate, by quarterly payments on &c. ; And thereout also pay the sum of £— for the (ascertained) costs of the said infant of this application ; and be allowed such payments in passing his accounts ; And Let the said L., on the — day of —, and the same day in every succeeding year, leave at the Chambers of the Judge his annual accounts as such guardian, and within fourteen days after the date of the Master's certificate of the allowance of each account, or within such other time as may be fixed in such certificate, make the lodgment in Court, directed in the Schedule hereto, [*if so, add, to be dealt with as therein mentioned*].

(*Insert in Lodgment Schedule.*)

	L.	£ s. d.	£ s. d.
Balance to be from time to time certified as due from him in passing his accounts as guardian of the infant A.'s estate or so much thereof as shall be certified to be payable.			
Invest and accumulate in (New Consols).			
N.B.—Directions for dealing with the funds, other than investment, should be inserted in a Payment Schedule.			

—See *Re Lawson*, V.-C. K. at Chambers, 25 June, 1853, B. 1456 ; *Re Wake*, V.-C. M. at Chambers, 31 Jan. 1871, B. 259.

For like orders, appointing separate persons guardians of the person and estate, see *Wynne v. Fisher*, V.-C. S. at Chambers, 13 Dec. 1854 ; *Re Stoute*, V.-C. K. at Chambers, 5 Dec. 1854, B. 222 ; *Re Chesterman*, M. B., 13 Feb. 1854, A. 736.

8. *Maintenance partly out of Income of Personal Estate in Court and partly out of Rents, &c.*

UPON the application &c., Let the sum of £— per ann. be allowed to the said C. D. for the maintenance and education of the said infant, as from the — day of —, and for the time to come during his minority, or until further order; And Let the funds in Court be dealt with as in the Schedule hereto; And Let the residue of the said annual sum of £— be paid to the said C. D. by the said receiver out of the rents and profits of the said real estate.

(*Insert in Payment Schedule.*)

Out of interest as it accrues during the minority of A. B.— Pay on the — day of — and the — day of — in each succeeding year, the first of such payments to be made on the — day of — [if so, free of income tax].	C. D., of &c., the guardian of the said infant.	£ s. d. 100 0 0	£ s. d.
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9. *Guardian of Person and Estate without Security on undertaking to account when required—Maintenance.*

UPON the application of &c., And the applicant's costs of this application having been assessed at £—, and P. by her solr undertaking to account for all moneys to be received by her when required so to do, the Judge doth hereby appoint the said P., without giving security, guardian of the person and estate of the infant M., during his minority, or until further order; And Let the said £—, and also the sum of £— per ann. for the maintenance and education of the said infant as from the — day of —, and during his minority, be retained by the said P. out of the infant's share in (the income of) the real and personal estate to which he is entitled under the will of his father J. P., or until further order.—*Re Poole*, V.-C. M. at Chambers, 17 Nov. 1876, B. 1921.

As to guardian of the person accounting, see *post*, pp. 1023 *et seq.*

10. *Removal of Guardian for Misconduct.*

LET the Deft be removed from being a (trustee of the will of — the testator) and from being the guardian of the infant Plts.—*Price v. P.*, M. R., 7 May, 1872, B. 1324.

For form of summons, see D. C. F. 686.

11. *Guardian of Estate discharged—New Guardian—Account of Rents.*

AND W., the guardian of the Petr G., the infant, by his counsel submitting to be discharged, Let the said W. be discharged from being such guardian accordingly: And Let a proper person (on his giving security) be appointed the guardian of the person and estate of the said infant during his minority in the place of the said W., to act

jointly with P. (*continuing guardian*) in the guardianship of the said infant; And Let the said P. be continued as the guardian of the said infant during his minority, or until further order, and act solely in the guardianship of the said infant until the appointment of the guardian hereby directed to be appointed in the place of the said W.; And Let an account be taken of the rents and profits of the estates devised to, or otherwise vested in, the said infant, possessed or received by the said W. and P., or either of them, since their appointment as guardians of the (person and) estate of the said infant, or by any other &c., and of the application of such rents and profits, and the amounts paid by them, or either of them, for or towards the maintenance, clothing, and education of the said infant, or otherwise for his benefit.—Direction to allow to the guardians in taking the account their reasonable costs, charges, and expenses properly incurred relating to the guardianship.—Adjourn &c.—*Re Gregory*, V.-C. E., 2 June, 1848, A. 1434.

12. *Removal of Guardian, and reference to Chambers to appoint another.*

THE application of A. B. and C. D., infants, by E. F., their next friend, which, upon hearing &c. was adjourned &c., and upon hearing counsel for the applicants and for G. H.; Let the said G. H., the guardian of the said infants appointed by an order dated &c., be removed from the office of guardian of the persons of the said infants; Let a proper person be appointed guardian of the persons of the said infants in the place of the said G. H.; And Let, until such guardian be appointed, the said infants be not removed without the leave of the Judge from &c.—*Re Bowyer Smijth*, Kay, J., 10 Dec. 1887, B. 1647.

13. *Appointment of Guardian for the Purpose of consenting on behalf of an Infant under the Improvement of Lands Act, 1864 (27 & 28 V. c. 114), and the Limited Owners' Residences Act, 1870 (33 & 34 V. c. 56).*

UPON the application of W. B., an infant, by C. of &c. his next friend, Let the said C. be appointed the guardian of the said infant for the purpose of consenting on behalf of the said infant to the application proposed to be made to this Court by the summons issued by N. B. (*father and tenant for life*) on the &c. under the provisions of the above-mentioned Acts; And Let such guardian be at liberty to consent to such application accordingly.—*Re Blundell*, M. R. at Chambers, 3 July, 1871, A. 1768; *Re D. of Manchester*, M. R. at Chambers, 17 Dec. 1870, B. 3215.

For the like order under the first Act only, see *Re Lord Sefton*, V.-C. M. at Chambers, 4 Aug. 1871, B. 2470.

For the appointment of a guardian to make, or consent to an application on behalf of infants or lunatics under the Settled Estates Acts, see Seton, 4th ed., p. 1474.

14. *Father to concur in Conveyance of Infant's Estate, under the Places of Worship Sites Act, 1873 (36 & 37 V. c. 50), and Vendor and Purchaser Act, 1874 (37 & 38 V. c. 78).*

UPON motion &c. by way of appeal from &c. the order dated &c. declining to make any order upon an application by summons to dispense with the requisition made by or on behalf of the Ecclesiastical Commrs for England requiring a guardian to be appointed of the estate of C. an infant for the purpose of concurring in the grant and conveyance of certain land under the provisions and for the purposes of the secondly above-mentioned Act (36 & 37 V. c. 50); And this Court, being of opinion that S., the father of the said C., the infant tenant in tail in remainder of the freehold land intended to be conveyed to the Ecclesiastical Commrs for England, for the purposes and under the provisions of the said secondly mentioned Act, is, as the natural guardian of the said infant, the person to concur under the provisions of the said Act on behalf of the said infant in the conveyance of the said freehold land, doth order that the said order dated &c. be discharged.—*Re Marq. Salisbury*, C. A., 29 Jan. 1876, B. 417; 2 Ch. D. 29, C. A.

For order appointing a guardian for an infant to convey under this Act, see *Re Starkie*, V.-C. H., 27 June, 1874, B. 1843.

15. *Guardian appointed to consent to Marriage—Marriage Act, 1823 (4 G. IV. c. 76), s. 16.*

LET B. be appointed guardian of the person of A., the infant, for the purpose of giving a legal consent to her marriage.—*Re Moorcroft*, V.-C. E., 15 July, 1835, B. 835.

And see *Re Woolcombe*, 1 Mad. 213, under 26 G. II. c. 33, s. 3.

16. *Guardian appointed to protect Infant's Interest on Bill in Parliament.*

LET B. be appointed the guardian of A., the infant, for the purpose of appearing on his behalf and watching over (protecting) his interests on [or of presenting a petition to Parliament against] the bill now pending in Parliament for &c., and of assenting to the said bill on behalf of the said infant, if the same shall appear to be for the benefit of the said infant.—*Re Wharton*, M. R. at Chambers, 9 June, 1856, B. 1122.

17. *Approval of Proceedings before the House of Lords to establish Infant's Claim to a Peerage—Settled Land Act, 1882, s. 36.*

THE application of A. B., by C. D. his guardian, which upon hearing &c. was adjourned to be heard in Court &c., and upon hearing counsel

for the applicant and for the respondents, Let the proceedings taken by the applicant before the House of Lords and the Committee of Privileges of the said House for establishing his claim to the Earldom of Aylesford be, pursuant to the 36th section of the Settled Land Act, 1882, approved as proceedings taken for the protection of the settled land, which, under the said settlement, stands settled in such manner as to devolve with the said earldom.—*Re Aylesford's Settlement*, Bacon, V.-C., 20 Feb. 1886, A. 340.

18. *Leave for Infant to Petition the Queen for permission to use Name and Arms.*

UPON the application of the Plts, and upon hearing the solrs for the applicant and for the Defts, and upon reading &c., Let the applicant D. be at liberty to present a petition by the said E. to her most gracious Majesty the Queen, praying that he may be allowed to take, use, and bear the surname and arms of the testator P., in addition to his own surname and arms, in accordance with the will of the testator.—Receiver to pay the costs out of rents and profits.—*Re Poynder*, P. v. Cook, V.-C. M. at Chambers, 19 Feb. 1881, B. 327.

NOTES.

JURISDICTION—INFANT WARD—GUARDIAN OF THE PERSON.

By the Jud. Act, 1873, s. 34 (3), the wardship of infants and the care of infants' estates—a jurisdiction which has been from the earliest times exercised by the Court of Chancery, representing, in the person of the L. C., the authority of the Sovereign as *parens patriæ*—is now assigned exclusively to the Ch. D. of the High Court of Justice.

This jurisdiction is not usually exercised unless the infant has property which can be applied for his use and maintenance, or protected and secured for his benefit: *Wellesley v. D. Beaufort*, 2 Russ. 21; *Clayton v. Clarke*, 3 D. F. & J. 682; but it is not absolutely limited to cases in which there is property of the infant to be dealt with: *Re Spence*, 2 Ph. 247; *Re Fynn*, 2 Dr. & S. 481; *Re McGrath*, (1892) 2 Ch. 496, 511; Dan. 905.

A suit relating to the estate or person of an infant, and for his benefit, has the effect of making him (whether Plt or Deft) a ward of Court: *Gynn v. Gilbard*, 1 Dr. & S. 356; *Marq. Bute's Case*, 9 H. L. C. 440; *Pendleton v. Mackray*, 2 Dick. 736.

Accordingly, to give the Court jurisdiction over an infant, e.g., to prevent his contracting an improper marriage, the course is frequently taken of settling a small sum upon him, and then commencing an action to administer the trusts of the settlement, in which action an injunction may be at once obtained: see *Dawson v. Thompson*, 12 L. T. 178; *Simpson*, 144.

An infant may, however, be constituted a ward of Court by an order made on petition for the appointment of a guardian: *Stuart v. Bute*, 9 H. L. C. 440; *Re McCullochs*, 6 Ir. Eq. 393; or even, it has been held, by the mere taking out of a summons for the appointment of a guardian, though no order was actually made: *De Pereda v. De Mancha*, 19 Ch. D. 451; but see *Re McGrath*, (1892) 2 Ch. 496, 513; or by an order for maintenance upon petition or summons without suit: *Re Graham*, 10 Eq. 530;

—by payment into Court under the Trustee Relief Act (now replaced by the Trustee Act, 1893, s. 42: and see O. LRVB, 4, *inf.* p. 1191) of a fund in which he is interested: *Re Hodge's Settlement*, 3 K. & J. 213; *Re Benand*, 16 W. R. 538; *Re Lloyd's Trust*, 1 R. 2 Eq. 507; or by payment of money into

Court to the separate account of the infant in an administration action to which the infant is not a party: *De Pereda v. De Mancha, sup., sed quære*; see *Brown v. Collins*, 25 Ch. D. 56; *Lewin*, 417;

—but not by payment into Court under the Legacy Duty Act (36 G. III. c. 52), s. 32 (now replaced by the Trustee Act, 1893, s. 42; and see O. LIVB, 4 (1), as to lodgment without affidavit, *inf.* p. 1192), of a legacy to which the infant is entitled: *Re Hillary*, 2 Dr. & S. 461; nor by payment into Court under the Lands Clauses Act of the purchase-money of an infant's estate: *Re Wilts & Somerset Ry., Exp. Brewer*, 2 Dr. & S. 552; *Re Farndell*, V.-C. K., 3 Dec. 1858; *Lewin*, 417;

—nor, where infants are aliens resident abroad, by the carrying over of a settled legacy to an account referring to them as "issue": *Brown v. Collins, sup.*; and *quære* whether even in the case of a British subject the mere carrying over of a legacy in an action to which he is not a party to an account, merely describing a class of persons of whom he is one, is sufficient to constitute him a ward of Court: *S. C.*;

—nor, it would seem, by an order approving of a marriage settlement under the Infants' Settlement Act, 1855: *Re Dalton*, 6 D. M. & G. 201; *Re Strong*, 26 L. J. Ch. 64; 2 Jur. N. S. 1241.

The jurisdiction of the Chancery Division of the High Court and of the V.-C. of the County Palatine over an infant ward is not affected by the infant having become of unsound mind: *Re Edwards*, 10 Ch. D. 605.

The Chancery Division has no jurisdiction to appoint a guardian to a person of unsound mind not so found, though it has power in the admon of the trusts of his property to give directions for maintenance: *Re Bligh*, 12 Ch. D. 364, C. A. (questioning *Vane v. V.*, 2 Ch. D. 124).

As to the jurisdiction to direct and interfere with the infant's custody or religious education, see *inf.* Sect. VI.; and as to the marriage of infants and wards, see *inf.* Sect. VII.

APPLICATION AND FORM OF ORDER.

Applications as to the guardianship of infants are now made by summons in Chambers: O. LV, 2 (13); *Dan.* 910; D. C. F. 679 *et seq.* If no action or matter be pending, a summons is taken out in the name of the infant by a next friend *pro hac vice*, and is intitled in the matter of the infant: *Marq. Bute's Case*, 9 H. L. C. 440.

Where the amount of the property is large, and there are any difficulties or intricacies whatever in the admon of the infant's property, or the care of his person, or disputes about the same, the safer course will be to commence an action or institute proceedings by originating summons for admon on the infant's behalf, by which he at once becomes a ward of Court: *Simpson*, 242.

Directions for the appointment of a guardian and for maintenance, including directions as to education, &c., are no longer inserted in the judgment or order, but application is made in Chambers for the purpose, and it is not necessary to give liberty to so apply.

By O. LV, 25, upon application for the appointment of guardians of infants, and allowance for maintenance, the evidence must show the ages of the infants, the nature and amount of the infants' fortunes and incomes, and what relations the infants have.

Under the old practice the Court had no jurisdiction to appoint a receiver of an infant's real estate except on bill filed: *Exp. Whitfield*, 2 Atk. 315; *Exp. Mountfort*, 15 Ves. 445, n.; and see *Anon.*, 1 Atk. 489; *West*, 347. But in *Re Bartholomew*, 15, 17 Feb. 1843, A. 657, 8, V.-C. E., the Court, by separate orders, appointed a receiver of the estate and guardian of the person; and in *Re Leeming*, 5 July, 1851, B. 1205, V.-C. K. B., on petition, appointed the same person guardian and receiver; and in *Re Gascoyne*, 5 Aug. 1851, A. 144, also on petition, appointed two guardians of the person, and one of them receiver of the estate: *S. C.*, 20 L. J. Ch. 550; and in *Re Baron*, 6 Feb. 1854, A. 529, V.-C. W. appointed separate persons guardian and receiver, on summons in Chambers, and this has often been done. And as to the general jurisdiction of the Court to appoint a receiver under the Jud. Act, 1873, s. 25 (8), *v. sup.* p. 773, The more usual course is to appoint a guardian

of the person and estate, without receiver, and he is usually required to enter into a recognizance duly to account, with sureties, as in the case of a receiver: see *Simpson*, 434. The practice as to the nature and extent of the security has not been uniform; where the income was small, the Court was satisfied with the guardians undertaking to account: *Re Sidingham*, M. R., 24 June, 1859, B. 1895, and Form 9, p. 993.

The recognizance formerly entered into that the infant should not marry with the guardian's privity without leave of the Court (*Davis's Case*, 1 P. Wms. 608; *Eyre v. Cs. Shaftesbury*, 2 P. Wms. 112), was stated by Lord Hardwicke, in 1740, to have been discontinued of late years in the case of wards staying in England, though still required when the wards were allowed to go abroad: see *Jeffrys v. Vanteswarstwarth*, Barn. Ch. 141, 4. And it may, perhaps, be still required where there is apprehension of an improper marriage: *Simpson*, 249.

GUARDIAN, WHO MAY BE APPOINTED.

A married woman is not a proper person to be appointed as sole guardian: *Re Kaye*, 1 Ch. 387; and if a female guardian appointed by the Court (though the mother of the infant) married, her appointment ceased, and a reference was usually directed to ascertain whether it was for the benefit of the infant to continue her as guardian, and she was at liberty to propose herself, and was generally reappointed, alone or with others, on giving recognizances: *Re Gornall*, 1 Beav. 347; *Jones v. Powell*, 9 Beav. 345; *Anon.*, 8 Sim. 346; *Marquis Camden v. Murray*, 16 Ch. D. 161, 166; but now by the Guardianship of Infants Act, 1886, *v. inf.* p. 1000, the mother is placed in the position of a testamentary guardian, and it is presumed that, subject to the power of the Court to appoint others to act jointly with her, she will not be superseded except upon grounds applicable to a testamentary guardian.

If no guardian had been appointed by the father, or if by reason of the invalidity of the marriage the appointment was ineffectual, the mother was entitled to the guardianship of her children: *Re Moore*, 11 Ir. C. L. 1; *Re Darcys*, *Ib.* 298; *Reg. v. Nash*, 10 Q. B. D. 454.

For the course taken where the mother has changed her religion since the father's death, see *inf.* Sect. VI., "CUSTODY OF INFANT."

The sole of any person exercising a control over the infant's estate ought not to be appointed guardian of his person: *Re Johnstone*, 2 J. & Lat. 222.

Where more than one guardian is appointed by the Court, the office does not—as in the case of testamentary guardians, see *Eyre v. Cs. Shaftesbury*, 2 P. Wms. 103—survive: *Bradshaw v. B.*, 1 Russ. 528; though the survivors might have been appointed without a reference: *Hall v. Jones*, 2 Sim. 41.

If the father is out of the jurisdiction and is unable to maintain his children (see *Exp. England*, 1 Russ. & M. 499), or if there be a testamentary guardian who declines to act, a guardian may be appointed by the Court: *O'Keefe v. Casey*, 1 Sch. & Lef. 106.

If, however, the testamentary guardian has acted, he cannot be removed without suit: *O'Keefe v. Casey*, *sup.*; *Re McCullochs*, Dru. 276; 6 L. & Eq. 393; *Simpson*, 242.

Notwithstanding the appointment by deed by an infant aged fourteen, and entitled to real estate, of a guardian for himself, the Court has appointed a guardian: see *Cohan v. C.*, 13 Sim. 639; *Curtis v. Rippon*, 4 Madd. 462.

A guardian must be specially appointed for the purpose of consenting to an application under the Settled Estates Acts and Improvement of Lands Acts, the consent of the father or the testamentary guardian as such not being sufficient: *Re James*, 5 Eq. 334; *Re Caddick*, 7 W. R. 334; *Re Blundell*, *sup.* Form 13.

But the father is competent to concur on behalf of his son, the infant tenant in tail, without the appointment of a guardian for the purpose, in a grant made by himself as tenant for life of part of the settled estate as a church site under the Places of Worship Sites Act, 1873 (36 & 37 V. c. 50), s. 1: *Mary. Salisbury's Case*, 2 Ch. D. 29, *sup.* Form 14.

Under the Settled Land Act, 1882 (*v. inf.* Chap. XLV., "SETTLEMENTS"), s. 60, where a tenant for life or person having the powers of a tenant for life (which includes an infant tenant in fee, see s. 59) is an infant, and there are

no trustees of the settlement, the powers of the Act may be exercised on the infant's behalf by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders. In such a case, where a sale is contemplated, it is the practice for the Judge to approve the sale, and the purchase-money is paid into Court.

FOREIGN GUARDIAN.

Though the Court has undoubted jurisdiction to appoint guardians to infants born abroad, or resident out of the jurisdiction, provided they are British subjects (*Hope v. H.*, 4 De G. M. & G. 345, 346; *Re Willoughby*, 30 Ch. D. 324, C. A.), in which category are included all infants whose paternal grandfather was a natural-born British subject (*De Geer v. Stone*, 22 Ch. D. 243, 255; *Re Willoughby*, *sup.*); yet the authority of a guardian who has been appointed by a foreign Court of competent jurisdiction will not be interfered with: *Nugent v. Vetzera*, 2 Eq. 704; *Re Willoughby*, 30 Ch. D. 324, C. A.; and the Court will give effect in all respects to the orders of the Courts of a foreign country in respect of an infant brought to this country, so far as is consistent with the law of England: *Di Savini v. Lousada*, 18 W. R. 425; 22 L. T. 61.

But in a case where the French mother of infants resident abroad was not a proper person to be appointed, and proceedings taken by her in France for the appointment of guardians were standing over until it should be seen what course the English Courts would adopt, the Court exercised its jurisdiction: *Re Willoughby*, *sup.*

And under special circumstances Scotch tutors dative appointed by the Court of Session have been restrained from interfering with the infant (for whom guardians had been appointed in this country) or his property other than his Scotch estates: *Marq. Bute's Case*, 9 H. L. C. 440; 4 Macq. Sc. Ap. 1; 2 Giff. 582; and their authority in this country over a Scotch domiciled infant has been negatived: *Beattie v. Johnstone*, 10 Cl. & F. 42; 1 Ph. 17.

And see *Re Dawson*, 3 D. M. & G. 764; 2 Sm. & G. 199, where English guardians were appointed for an infant who had been clandestinely removed from America, where she had real estate, in breach of an injunction granted by an American Court to restrain her removal.

Where it was doubtful whether the infants were to be considered as French or British subjects, and the French Court had exercised jurisdiction by appointing guardians, the English Court declined to interfere: *Re Bourgoise*, 41 Ch. D. 310, C. A.

Proceedings in Ireland appointing guardians in that country over infants there residing have been adopted by appointing the same persons guardians, and ordering payment to them of maintenance money out of the infant's fortune in Court here: *Daniel v. Newton*, 8 Beav. 485; and in *Re Morrison*, 16 Sim. 42, dividends of a fund in Court belonging to an infant, resident abroad, with a guardian appointed by a foreign Court, were paid to her solicitor here, on his undertaking to remit to the guardian; but the better course is to appoint a joint guardian here.

As to the appointment of a receiver of an infant's real estate, see Vol. I. Chap. XXXII., pp. 786, 803.

TESTAMENTARY GUARDIAN.

It being enacted by 1 V. c. 26, s. 7, that no will made by any person under twenty-one shall be valid, an infant can no longer exercise the power given by 12 Car. II. c. 24, without distinction of age, of appointing a guardian to his children by will, though he may still do so by deed.

Control will be exercised over a testamentary guardian if his conduct be improper: see *Talbot v. E. Shrewsbury*, 4 My. & Cr. 673; *D. Beaufort v. Berty*, 1 P. Wms. 704.

And though such a guardian is rarely if ever removed (see 2 L. C. Eq. 742; 1 L. C. Eq., 7th ed. 521), orders may be made regulating his conduct: *Roach v. Garvan*, 1 Vez. 160; *Jones v. Powell*, 9 Beav. 345.

The marriage of a female testamentary guardian does not of itself determine her office, but inquiries should, it seems, be directed whether it will be for the benefit of the infants to continue to reside with her notwithstanding her second marriage: *Jones v. Powell*, 9 Beav. 345; and see 2 L. C. Eq. 742; 1 L. C. Eq. 511, 514.

And, without removing the testamentary guardians from their office, the care and religious education of the infants may be intrusted to the mother, or other persons appointed for that purpose: see *Andrews v. Salt*, 8 Ch. 622; *Re Newbery*, 1 Eq. 431; 1 Ch. 263; *Smith v. Bate*, 2 Dick. 631; *Ingham v. Bickerdike*, 6 Madd. 275; *Re Clarke*, 21 Ch. D. 817. And *inf. Sect. IV.*, "CUSTODY OF INFANT."

The father may authorize the survivor of the testamentary guardians whom he has appointed to nominate another in the place of the one who has died: *Re Parnell*, L. R. 2 P. & M. 379.

Effect will be given to the recommendation of a father, who has, by will, appointed a guardian, that his children should be placed under the care of two other persons, subject to the guardian's general superintendence and control: *Knott v. Cottle*, 2 Ph. 192; *Hartley v. Smith*, 10 W. R. 750, 763; 9 Jur. N. S. 87; but the wishes of the father (though greatly respected by the Court: *Simpson*, 246, 247) will not be regarded if disadvantageous to the infant: *Hartley v. Smith*, *sup.*; *Simpson*, 347.

The nomination by a testator of a "guardian of the estate of my son during his minority," does not give the person so appointed the powers of a testamentary guardian so as to displace the mother from the care and custody of the infant: *Re Norbury*, L. R. 9 Eq. 134.

The appointment by the father of a testamentary guardian does not affect the right of the Court to appoint a receiver of the infant's estate: *Gardner v. Blane*, 1 Ha. 381; nor does it affect the rights of the mother under the Act next cited.

GUARDIANSHIP OF INFANTS ACT, 1886.

By this Act (49 & 50 V. c. 27), sect. 2, on the death of the father of an infant (or, in case the father has died prior to the passing of the Act, then from and after the passing of the Act, 25th June, 1886), "the mother, if surviving, shall be the guardian of such infant, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is, or are, dead, or refuses or refuse to act, the Court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother."

The section does not affect the rights of the father as to the religious education of his children: *Re Scanlan*, 40 Ch. D. 201 (where the deceased father being a Protestant, and the surviving mother a Roman Catholic, two Protestants were appointed to act jointly as co-guardians of the children, who were to be brought up in the Church of England).

By sect. 3 (1), "the mother of any infant may, by deed or will, appoint any person or persons to be guardian or guardians of such infant after the death of herself and the father of such infant (if such infant be then unmarried), and where guardians are appointed by both parents, they shall act jointly." (2) The mother may also, by deed or will, provisionally appoint a person or persons to act as guardian or guardians after her death jointly with the father, and the Court, after her death, "if it be shown to the satisfaction of the Court that the father is for any reason unfitted to be the sole guardian of his children," may confirm the appointment, or make such other order in respect of the guardianship as it thinks right. (3) "In the event of guardians being unable to agree upon a question affecting the welfare of an infant, any of them may apply to the Court for its direction, and the Court may make such order or orders, regarding the matters in difference, as it shall think proper."

Guardians under the Act are (by sect. 4) invested with the powers of testamentary guardians, under 12 Car. II. c. 24. The Court may make orders as to the custody of the infant: sect. 5 (*v. inf.* pp. 1041 *et seq.*); and, on

being satisfied that it is for the welfare of the infant, may, in its discretion, remove from his office any testamentary guardian or guardian under the Act, and also, if deemed for the welfare of the infant, appoint another guardian in the place of the guardian so removed: sect. 6; see *Re Grays*, 27 L. R. Ir. 609. Where a decree for judicial separation or divorce is pronounced, the Court may declare the parent, by reason of whose misconduct the decree is made, to be a person unfit to have the custody of the children of the marriage, and such parent shall not, upon the death of the other parent, be entitled as of right to the custody or guardianship of the children. The Act confers jurisdiction upon the County Court, subject to provisions for removal of proceedings to the Ch. Div. of the High Court, and for appeals to be heard by a Judge of the Ch. Div. at Chambers, or in Court, as he shall direct: sects. 9, 10; and provides for the making of rules: sect. 11.

Nothing in the Act is to restrict or affect the jurisdiction of the High Court, or any division thereof, to appoint or remove guardians, or otherwise in respect of infants: sect. 13.

Applications under the Act are to be made by summons; where there is any pending action or proceeding, by a summons in the action or proceeding, and in the matter of the infant; and where there is no pending action or proceeding, by an originating summons in the matter of the infant: R. S. C. Guardianship of Infants, r. 2.

A summons under sect. 2 of the Act may be taken out by any next friend of the infant, and is to be served on the mother; and a summons under sect. 3 (2) of the Act may be taken out by any next friend of the infant, and is to be served upon the father.

A summons under sect. 3 (3) may be taken out by any guardian of the infant, and is to be served on the other guardian or guardians: rr. 3, 4.

Under sect. 5, a summons taken out by the mother is to be served on the father, or, if he be dead, upon the guardian or guardians; and a summons taken out by the father is to be served on the mother, or, if she be dead, upon the guardian or guardians, other than the father; and a summons taken out by any guardian of an infant, other than a parent, is to be served on the other guardian or guardians, if any, other than a surviving parent, and also upon the surviving parent: r. 5.

A summons under sect. 6 may be taken out by any next friend of the infant, and is to be served upon his guardian or guardians: r. 6.

The Court may direct that any persons, other than those mentioned in the rules, be served: r. 9.

The evidence to be adduced upon any application for the appointment of a guardian is to show: (a) the age of the infant; (b) the nature and amount of the infant's fortune and income; (c) what relations the infant has: r. 10.

The Court has power to remove a guardian appointed by the mother under sect. 3, if satisfied that it is for the welfare of the infants so to do: *Re McGrath*, (1892) 2 Ch. 496; (1893) 1 Ch. 143, C. A.

The appointment by the mother under sect. 3, sub-sect. 2, should be in form an appointment of guardians to act "jointly with the father," and the order of the Court after her death confirming the appointment should be made in that form, and upon evidence that the father is "unfit to be the sole guardian"; but a testamentary appointment by the mother, though wrong in form, will be acted upon by the Court, if intended to be made under the statutory power: *Re G.*, (1892) 1 Ch. 292; Form 9, *inf.* p. 1037.

The general jurisdiction of the Court, and its power, in a proper case, to displace the father altogether, is not affected by the Act: *S. C.*

Where there is no guardian appointed by the father in existence, the mother, if surviving, is entitled to be the sole guardian of her infant child, and the statutory and inherent jurisdiction of the Court to appoint a guardian to act jointly with the mother will not be exercised merely because the mother has married a second husband of a religion different from hers and that of the infant, if there is no personal misconduct or interference with the proper bringing up of the infant; but the Court will only interfere where it is shown that, having regard to the real benefit of the infant, it ought to do so: *In Re X. X. v. Y.*, (1899) 1 Ch. 526, C. A.

(II.) ORDERS RELATING TO MAINTENANCE AND EDUCATION.

1. *Order for Increase of Maintenance.*

LET the sum of £— a year be allowed, in addition to the sum of £— a year, allowed by the order dated &c., making together the sum of £— a year, for the maintenance and education of A., the infant, such increased allowance to commence as from &c., and be paid out of the income of the trust estate in the said order dated &c., mentioned to H., the father of the said infant, during his minority, or until further order.—*Re W. H. Hora, an Infant*, M. R. at Chambers, 18 Feb. 1873, A. 407.

If the increase is to be paid out of funds in Court, see Form 5, *sup.* p. 991.

For order for sale of so much of the fund in Court as would raise £—; being £31 for maintenance of the infant from — to —; £— the amount of a doctor's bill for the infant and of his expenses to the sea-side; and £— as the costs of the application and payment to the guardian, he undertaking to apply the said sum of £31 for the maintenance and clothing of the infant from a past date, see *Re Hay, an Infant*, V.-C. B. at Chambers, 10 Feb. 1873, A. 206.

For allowance of £35 for the purchase of a pianoforte for the infant, and direction for the trustees to raise the amount by sale of Consols standing in their names, and to lay out the money in the purchase; allowance of £30 (including the sum of £15 already paid for the maintenance and education of the infant for the time past), and allowance of a sum, not exceeding £40 per annum, for future maintenance during minority; such last-mentioned allowance to be paid to B. B., the father of the infant, by half-yearly payments, to be paid and retained out of surplus income, see *Re Bendrey, an Infant*, V.-C. W. at Chambers, 11 March, 1873, A. 714.

For inquiry, on petition of next of kin, whether a person of unsound mind not so found has been properly maintained, and whether any and what further provision ought to be made for her maintenance and comfort, see *Madden v. Baxter*, M. R., 21 Dec. 1859, B. 469.

For forms of application, &c. in reference to maintenance, see D. C. F. 687 *et seq.*

2. *Declaration as to Rights of Infants—Conveyancing Act, 1881, s. 43.*

DECLARE, that upon the true construction of the testator's will and in the events which have happened the Deft M. A. D., who attained the age of twenty-one years on the — day of —, is entitled to one-sixth of the corpus and income accumulations after the payment of costs hereinafter directed of and in the residuary estate of the testator, and that the remaining five-sixths of the said income accumulations are applicable, at the discretion of the trustees of the said will, for or towards the maintenance, education, or benefit of the infant Plt C. F. H. and the infant Defts J. H. E. H., G. A. H., T. P. A. H., and J. C. H.; The trustees of the will to pay and retain the costs of all parties, to be taxed, out of the said income accumulations.—See *Re Holford, Holford v. Holford*, Chitty, J., 15 March, 1894, A. 434; affirmed by C. A., 28 May, 1894; (1894) 3 Ch. 30, C. A.

3. *Advance for Maintenance, out of Income of Contingent Share, secured by Policy.*

“AND the Judge being of opinion that it is fit and proper, and for the benefit of the infant E., that the sum of £225 should be allowed

for her past maintenance and education from &c. to &c., and that the annual sum of £150 should be allowed for her future maintenance &c.; And it appearing that the only fortune of the said infant E. consists of the share of and in the real and residuary personal estate of the testatrix K. to which the said infant is presumptively entitled, and will become absolutely entitled under the said will on her attaining the age of twenty-one years or being married, and that the income arising and to arise from such share is not in the meantime applicable for the maintenance and education of the said infant; and it having been proposed and submitted to the Judge by or on behalf of the said A., the father of the said infant, that &c., and the Judge having approved of the said proposal, and it appearing that the policy of assurance herein-after mentioned has been effected with the M. Society in the names of N. and J., No. —, dated &c., for the sum of £4,000 on the life of the said infant E., Let the said policy of assurance be deposited in the Central Office; And Let the same be held as a security for the purpose of recouping and repaying to the estate of the testatrix any loss in the event of the death of the said E. without having attained the age of twenty-one years or marrying, the amounts which shall have been paid or advanced out of the share of the annual income of the real and residuary personal estate of the testatrix to which the said infant is so presumptively entitled, for the maintenance and education of the said infant, and for procuring and keeping on foot the said policy, and for the costs of obtaining this order, and also such an amount or sum of money as will be equivalent to the amounts of money or funds and securities which would have arisen from such part of the said annual income as shall be so paid and applied, in case the same instead of having been so paid and applied had been accumulated at compound interest by the investment thereof, and all the resulting income thereof in manner directed by the said will; And Let notice of such deposit and of the purpose for which the said policy has been so effected and deposited be given to the said M. Society; And Let, upon such deposit being made and such notice being given, the sum of £225 be allowed for the maintenance and education of the said infant from &c. to &c., and be paid by the said N. and J. as such trustees as aforesaid to the said A., the father of the said infant, out of the share of the annual income which has arisen from the said real and residuary personal estate to which the said infant is presumptively entitled under the said will on her attaining her age of twenty-one years or on marriage."—Allow the annual sum of £150 for future maintenance to be paid in the same manner.—Trustees to pay the costs and first premium out of the same funds.—And Let the funds in Court be dealt with as directed in the schedule hereto, and the payments of premiums thereby directed are to be considered as payments out of the share of the annual income which shall arise from the said real and residuary personal estate to which the said infant is so presumptively entitled as aforesaid.

(Insert in Payment Schedule.)

		£ s. d.	£ s. d.
Out of the dividends as they accrue on the above (New Consols)— Pay the premiums due on the — day of —, and on the same day in each succeeding year, on the policy to be effected on the life of E., as in this order mentioned.	C. D., the actuary, for E. F., the principal officer of the M. Society, or other the actuary or principal officer for the time being of the said society.		

—See *Re Arbuckle*, V.-C. K., 30 May, 1866, A. 1233; *S. C.*, 14 W. R. 535; 14 L. T. 538; followed in *Re Bruce*, Kay, J., 30 W. R. 922.

4. Maintenance charged on Infant's Real Estate.

LET the Defts [*the exors and trustees*] out of any funds in their hands pay to the Deft T. on her separate receipt the sum of £— for the past maintenance of the Plt up to &c., and the yearly sum of £— for his future maintenance from the last-mentioned day; and if such funds shall be insufficient, Declare that what the Defts [*the exors and trustees*] or either of them shall have paid or shall pay in respect of such past or future maintenance ought to be a charge upon the estate and interest of the Plt in the real and personal estate of the testator given and devised to him by the testator's will.—*Fentiman v. F.*, V.-C. E., 1841, A. 1676; *S. C.*, 13 Sim. 172. See also *Re Allen*, 1849, A. 760; 8 Ch. 417, n.; *Re Howarth*, 8 Ch. 415; but see *inf.* p. 1010.

5. Accumulation of Income of particular Property applied for Maintenance—Infant being entitled to more Funds than one.

THE application of the Plts, which upon hearing &c., in Chambers, was adjourned &c., and upon hearing counsel for the Plt and Defts, Declare that upon the true construction of the will of X., and in the events which have happened, the Deft A. B. is absolutely entitled to the whole of the accumulations which have arisen during her minority from one moiety of a certain legacy of £—, and of a freehold house called &c., and from the share of the residuary estate of the testator settled upon the said A. B. and her children (if any); And this Court being of opinion that it is for the benefit of the infant Deft C. D., that as between the income of her moiety of the said legacy of £— and the said house, and the income of the share of the residuary estate of the testator settled upon the said C. D. and her children (if any), the income of the moiety of the said legacy and house should be primarily applied for her maintenance, Let her maintenance be provided for accordingly by the Plts, as such trustees, at their discretion.—Tax costs of Plts and Defts as between solr and client.—Let such costs be retained and paid by the said trustees, as to the costs of the Plts and the Deft E. F., out of the residuary estate of the testator, and as to the costs of the Defts A. B. and C. D. out of the accumulations of income of their respective moieties in the said legacy and house.—*Re Wells*, *Wells v. W.*, North, J., 7 Dec. 1889, B. 1680; *S. C.*, 43 Ch. D. 281. See also *Lucas v. King*, 11 W. R. 818; *Martin v. M.*, 1 Eq. 369; *Simpson*, 320,

6. *Tenant for Life declared entitled to Accumulations of Income during Infancy—Conveyancing Act, 1881, s. 43, sub-ss. 2, 3.*

DECLARE that the accumulations, representing or attributable to income of the share of the Deft A. N. E. H. L., of the residuary estate of the testator, accrued prior to and since the said Deft's marriage with J. A. L., ought to be paid to her by the Plts [*the executors and trustees*].—See *Re Humphreys, Humphreys v. Levett*, North, J., 20 Dec. 1892, A. 1902; affirmed by C. A., 24 Ap. 1893, A. 680A; (1893) 3 Ch. 1, C. A.

7. *Intermediate Rents applicable for Maintenance of Infants—Contingent Legatees—Conveyancing Act, 1881, s. 43.*

DECLARE that the rents and profits of the leasehold estate of the above-named J. S. W. deceased, devised in trust for the testator's daughter E., afterwards E. G., and her children, from the death of the said E. G. until a child of the said E. G. attains the age of twenty-one years, or being a daughter attains that age or marries, are, with the accumulations thereof, applicable for the maintenance of the infant Deft J. S. G. and the other children of the said E. G.—See *Re Woodin, Woodin v. Glass*, C. A. 24 May, 1895, B. 1907; (1895) 2 Ch. 309, C. A.

8. *Infant having come of Age, Guardian of Estate to pass his Accounts and pay over Balances.*

UPON the application of D., late an infant, but now of full age &c., Let the fund in Court to the credit of &c. be dealt with as directed in the schedule hereto; And Let M. S. [*guardian*] forthwith leave in the Chambers of the Judge his first and final account as such guardian, and, within such time as shall be fixed by the Master for the allowance of such account, pay the balance which shall be certified to be due from him to the said D.; And Let the said M. S., on or before &c., transfer and pay to the said D. the several funds belonging to the said D. arising from the estate of the late B., deceased, the grandfather of the said D., and of I. B., deceased, the aunt of the said D., and any dividends accrued or to accrue thereon, the amount to be verified by affidavit; And Let, upon his passing his account and transferring and paying over such balance and funds as aforesaid, the recognizance dated &c. entered into by the said M. S. be vacated; And Let the costs of the said M. S. of preparing and passing his account as such guardian be allowed him as a disbursement in such account.—[Add Payment Schedule, Form No. 34.]—See *Re Davis, Basire v. Passingham*, V.-C. H. at Chambers, 15 June, 1876, A. 1673.

9. Infant placed as a Pupil, or at School.

LET the Plt H. be allowed to enter and remain as a pupil in the offices of Messrs. C., accountants, of &c., until the expiration of one year from &c., or until arrangements be made for his entering a suitable mercantile house; And Let the name of the Plt A. be entered at the house of T., one of the house masters at M— college, as an intended boarder.—*Soden v. S.*, V.-C. H. at Chambers, 28 April, 1876, B. 903.

For orders under the old practice directing a scheme for the education and bringing up of infants according to the meaning and intention of the testator as expressed in his will, regard being had to their rank and expectations in life, and to all the circumstances of the case, see *Knott v. Cottee*, 1843, A. 648; *S. C.*, 2 Ph. 192; *Colston v. Morris*, 1818, A. 1444; *Knighley v. Leigh*, 1832, A. 2383; and see Simpson, Infants, 257 *et seq.*

10. Infant to be Articled or Apprenticed.

LET A., the infant, be placed out as an articted clerk [*or apprentice*] with B., of &c., for the term of — years, for the purpose of being instructed in the profession [*or trade, or business, or art*] of &c.; And Let £— be allowed as a proper premium to be paid to the said B. on that occasion; [*If so, and £— for the necessary outfit of the said infant;*] And the Judge having approved of the articles of clerkship [*or indenture of apprenticeship*] marked A, intended to be made between &c., of &c., as proper articles of clerkship [*or a proper indenture*] to be executed for the purpose aforesaid, as appears by the memorandum of approval signed by the Master in the margin of the engrossment thereof; Let, upon the execution of such articles [*or indenture*] by such parties thereto as the Judge shall direct, D. and E., the trustees of the will of &c. [*or the receiver appointed in this action*], out of the rents and profits of the estates of the said infant, pay the said sum of £— to the said B. for such premium as aforesaid; *If so*, and the said sum of £— to C., the guardian of the said infant, for such outfit, the said C., by his solicitor, undertaking to apply the same accordingly; and £— for the costs of the said infant of this application; *If so*, and retain the sum of £— for their own costs in respect thereof; *Or, if out of fund in Court*, And Let, upon the execution of such articles *or indenture* by such parties thereto as the Judge shall direct, being certified [*or by X., Y., and Z. (naming them)*], such execution to be verified by affidavit, the fund in Court be dealt with as directed in the schedule hereto. (*Insert in Payment Schedule.*)

Upon the execution of the articles <i>or indenture</i> in the order mentioned by such parties thereto as the Judge shall direct being certified [<i>or by X., Y. and Z. (naming them)</i>], such execution to be verified by affidavit.— Sell sufficient (New Consols) to raise (£100). Out of proceeds pay.....	{ B. C., the person to whom the infant is to be articted <i>or apprenticed.</i>	£ s. d.	£ s. d.
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For forms of application, &c., see D. C. F. 689 *et seq.*

For such order for payment by trustees, see *Dixon v. Wilkinson*, V.-C. K., 10 March, 1857, A. 1097.

For order to place infant with Messrs. Green, shipowners, and allowances, see *Re Cramer*, V.-C. K. in Chambers, 6 June, 1860, B. 1091.

For order for cancelling the indentures with the Master's consent, the infant having become imbecile, see *Hughes v. H.*, M. B., 30 Jan. 1862, A. 380.

11. *Determining Apprenticeship of Infant in consequence of Bankruptcy of Master, and for return of part of Premium.*

UPON the application of D., the mother of the infant Plt, &c., Let the applicant be at liberty, pursuant to sect. 33 of the Bankruptcy Act, 1869 [now sect. 41 of the Bankruptcy Act, 1883], to determine the indenture of apprenticeship between the applicant and the infant and G., dated &c., in consequence of the bankruptcy of the said G.; And Let the applicant be at liberty to apply to the trustee, D., under such bankruptcy, to pay to the applicant out of the bankrupt's estate as a preferential claim, such a sum (part of the premium of £— paid to the said bankrupt) for the use of the said infant as he is entitled to claim, regard being had to the amount of the premium paid, and the time which the said infant has served with the said bankrupt, and the other circumstances of the case, with liberty to the said trustee to reserve a sufficient part of the bankrupt's estate available for that purpose to satisfy such claim.—*Re Dent, D. v. Harden*, Kay, J., at Chambers, 5 August, 1882, A. 3877.

NOTES.

MAINTENANCE—FATHER'S ABILITY.

Applications as to the guardianship and maintenance or advancement of infants are to be made in Chambers: O. LV, 2 (12).

The Court has no jurisdiction on a summons for maintenance, intituled only in the matter of the infant, to order trustees to pay a certain sum out of income for maintenance; either an action or originating summons is necessary to give the Court adverse jurisdiction: *Re Lofthouse*, 29 Ch. D. 921, C. A.

An inquiry was formerly directed whether the father was of ability to maintain and educate the infant in a manner suitable to his fortune, and if not, as to the amount of maintenance, and out of what fund the same ought to be paid, and whether to the father or to what other person: see *Kekewich v. Langston*, 11 Sim. 291; but the application is now made in Chambers without any preliminary inquiry.

As a general rule maintenance will not be given out of the infants' property during the father's life if he is able to maintain them: *Jackson v. J.*; *Fawkner v. Watts*, 1 Atk. 515, 408; *Butler v. B.*; *Darley v. D.*, 3 Atk. 60, 399; their maintenance being in law due from him: *Andrews v. Partington*, 2 Cox, 223; even though the gift contains a provision for maintenance: *Hughes v. H.*, 1 Bro. C. C. 387; *Lucknow v. Brown*, 12 Jur. 1017;

—unless there is an express gift to the father for that purpose: *Hughes v. H.*, *sup.*; *Hawkins v. Watts*, 7 Sim. 199; *Leach v. L.*, 13 Sim. 304;

—or a trust for the maintenance of the children (as distinguished from a mere power: see *Newton v. Curzon*, 16 L. T. 696) contained in an antenuptial marriage settlement, and therefore based upon contract; in which case the father has been considered as a purchaser of so much of the fund as would be properly applicable for maintenance, and entitled to an allowance for past and future maintenance without reference to his ability, and a distinction has been drawn between such a case and that of a purely voluntary settlement: *Mundy v. E. Howe*, 4 Bro. C. C. 223; *Re Kerrison's Trusts*, 12 Eq. 422; *Ransome v. Burgess*, 3 Eq. 773; *Thompson v. Griffin*, Cr. & Ph. 317; but the principle of *Mundy v. E. Howe*, *sup.*, and the cases founded on it, is not to be extended, and must (*semble*) be limited to cases where there is a trust to apply the whole or part of the income for maintenance, rendering it obligatory on the trustees to make such application, and not extended to

cases where the words of the trust import discretion, *e.g.*, where the trust is to apply the whole or part of the income "in or towards" the maintenance: *Wilson v. Turner*, 22 Ch. D. 521, C. A., not following *Ransome v. Burgess*, *sup.*, and tending to show that the question must depend rather on the wording of the trust than on the character of the instrument. In *Wilson v. Turner*, the trustees having, without exercising any discretion, paid the whole income to the father, it was held that the father's estate must account for the income received by him; and see *Hoste v. Pratt*, 3 Ves. 730; *Brophy v. Bellamy*, 8 Ch. 798, where the Court declined to control the discretion of trustees under a will to apply the income of infants' shares towards their maintenance irrespectively of the ability of the father to maintain them.

If the father is not of ability, maintenance will be allowed, though there be no express provision in the gift for that purpose: *Errat v. Barlow*, 14 Ves. 202; *Cavendish v. Mercer*, *Fendall v. Nash*, 5 Ves. 195, n., 7, n.

—and all the dividends were paid to him without inquiry where he was in very poor circumstances: *Payne v. Low*, 1 Russ. & M. 223.

In allowing maintenance where the father is not of sufficient ability or is dead, the Court has refused to take into consideration the mother's ability to maintain them, even where she had separate estate: *Billingsley v. Critchett*, 1 Bro. C. C. 268; *Haley v. Bannister*, 4 Mad. 275; *Lanoy v. Ds. Athol*, 2 Atk. 447; *Exp. L. Petre*, 7 Ves. 403; *Douglas v. Andrews*, 12 Beav. 310.

It is provided, however, by the Married Women's Property Act, 1882, s. 21, that a married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren, as the husband is now by law subject to, provided that nothing in the Act is to relieve the husband from his liability.

The father's ability is to be estimated not merely with regard to his own circumstances, but to the state of his family, the infant's expectations, and the necessity of an education suitable to such expectations: see *Buckworth v. B.*, 1 Cox, 80; and in many cases maintenance has been allowed even where the father had ample means: see *Jervoise v. Silk*, G. Coop. 52; *Haley v. Bannister*, 4 Madd. 275; *Exp. Williams*, 2 Coll. 740; *Simpson*, 296.

The sum allowed for the maintenance of a female infant to the mother or other person who has undertaken the charge will be measured not by the actual cost of the infant's maintenance, but by the expenses of the establishment which has been kept up for her benefit: see *Brown v. Smith*, 10 Ch. D. 377, C. A.

And the rule is that a liberal allowance for the maintenance of an infant will be directed, having regard to the circumstances of his family, especially the bringing up of his brothers and sisters in such situations as to reflect credit upon him: see *Wellesley v. D. Beaufort*, 2 Russ. 28; *Harvey v. H.*, 2 P. Wms. 21; *Lanoy v. Ds. Athol*, 2 Atk. 447; *Petre v. P.*, 3 Atk. 511; *Tweddell v. T.*, T. & B. 13.

On the consent of a first tenant in tail of personal property, an allowance was granted for infants entitled successively as tenants for life after the death of their father, who was also previously entitled for life: *Re Allan, Havelock v. H.*, 17 Ch. D. 807; and see *Re Collins, C. v. C.*, 32 Ch. D. 229; but where there was a trust to accumulate the income for twenty years, the Court refused to continue maintenance out of the estate after the infant came of age, before the expiration of the twenty years: *Re Alford, Hunt v. Purry*, 32 Ch. D. 383. As to the allowance of maintenance under special circumstances, notwithstanding a direction for accumulation, *v. inf.* p. 1010.

And in *Allen v. Coster*, 1 Beav. 202, the infant's maintenance was increased on account of the parents' indigency.

And out of an allowance for the maintenance and education of an infant entitled to large property, the residue, after providing the amount certified to be necessary for that purpose, has been ordered to be paid to the mother: *Heysham v. H.*, 1 Cox, 179.

This principle has been extended to the case of an illegitimate brother of the infant, born of the same parents, but left unprovided for: *Bradshaw v. B.*, 1 J. & W. 647.

PAST MAINTENANCE.

Formerly, even though the father was not of ability, maintenance could not be allowed to him for the time past: *Hughes v. H.*, 1 Bro. C. C.

387; *Hill v. Chapman*, 2 Bro. C. C. 231; *Andrews v. Partington*, 3 Bro. C. C. 60.

But it may now be allowed to a parent, if not of ability, for time past as well as to come: *Reeves v. Brymer*, *Sherwood v. Smith*, 6 Ves. 425, 454; *Re Hodges*, *Davey v. Ward*, 7 Ch. D. 754; especially where the father has incurred debts and sold property for the purpose of maintaining his child: *Parsons v. Peters*, 11 Jur. N. S. 150; 11 L. T. 501; 13 W. R. 214.

A release by an infant with full knowledge, after coming of age, to the trustees who had, notwithstanding a trust for accumulation, allowed the father, on the ground of his want of means, to apply the dividends of her share for her maintenance, was held to have discharged the trustees from all liability in respect of her share: *Aveline v. Melhuish*, 2 D. J. & S. 288.

A mother of an orphan child has, after its death, been allowed sums expended for past maintenance: *Bruin v. Knott*, 1 Ph. 572; 12 Sim. 459; and see *Brown v. Smith*, 10 Ch. D. 377, C. A.

But advances to an infant by his mother, without evidence of any intention to claim repayment, were held not to constitute a debt due to her out of his estate: *Re Cottrell*, 12 Eq. 566.

PERSON OF UNSOUND MIND.

The jurisdiction of the Ch. Div. to give directions as to the maintenance of a person of unsound mind is not confined to applying income, but extends to capital: *Re Tuer's Will Trusts*, 32 Ch. D. 39, C. A.; but is not exercisable unless there is either money belonging to him in Court, or the Court has control over his property, by reason of there being an action, or some other proceeding pending relating to the property: *Re Grinnett's Trusts*, 56 L. J. Ch. 419; *Re Macfarlane*, 2 J. & H. 673; *Re Burke*; *Re Tayler*, 2 D. F. & J. 124, 125.

Where the property of a person of unsound mind not so found is small (though exceeding the limit fixed by the Lunacy Regulation Act, 1862, s. 12,—£1,000 in value, or £50 per ann.—increased to £2,000 and £100 by the Lunacy Act, 1890, s. 116), and there is no intention to take proceedings in Lunacy, the Ch. Div. of the High Court may give directions as to the maintenance of such person: *Vane v. V.*, 2 Ch. D. 124; *Whithy's Trusts*, W. N. (77) 208; but it has no jurisdiction to appoint a guardian of his person: *Re Bligh*, 12 Ch. D. 364, C. A. (correcting *Vane v. V.*, 2 Ch. D. 124); and see *Brandon's Trusts*, 13 Ch. D. 773.

Where the fund was of small amount, the Court directed that the whole income should be paid to the wife of the *non compos* for his maintenance: *Re Silva's Trusts*, 36 W. R. 366; W. N. (88) 3.

As to the right of the Master in Lunacy in New South Wales in respect of a fund in Court belonging to a person of unsound mind, not so found, resident in the colony, and that the Court in such a case would be justified in paying to the colonial Master in Lunacy sums which the competent colonial authority decided to be necessary for the maintenance or benefit of the *non compos*, see *Re Barlow's Will*, 36 Ch. D. 287, C. A.; and that it is competent to the Court to pay the capital fund to the foreign curator if his authority to receive and get in the trust property is satisfactorily proved: see *Didisheim v. London & Westminster Bk.*, (1900) 2 Ch. 15, 50, C. A.; or the income, in excess of what is required for maintenance, where the lunatic is an Englishwoman resident abroad: *New York Trust Co. v. Keyser*, (1901) 1 Ch. 666.

Where the fund in Court was the sole property of a German lady, whose only connection with this country arose from the fact that her mother was English, and who had been found lunatic by, and made a ward of the proper tribunal in Germany, the Court ordered a transfer of the fund to a commission of the German Court appointed for the purpose: *Re De Linden*, (1897) 1 Ch. 453; and as to the like discretion of the Court in lunacy under s. 134 of the Lunacy Act, 1890, see *Re Brown*, (1895) 2 Ch. 666, C. A.; *Re Knight*, (1898) 1 Ch. 257, C. A.; and see Lewin on Trusts, 10th ed. pp. 416, 417; the Court will in general order the transfer or payment of the lunatic's English property to the foreign tuteur, whether the property is a trust fund under the control of the Court, or merely a debt due to the estate: *Thiery v. Chalmers*, (1900) 1 Ch. 80; following *In re Brown*, (1895) 2 Ch. 666, C. A.; and *In re De Linden*, (1897) 1 Ch. 453; and as to the right of a foreign tuteur,

curator, or *admor provisionaire* to apply to the Court as next friend of or on behalf of a lunatic, not so found, see *Didisheim v. London & Westminster Bk.*, *sup.*; *Thiery v. Chalmers*, *sup.* But under s. 134 of the Lunacy Act, 1890, the Court in lunacy has no jurisdiction to order a transfer of the securities of a foreign lunatic unless his status has been altered by a judicial declaration of lunacy according to the foreign law: *Didisheim v. London & Westminster Bk.*, *sup.*

As to the allowance of maintenance to a pauper lunatic, see *Re Tye*, (1900) 1 Ch. 249, C. A.; and *inf.* p. 1070.

MODE OF RAISING MONEY FOR MAINTENANCE.

In order to provide maintenance for infants who are only entitled contingently upon attaining twenty-one, where there is nothing in the instrument to warrant maintenance, the course has been taken of effecting a policy of insurance, so as, in the event of the infant dying under twenty-one, to recoup the amount paid for maintenance and for the premiums upon the policy: see *Re Arbuckle*, 14 W. R. 535; 11 L. T. 538; *sup.*, Form 3, p. 1002; and that this is the proper form of order, see *Re Tanner*, 53 L. J. Ch. 1108; 51 L. T. 507, in which case Kay, J., refused to declare that sums advanced by a father for the benefit of his infant son were a charge on property to which the son was entitled only in the event of his attaining twenty-one: and see *Re Robinson*, 16 W. R. 1106; 19 L. T. 81.

The same course has been followed with respect to the reversionary interests (some of which were contingent on attaining twenty-one) of infants expectant on the life interest of their father, who was unable to maintain them: *De Witte v. Palin*, 14 Eq. 251.

Where infants were entitled under a will to certain specified maintenance, and also to interests in expectancy, increased maintenance was allowed by the Court out of income directed to be accumulated, and the trustees of the will were ordered to hold the interests of the infants as security to recoup any persons affected by the order: *Re Colgan*, 19 Ch. D. 305.

On application by an infant for maintenance, the expenses of his past maintenance and the costs of the application have been charged without suit on the *corpus* of his freehold estate: *Re Howarth*, 8 Ch. 415; the case proceeding on the ground that anyone who maintained the infant could obtain a judgment against him, which would charge his real estate, and that the order made came substantially to the same thing; but in *Re Hamilton*, 31 Ch. D. 291, C. A., the Court of Appeal held that there was no jurisdiction to charge maintenance of an infant on his reversionary estate tail, inasmuch as such an estate could not be taken in execution, and that the principle of *Re Howarth* did not apply; and in *Cadman v. C.*, 33 Ch. D. 397, C. A., where infants were successively entitled as tenants in tail in remainder, and the tenant for life was willing to release her life interest, it was held that there was no power to charge the estate for maintenance of the infants, and it was doubted whether the Court was warranted, in *Re Howarth*, in making the order which was there made; and see *Simpson*, 307; and *Re Swanston*, 31 Sol. J. 427, C. A., where it was held that the Court had no power to charge an infant's real estate for the purpose of his advancement.

Notwithstanding an antecedent trust for accumulation, maintenance has been allowed under special circumstances: *Re Allan, Havelock v. H.*, 17 Ch. D. 807, followed in *Re Collins, C. v. C.*, 32 Ch. D. 229; *Simpson*, 264, and note; but there is no general jurisdiction in the Court to disregard such trust, even though there is no other way in which maintenance can be provided for the person, who, if he is living at the end of the accumulation, will be the tenant for life: *Re Alford, Hunt v. Parry*, 32 Ch. D. 383 (where *Re Allan, Havelock v. H.*, was distinguished by Pearson, J.); and see *Kemmis v. K.*, 13 L. R. Ir. 372; *Re Smeed, Archer v. Prall*, 54 L. T. 929; *King-Hurman v. Cayley* (1899), 1 L. R. 39 (where, upon the construction of the will, the trustees were held to be empowered to allow maintenance notwithstanding an express direction that in a particular event, which had happened, the income should be accumulated and applied in reduction of charges).

Maintenance will be allowed in the form most beneficial to the infant, and where more than one fund is available, out of that which it is most for his benefit to have recourse to: *Lucas v. King*, 11 W. R. 818; 8 L. T. 623; *Re*

Weaver, 21 Ch. D. 615, C. A.; e.g., by payment of interest upon a legacy under his father's will contingent upon his attaining twenty-one, rather than out of his share of residue: *Martin v. M.*, 1 Eq. 369; or from a fund specially provided for maintenance, and subject thereto given over: *Simpson*, p. 320.

And where trustees had not exercised their discretion as to the fund out of which the maintenance should come, the Court exercised it by directing that the amount paid for maintenance should be deemed to have been primarily paid in the way which was most for the benefit of the infant: *Re Wells, W.* v. *W.*, 43 Ch. D. 281; *Form 5, sup.* p. 1004.

In cases of necessity, especially where the legacy or trust fund is small, and the income insufficient, small portions of the capital have been applied, and trustees will be allowed sums so expended for the maintenance and education, or for the advancement in life, of infant children: see *Exp. Chambers*, 1 Rus. & M. 577; *Exp. England*, *ib.* 499; *Nottley v. Palmer*, 11 Jur. N. S. 968; 13 L. T. 647; 14 W. R. 170; *Re Tibbs*, 17 W. R. 304; *Prince v. Hine*, 26 Beav. 634; *Worthington v. M'Craer*, 23 Beav. 81.

So also where an exor has advanced for the maintenance of children sums exceeding their presumptive shares, which were small, he has been allowed in admon the balance after payment of the costs of suit: *Robison v. Killey*, 30 Beav. 520.

In addition to the sum directed by a testator to be allowed for maintenance the Court has ordered payment out of the rents of the settled estate of such a sum as will keep up the principal mansion as a residence for the minor, so as to carry out the testator's clearly expressed intention: *Griggs v. Gibson* (2), 14 W. R. 538; *Re Walker, W. v. Duncombe*, (1901) 1 Ch. 879; and allowed various sums for re-furnishing, decorating, and repairs: *S. C.*, 21 W. R. 818, *inf.* Sect. V. (1), *Form 7*, p. 1018.

A discretion given to trustees for the application of the income of an estate for maintenance will not, in the absence of a *malâ fide* exercise, be controlled by the Court: *Gisborne v. G.*, 2 App. Ca. 300; *Re Roper's Trust*, 11 Ch. D. 272; *Tabor v. Brooks*, 10 Ch. D. 273; *Re Lofthouse*, 29 Ch. D. 921, C. A.; *Re Bryant, B. v. Hickley*, (1894) 1 Ch. 324. But the trustees must exercise their discretion: *Wilson v. Turner*, 22 Ch. D. 521; see *sup.* p. 1008; and in exercising it should consider what is most for the benefit of the infant, and should not be deterred from doing what is for the benefit of the infant, because it is also a benefit to the father, though, on the other hand, they ought not to act with a view to the father's benefit, apart from that of the infant: *S. C.* If the discretion has been improperly exercised, having regard to the terms of the trust, the Court will take upon itself the regulation of the maintenance: *Costabadie v. C.*, 6 Ha. 410; *Davey v. Ward*, 7 Ch. D. 754; *Re Roper's Trusts*, 11 Ch. D. 272; and see *Lewin on Trusts*, 10th ed. p. 730.

The trustees must exercise their discretion according to the circumstances as they exist at the time, and not commit themselves *â priori* as to the mode of execution of the trust *in futuro*: *Weller v. Ker*, 1 Sc. App. 11; *Moore v. Clench*, 1 Ch. D. 447, 453; *Chambers v. Smith*, 3 App. Ca. 795, 815; *Oceanic Steam Navigation Co. v. Sutherland*, 16 Ch. D. 236, C. A.; *Saul v. Puttinson*, 55 L. J. Ch. 831; 54 L. T. 670; 34 W. R. 561; and see *Thacker v. Key*, 8 L. R. 8 Eq. 408; and *In re Wise, Jackson v. Parrott*, (1896) 1 Ch. 281 (in which case directions for maintenance were held to be distinct from the trust of the capital, and to be valid though the trust was void for remoteness).

Guardians and committees having an allowance for maintenance will not be called on to account for the expenditure if it appears that the infants have been maintained, educated, and supported: *Hora v. H.*, 33 Beav. 88; *Jodrell v. J.*, 14 Beav. 397; *Re Evans, Welch v. Channell*, 26 Ch. D. 58, C. A.; but where a guardian paid the whole income to his co-guardian, who maintained the infants, he had to show that they were properly maintained: *S. C.*; and as to refunding allowance paid in advance, on death of lunatic, see *Strangways v. Read*, (1898) 2 Ch. 419.

Orders may be made for the maintenance of infants out of the jurisdiction: see *Stephens v. James*, 1 M. & K. 633; *Wyndham v. L. Ennismore*, 1 Ke. 468; and where both the infant and the father resided out of the jurisdiction, the order, upon appointment by the father of an attorney to receive the maintenance, was for payment of the dividends of the fund to such attorney half-yearly, upon production to the accountant general of an affidavit that he had duly applied, in the maintenance and education of the infant, all moneys received by him on that account up to the time of making such affidavits respectively: *De Weever v. Rochport*, 6 Beav. 391.

COSTS.

By O. LXV, 13, "Where the Court or a Judge appoints one of the solrs of the Court to be guardian *ad litem* of an infant or person of unsound mind, the Court or Judge may direct that the costs to be incurred in the performance of the duties of such office shall be borne and paid either by the parties, or some one or more of the parties, to the cause or matter in which such appointment is made, or out of any fund in Court in which such infant or person of unsound mind may be interested, and may give directions for the repayment or allowance of such costs as the justice and circumstances of the case may require."

The costs of an application for appointment of a guardian and allowance of maintenance will be paid out of the infant's property by a sale, if necessary, or by allowing them to the guardian in his accounts: *Simpson*, 243, citing *Barton v. Cooke*, 5 Ves. 461, 464; *Exp. Thomas*, Amb. 146.

Where the official solr is appointed guardian *ad litem* his costs *prima facie* are as between party and party: *Eady v. Elsdon*, (1901) 2 K. B. 460, C. A.

RETURN OF PREMIUM.

In the absence of proved misconduct on the part of a solr, to whom a ward of Court has been articleed, there is no jurisdiction to order him, on the articles being cancelled, to return the premium, or any part of it, paid by direction of the Court: *Craven v. Stubbins*, 13 W. R. 68, 208; 34 L. J. Ch. 126; 11 L. T. 402; 10 Jur. N. S. 1189; and although in *Hirst v. Tolson*, 2 Mac. & G. 134, it was held that upon the death of the solr before expiration of the articles, a proportionate part of the premium was to be recovered as a debt from his assets, this decision has been disapproved, on the ground that a partial failure of consideration gives no right of action, and that there is no breach of contract in the death of the master: see *Whincup v. Hughes*, L. R. 6 C. P. 78; followed by *Pearson, J.*, in *Ferns v. Carr*, 28 Ch. D. 409; *Simpson*, 99; so also, in *Re Thompson*, 1 Ex. 864, the Court of Exchequer refused to order a return of premium to the parents of an articleed clerk who died within one month after payment; but in the event of bankruptcy, see *Re Dent, D. v. Harden, sup.*, Form 11, p. 1007.

STATUTORY POWERS OF MAINTENANCE—LORD CRANWORTH'S ACT.

By 23 & 24 V. c. 145, ss. 26, 34, provision was made for the application for maintenance and education of the income of property to which an infant was entitled under deed, will, or codicil executed, confirmed, or revived after the passing of the Act contingently on his attaining twenty-one, or some previous event.

To obtain the benefit of sect. 26, it is not necessary that the infant should be entitled indefeasibly, and the income of a share to which he is entitled contingently on attaining twenty-one may be paid to his father as his natural guardian: *Re Cotton*, 1 Ch. D. 232; provided, however, the infant on coming of age will be entitled to both the principal and the intermediate income: *Re George*, 5 Ch. D. 837, C. A.

The section was confined to absolute and contingent gifts, and did not extend to a gift absolute in the first instance, but liable to be defeated in the event of the legatee not attaining twenty-one: *Re Buckley's Trusts*, 22 Ch. D. 583.

The section was held not to apply in the case of an adult where there was an interval between twenty-one and the time of vesting: *Re Breed*, 1 Ch. D. 226.

CONVEYANCING ACT, 1881.

Sect. 26 of 23 & 24 V. c. 145, is repealed by sect. 43 of the Conveyancing and Law of Property Act, 1881 (44 & 45 V. c. 41), which provides as follows:—

"(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any

event before his attaining that age, the trustees may at their sole discretion pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

"(2) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

"(3) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

"(4) This section applies whether that instrument comes into operation before or after the commencement of this Act."

Where residue is bequeathed to an infant, the exor, when the estate is cleared and the residue ascertained, becomes "trustee" for the infant within the meaning of sub-sect. 1: *Re Smith, Henderson-Roe v. Hichins*, 42 Ch. D. 302.

The recent enactment applies, as did the previous one, where the infant is entitled contingently on attaining twenty-one, or on some event before his attaining that age; but where a further contingency is involved, as, for instance, that of surviving a particular person, the case is outside the Acts, neither the trustees nor the Court can apply the income for maintenance, and there is no obligation to accumulate: *Re Judkin's Trusts*, 28 Ch. D. 743; and the section does not apply where the infant, on attaining twenty-one, would, apart from the Act, only be entitled to the legacy without interest, e.g., where a legacy is given by one who is not a parent or *in loco parentis*, to an infant *simpliciter* on the happening of a contingent event: *Re Dickson, Hill v. Grant*, 28 Ch. D. 291; 29 Ch. D. 331, C. A.; *Re Clements, C. v. Pearsall*, (1894) 1 Ch. 665, 669; *Re Woodin*, (1895) 2 Ch. 309, 316, C. A. and cases there referred to; but where the donor is *in loco parentis* to the infant, or the subject-matter of the gift is residue (*Genery v. Fitzgerald*, Jac. 468; *Earl of Bective v. Hodgson*, 10 H. L. Cas. 656; 1 H. & M. 376; *Re Holford*, (1894) 3 Ch. 30, C. A.; *Re Taylor, Smart v. T.*, (1901) 2 Ch. 134), or is severed from the general estate for the benefit of the legatee—as, e.g., by a direction that a fund should be invested and held or otherwise set apart for the benefit of the infant, *Re Woodin, sup.*—the income on the happening of the event passes with the capital, and the section applies accordingly: *Re Woodin, sup.*; *Re Medlock, Ruffle v. M.*, 55 L. J. Ch. 738; 54 L. T. 828; *Johnston v. O'Neil*, 3 L. R. Ir. 476; *Kidman v. K.*, 40 L. J. Ch. 359; but a direction given for convenience of admon will not be construed as amounting to a severance: *In re Inman, I. v. Rolls*, (1893) 3 Ch. 518.

Where there is a gift of residuary personal estate among a class of persons contingently on their attaining twenty-one, the members of the class as they respectively attain twenty-one take the income of their respective shares, and the income of the shares of those who from time to time are infants is applicable for their maintenance under the section: *Re Holford*, (1894) 3 Ch. 30, C. A., overruling *Re Jeffery, Burt v. Arnold*, (1891) 1 Ch. 671, and *Re Adams*, (1893) 1 Ch. 329; and see *Re Jeffery, Arnold v. Burt*, (1895) 2 Ch. 577, and *Lewin on Trusts*, 10th ed., pp. 692, 693.

Where real estate is devised in trust for a class of children contingently on their attaining a specified age, the eldest child on attaining the age is entitled to the entirety of the rents until the next child attains the age, and so on, in the same way as if the limitations were legal: *In re Averill, Salisbury v. Buckle*, (1898) 1 Ch. 523.

The word "property" in sub-sect. 2 is (*semble*) not necessarily to be restricted exclusively to capital. "The object of the Act was to shorten and simplify conveyances, and it was not intended to alter the devolution of property": *Re Wells, W. v. W.*, 43 Ch. D. 281, per North, J., holding that an

infant tenant for life of a share of residue, on attaining her majority, had become absolutely entitled to the accumulations of the past income of her share: and see Lewin, 693, 694; *Re Humphreys, H. v. Levett*, (1893) 3 Ch. 1, C. A., where, under a gift of a vested life interest to an infant passing the whole income, it was held that there was evidence of a "contrary intention" within sub-sect. 3, so as to exclude the operation of sub-sect. 2.

A direction to trustees to accumulate the income of the shares of children who are entitled contingently on their attaining twenty-one, or being daughters attaining that age or marrying, and to pay the same to them as and when their presumptive shares become payable, is not the expression of a "contrary intention" within sub-sect. 3: *Re Thatcher's Trusts*, 26 Ch. D. 426.

Sect. 43 must, for the purpose of determining whether a legacy to an infant child carries interest, be treated as incorporated into any will to which it is applicable: *Re Moody, Woodroffe v. M.*, (1895) 1 Ch. 101.

The powers of sect. 43 may, in some cases, be concurrent with those of sect. 42 of the same Act (as to which, *v. inf.* p. 1026), as, for instance (see Lewin, 694), if under an instrument coming into operation since the 31st Dec. 1881, real estate were vested in trustees in trust for an infant for life, and the trustees had a power of sale or of consenting to the exercise of a power of sale.

(III.) ORDERS UNDER STATUTES RELATING TO INFANTS' STOCK.

1. *Interest of Stock in Infant's Name applied for Maintenance, on Petition, under Infants' Property Act, 1830* (1 W. IV. c. 65), ss. 32, 35, 44.

"LET the secretary or deputy secretary, or accountant general or deputy accountant general of the Governor and Company of the Bank of England, pursuant to the said Act of Parliament, pay to the Petr B., as the guardian of the infant G., the arrears of the dividends accrued upon the £— Consols, standing in the name of the said infant G. (by the name and description of &c.) in the books of the Bank of England, and also the dividends which shall accrue thereon for the time to come during the minority of the said infant, or until further order."—Direction to tax costs, and guardian to pay them out of arrears, and apply surplus and future income for infant's maintenance and education.—See *Re Gray*, V.-C. E., 8 Aug. 1835, A. 916.

Under the 1 W. IV. c. 65, s. 32, which enables the Court to order maintenance out of dividends of stock standing in an infant's name on petition by guardian, a guardian must be appointed before application for maintenance: *Re Pongerard*, 1 Dr. & S. 426; *Re Gray*, 31 July, 1835, A. 885; *Re Raplett*, 2 July, 1835, B. 809; *Re Alice Kemp*, 36 W. R. 729; 59 L. T. 209.

Maintenance may be ordered to be paid to the father as natural guardian: *Ramon v. R.*, 27 W. R. 260; *Re Naish*, 9 L. J. N. S. Ch. 252; *Re Murphy*, 2 Ir. Eq. R. 24.

Where an infant was entitled beneficially, an order made by inadvertence under the Trustee Extension Act, (15 & 16 V. c. 55), s. 3, declaring him a trustee was afterwards corrected and made under the Act 1 W. IV. c. 65: *Re Westwood*, 6 N. R. 61, 316.

And see on the Acts, Simpson, 288, 289; Dan. 912, 913.

2. *Payment of Dividends on Infant's Stock to Guardian.*

UPON the petition of A. B. &c., Let the secretary or deputy secretary or accountant general, or deputy accountant general, of the Governor

and Company of the Bank of England, pursuant to the first above-mentioned Act, pay to the Petrs A. B. and C. D. the arrears of the dividends accrued upon £— Cons. standing in the names of E. F. deceased, and the infant G. H., in the books of the Bank of England, and also the dividends which shall accrue thereon, for the time during the minority of the infant G. H., or until further order, for the benefit of the infant G. H.—*Re Kemp*, Kay, J., 9 June, 1888, A. 865; 36 W. R. 729; 59 L. T. 209; W. N. (88) 138.

In this case, the Court, upon a petition for appointment of new trustees of the stock, suggested that an order might be made directing the Bank to accumulate the dividends. The Bank, however, refused to act on such an order. But since September, 1890, the Bank of England has accumulated dividends on amounts of 2l. 15s. p. c. stock less than 1,000l.; and see now National Debt (Stockholders Relief) Act, 1892 (55 & 56 V. c. 39), s. 3.

SECTION V.—JURISDICTION OVER INFANT'S PROPERTY.

(I.) MANAGEMENT OF PROPERTY.

1. *Guardian of Estate—Proceeds of Timber to be paid into Court—Accounts.*

UPON the application of &c., infants, by W. J., their father and next friend—Directions for appointment of W. J. guardian of the estate of the said infants and for maintenance out of income [*sup.* Form 4, p. 991].—And let the said W. J. within fourteen days after receipt of the proceeds of sale of any timber on the infant's estate already cut, lodge the same (the amount and time of receipt to be verified by affidavit) in Court as directed in the schedule hereto; And Let the said W. J., as such guardian, on or before the &c.—Directions for passing accounts and paying in balances [*sup.* Form 7, p. 992].—[Add Lodgment Schedules, Nos. 1, 9, pp. 206, 207.]—See *Re Jenkins, Infants*, V.-C. H. at Chambers, 7 Feb. 1876, A. 454.

2. *Guardian to retain current Expenses out of Timber Money, and to let the Sporting annually.*

“LET S. as the guardian of the Plt, notwithstanding the order dated &c. (which directs that the money to arise by the sale of the timber and coppice as in the said order mentioned should be paid into Court), be at liberty to retain out of the said money the sum of £— for payment of his current expenses as guardian; And Let him account for the said sum of £— on passing his accounts as such guardian.”—Direction for investment in Cons.; “And Let the said guardian be at liberty from time to time to give yearly a letter of licence to such of the several

tenants of the farms and premises constituting the specifically devised L— estates, authorizing them to sport and kill the game on such farms and in the woods belonging to the said L— estates respectively at such rents and on such terms as the said guardian in his discretion shall think best, but reserving in each case the Plt's right to sport and kill game."—*Spearman v. Bailey*, V.-C. H. at Chambers, 17 Nov. 1875, B. 3085.

3. Allowance for keeping up Mansion—Further Maintenance.

UPON the application &c., Let the sum of £— be allowed for keeping up the family mansion at B— Park as a residence for the infant D., from the — day of &c. to &c.; And Let F., D., and P., the present trustees of the will of the late E. P., be at liberty to pay such allowance to M., the guardian of the said infant, out of the rents and profits received or to be received by them of the estates subject to the trusts of the said will, and of which the said infant is now tenant in tail in possession; And Let the said trustees be also at liberty in addition to the sum of £— already paid by them, to pay to the said M. as such guardian the further sum of £— out of the said rents and profits in respect of the personal maintenance of the said infant up to &c.; And Let the said sums be retained and paid by such trustees out of such rents and profits.—*Re Dixie*, V.-C. M. at Chambers, 22 March, 1872, A. 1048.

4. Order to let Mansion-house furnished, with Sporting Rights.

UPON the application &c., Let the Defts be at liberty to let to A. from &c. to &c., at the yearly rent of £— payable quarterly, and according to the terms and conditions comprised in the draft lease, being the exhibit marked X. in the said affidavit referred to, the messuage or mansion-house and pleasure grounds called &c., with the coach-houses &c. thereto belonging, and also with two pieces of pasture land called &c., containing together &c., all which said messuage and lands are situate in &c., together also with the two several cottages at &c., late in the occupation of &c., and such rights of sporting and fishing as in the said draft lease mentioned, and together also with the use of the household goods and furniture, fixtures, articles, and things in and about the said messuage and premises. And the Judge having approved of the said lease intended to be made between the Deft D. and others of the one part, and A. of the other part, and which lease and a counterpart thereof are respectively identified by the signature of the Master in the margin thereof respectively; Let the said lessors be at liberty to execute the same upon the said A. executing and delivering the said counterpart thereof.—*See Coote v. Lowndes*, V.-C. B. at Chambers, 11 Nov. 1875, A. 1861.

5. *Receiver to pay Interest on Charges and Maintenance—
Surplus to be lodged in Court and invested.*

DIRECTION to appoint receiver;—"And Let the said receiver out of such rents and profits keep down the interest on the two several mortgages &c.; and thereout also pay to the Deft C. for the past maintenance of the infant Plt from &c. to &c. the sum of £—, and thereout also pay to W. of &c., and the Deft C. the sum of £— per ann. for the maintenance and education of the said infant for the time to come during his minority or until further order, by equal half-yearly payments on the — day of — and the — day of — in each year, the first of such half-yearly payments to be made on the — day of —"; And Let the said receiver pass his accounts and lodge the surplus of such rents and profits in Court as the Judge shall direct.—See *Cecil v. Nicholson*, V.-C. S. at Chambers, 2 July, 1853, A. 1074.

For order appointing receiver of realty and personalty to keep down annuity out of rents and pay maintenance from income of personalty to guardian, and pay in balance to be invested, see *Clark v. Green*, V.-C. S. in Chambers, 11 May, 1853, A. 948.

For order for guardian to repair infant's freehold houses, and raise £200 to do so, by charge on the property, and keep down the interest, see *Re Silvester*, V.-C. K. at Chambers, 30 July, 1853, B. 1379.

For declaration that it was for the benefit of the *cs. q. t.* (some of whom were infants) interested or to become interested under the settlement, that Defts, the trustees, should be at liberty to raise by mortgage of the property, subject to the trusts of the settlement, a sum not exceeding £5,000 for the purpose of removing and rebuilding the mansion-house on the property, and to apply such sum in the expenses of and incidental to such removal and rebuilding, and decree accordingly, see *Frith v. Cameron*, V.-C. M., 27 June, 1871, A. 1782; *S. C.*, 12 Eq. 169; followed in *Re Jackson, J. v. Talbot*, 21 Ch. D. 786. As to the jurisdiction, see Lewin, 574, and *inf.* p. 1025.

6. *Improvement of Infants' Settled Estate—Improvement of Land
Act, 1864 (27 & 28 V. c. 114).*

UPON the application of A. B. and C. D., an infant, by the said A. B., his father and next friend, and upon hearing the solr for the applicants; Let the Board of Agriculture be authorized, notwithstanding the infancy of C. D., to entertain and proceed with an application which has been made to them by the said A. B. for their sanction to certain improvements upon the estates comprised in and settled by the above-mentioned indenture of settlement, by the drainage of land on the farm known as &c., and which farm forms part of the said settled estates; And Let the costs of this application be deemed part of the expenses of and incidental to the application for the proposed improvements.—See *Re De Bary*, V.-C. H., 6 Aug. 1881, A. 1847.

For order enlarging time for repayment of money borrowed under the above Act, and allowing the guardians to expend further sums for drainage and towards repairing the chancel of the parish church, and for repairing a mortuary, and as a donation towards rebuilding parish schools, see *Re Baron Rodney*, V.-C. W. at Chambers, 23 Feb. 1872, B. 651.

7. *Expenditure of Sums in Furniture for Residence, and in replacing Heirlooms.*

UPON the appeal &c.—Discharge the orders dated &c.; And Let the Defts G. and S. [*the trustees*] pay to F. as the husband of B., the mother and guardian of the said M. [*infant Plt*], and of B. M. [*infant Deft*], the sum of £—, to be expended by her in furnishing the new south wing of E. Lodge &c., part of the testator's estate and the residence of the said infant Plt and Deft under the order dated &c., and a sum of £— for repapering and redecorating the bed and drawing rooms in the main part of E. Lodge, and a sum of £— for replacing the kitchen range &c., at the date of the order dated &c., in use at E. Lodge aforesaid; And upon B., the mother and testamentary guardian of the infant Plt, by her counsel undertaking with all convenient speed as mentioned &c., after she shall receive the sum of £—, to lay out the said sum of £— in the purchase of carpets in the place of and in substitution for such of the carpets specifically bequeathed by the will of the testator as have been worn out and decayed, and also undertaking to produce to the Defts G. and S., the trustees of the will of the said testator, the usual invoices and vouchers for the carpets so to be purchased; Let the Defts G. and S., out of the surplus rents and profits of the estates of the said testator, pay to the said B., as such testamentary guardian, and on her sole receipt, the sum of £—; And Let the furniture and carpets so to be purchased be subject to the trusts in the said testator's will declared of or concerning the heirlooms thereby specifically bequeathed, and be subject also to the directions in the said will contained respecting the taking and signing of inventories of the heirlooms.—*Griggs v. Gibson*, L. JJ., 24 June, 1873, A. 1725.

8. *Guardians to present Infant's Nominee for Institution to a Living.*

UPON the application of the Defts, A. B. and C. D., as guardians of the infant Plt, and upon hearing the solrs for the applicants, and for the Plt and the Defts other than the applicants; Let the Defts A. B. and C. D. be at liberty to present the Rev. E. F., of &c., who has been nominated by the infant Plt, to the Lord Bishop of &c., for institution to the Rectory and Parish Church of &c., vacant by &c.—*Fleming v. Hardcastle*, Pearson, J., at Chambers, 15 March, 1886, A. 341.

For order appointing guardian for the purpose of consenting to the presentation, see *Re Burford*, M. B., 27 Jan. 1832, A. 714.

9. *Trustee to present Infant's Nominee to a Living.*

UPON the application of the Defts M. and A. [*trustees*], and upon hearing the solrs for the Plts and Defts, it is ordered that the Defts M. and A. [*trustees*], be at liberty to present a clerk to be nominated

by the infant Plt to the vicarage of S., in the county of —.—*Dixie v. D.*, V.-C. W. at Chambers, 18 June, 1855, A. 1067.

For like order, on petition of trustees of the will, that they present a clerk to the living to be nominated by the infant tenant for life, although the mother insisted that as testamentary guardian she was entitled to require the presentation of her nominee, see *Churchill v. Small*, L. C., 20 Feb. 1765, A. 116.

As to the right of an infant owner of an advowson to present to the living, whatever his age may be, see *Simpson*, 86; and generally as to the duty of trustees of an advowson to act for the benefit and observe the directions of their c. q. t., see *Lewin*, 10th ed. 250, 297.

10. *Trustees of Infant's Estate to oppose Bill in Parliament.*

LET the Defts, as trustees of the will of &c., be at liberty to present a petition to Parliament against the preamble of the Bill introduced in the present session, intituled &c., and to take such other steps to oppose the said Bill as they may be advised.—*Egremont v. Thompson*, V.-C. K. at Chambers, 9 Feb. 1860, A. 231.

For form of summons, see D. C. F. 616.

11. *The like Order.*

UPON the application &c., Let the Plts (*trustees*) be at liberty to take such proceedings as they may be advised to protect the estate of M., the testator &c., and the interests of the parties interested therein, on the intended application of the N. L. Ry. Co. to Parliament for a Bill to empower the said co. to construct a railway from &c., and for other purposes.—*Cust v. Middleton*, V.-C. S. at Chambers, 9 March, 1861, A. 479.

12. *The like—with Special Directions.*

LET the Petr M., the trustee of the will of &c., be at liberty to present a petition to both Houses of Parliament against the two Bills introduced by the S. W. Ry. Co. during the present session, and now pending, and against the lines of railway by the said Bills proposed to be constructed, and to watch the said Bills during their progress through Parliament, and to insist on such modifications thereof, and the insertion of such clauses therein, as they may be advised, for the advantage and protection of the B. estate in the petition mentioned, but the costs and expenses to be incurred in any of the matters aforesaid are not to exceed the sum of (£1,000).—*Meyrick v. Lawes*, M. R., 16 Feb. 1858, B. 541.

For order to appoint guardian for like purpose, see *sup.*, Form 16, p. 995.

For inquiry, on petition of person seeking to take the land, as to constructing railway over infant's land, under a Canal Act, 30 G. III. c. lxxxii., with leave for the petitioner to lay proposals before the Judge, for compensation, or otherwise for obtaining the right, see *Richards v. R.*, Joh. 255, 265.

13. *The like—Undertaking as to Costs.*

THE application of the Plt, which upon hearing &c., was adjourned &c., and upon hearing counsel for the Plt and for the Defts; And the Deft A. B., by his counsel, undertaking to bear all expenses of an application to Parliament for an Act enabling the Plt to carry out the sale of the land in the said agreement mentioned, in manner therein provided, unless it shall be otherwise directed by such Act of Parliament, this Court, on behalf of the infant Defts, being of opinion that the proposed application to Parliament would be for the benefit of the said infants, doth sanction and approve such application. Let the draft of the Bill for the purpose aforesaid be settled by the Judge on behalf of the infant Defts.—Costs of application and of the settlement of the said Bill to be costs in the action.—*Stanford v. Roberts, Kay, J.*, 30 Nov. 1882, B. 1876; *S. C.*, 52 L. J. Ch. 50; 48 L. T. 262.

14. *Application to Parliament for General Powers to Trustees for Infants to sell, lease, &c.*

UPON the petition of &c., the infant, And this Court being of opinion that it will be for the benefit of all persons interested in the inheritance of the estates of R., the testator &c., that an application should be made for an Act of Parliament for the purpose of conferring on the trustees of the said will, or other proper persons, full and proper powers of granting mining, agricultural, building, improving, and other leases, and of accepting surrenders of leases, and of selling, exchanging, enfranchising, partitioning, obtaining the enfranchisement of copyholds, and the renewal of leases of the freehold, copyhold, and leasehold estates, devised and bequeathed by the will of the said testator, and also of purchasing a proper estate with a suitable residence thereon, Let the Defts, the trustees of the said will, be at liberty to make such application accordingly; And Let the draft of the Bill for the purposes aforesaid be settled by the Judge (but the costs and expenses to be incurred in any of the matters aforesaid are not to exceed the sum of £—).—*Wheeler v. Tootel, V.-C. K.*, 12 March, 1858, B. 889.

This course was considered necessary as to the power of leasing &c., there not being any person who could apply under the 19 & 20 V. c. 120, s. 16 (now repealed and re-enacted as the Settled Estates Act, 1877, 40 & 41 V. c. 18).

Under sect. 12 of the Settled Land Act, 1882 (*v. inf.* Chap. XLV., "SETTLEMENTS"), a tenant for life, or person having the powers of a tenant for life, may now grant leases for giving effect to any contract made by a predecessor in title which would have bound the successors in title. But the Settled Land Act, 1882, does not apply to every case where an infant is interested in land; *e.g.*, a devise to such of the children of A. as shall attain twenty-one, will not constitute them persons having the powers of a tenant for life; *Re Horne's Settled Estates*, 39 Ch. D. 84.

For forms, see D. C. F. 677, 678.

15. *Appointment of Persons to manage Infant's Estate—Conveyancing Act, s. 42.*

UPON the application by originating summons of H., an infant, by S., his next friend, and upon reading &c., Let P. and S., the testamentary guardians of the said infant, be appointed to manage the land to which the said H. is entitled as heiress-at-law of N. P., for the purposes of the Conveyancing and Law of Property Act, 1881. Costs as between solr and client to be taxed and paid out of infant's property.—See *Re Parker*, an infant, Chitty, J., at Chambers, 26 Jan. 1891, B. 106.

For form of summons for appointment of trustees for like purposes, see D. C. F. 1225.

16. *Declaration as to Division of Accumulated Income, and as to Right of Trustee to apply Income for Maintenance—Conveyancing Act, 1881, s. 43.*

DECLARE that according to the true construction of the testator's said will, the whole of the surplus income of the testator's residuary estate, after paying the subsisting annuities given by the said will, now in the hands of the Plts, the trustees of the said will, and the future surplus income, until there is a change of interest, is divisible into eleven equal shares, which belong as to eight-elevenths to the eight adult grandchildren of the testator absolutely in equal shares, and as to the other three-elevenths to the three infant grandchildren of the testator contingently in equal shares; That the Plts as such trustees have power to pay or apply the said contingent shares of the said infant grandchildren in such surplus income for or towards the maintenance, education, or benefit of the said infant grandchildren respectively entitled thereto during their respective minorities.—See *Re Jeffery, Arnold v. Burt*, North, J., 26 June, 1895, A. 2932; (1895) 2 Ch. 577.

17. *Confirmation of Contract by Trustees of an Infant's Estate for the Purchase of Real Property.*

UPON the application &c., Let the conditional contract dated — entered into between the G. E. Ry. Co. by their agent D. of the one part, and the Defts G. and S. (*trustees of the will*) of the other part, for the purchase by the said Defts G. and S. as such trustees of the piece or parcel of land &c., free from incumbrances, but subject to the tenancy of C., together with the appurtenances, at the price of £—, be carried into effect; and a good title to the said piece of land having been shown, and a proper conveyance of the said piece of land to the said G. and S., as such trustees as aforesaid, having been settled and approved of by the Judge, consisting of an indenture marked X. and identified by the signature of the Master in the margin thereof, and intended to be made between the said co. of the one part and the

applicants of the other part ; Let, upon the execution thereof by the said co., the applicants be at liberty to pay to the said co. the said sum of £—, together with any interest payable thereon out of the residuary personal estate of the said testator, and be allowed the same on passing their accounts.—*Griggs v. Gibson*, V.-C. B. at Chambers, 11 June, 1873, A. 1768.

18. *Sale of Infant's Realty purchased out of Personal Estate postponed.*

DECLARE that it is not for the benefit of the infants interested in the estate of M. the testator, that such of the freehold ground rents in the Chief Clerk's certificate mentioned as have in fact been purchased by the Defts out of the personal estate of the said testator should at present be sold, the parties beneficially interested who are *sui juris* not desiring such sale ; but such ground rents are to be deemed personal estate ; And any of the parties are to be at liberty to apply at Chambers as to the conversion of the same or any part thereof.—*Reynolds v. Mason*, V.-C. H., 2 June, 1877, B. 1636.

19. *Costs and Apprenticeship Premium raised by Mortgage.*

THIS action coming on for further consideration &c., Declare that, according to the true construction of the will of A. B., the real estate situate at &c., and the income thereof, and any proceeds of sale thereof, subject to the trusts of the testator's will, declared for payment and discharge of the testator's debts, testamentary and funeral expenses, are subject to the trusts thereby declared for apprenticing the testator's children to a trade or profession suitable to their position in life, and subject to such trusts, and to the power to make allowances to the said children, as the said trustees should in their or his discretion think fit.—[Direction for taxation of costs.]—Let trustees, with the approbation of the Judge, raise by mortgage of the testator's real estate, or a sufficient part thereof, the amount of the said costs when taxed, and also such sum or sums as may be required for binding the testator's children apprentice as aforesaid.—*Re Jackson, J. v. Talbot, Kay, J.*, 7 July, 1882, A. 1359.

20. *Costs of Prosecuting an Action charged on Infant's Estate.*

THE application of C. D., an infant, by E. F., his next friend, which, upon hearing &c., was adjourned &c. ; Let the said E. F. be at liberty to raise by an equitable charge upon the real estate belonging to the said infant £—, to be expended in the necessary counsels' fees, and payments to witnesses in and about the action brought by the said E. F. against &c., in the Queen's Bench Division

of this Court, and sanctioned by this Court. Pay money raised to X, Plt's solr, he undertaking to account for the same.—*Re Jones*, Pearson, J., 25 January, 1883, A. 227.

NOTES.

GUARDIAN AND HIS WARD.

For the principles upon which a guardian must act with relation to his ward's property—that he must act for the infant's benefit; that he cannot make any profit out of his office; that, as a general rule, he cannot convert real into personal, or personal into real estate; and that with respect to property of the infant of which he gets possession, he stands in the position of trustee for the infant—see *Mathew v. Brise*, 14 Beav. 345; *Sleeman v. Wilson*, 13 Eq. 36; *Simpson*, Infants, 353—356.

And this fiduciary relation extends to and affects purchases by a guardian of his ward's estate immediately, or soon after, his coming of age, and generally to all transactions between them while the influence still lasts, or is recent: see *Hylton v. H.*, 2 Vez. 547; *Oldin v. Samborn*, 2 Atk. 15; *Aylward v. Kearney*, 2 Ba. & B. 463; *Hatch v. H.*, 9 Ves. 292; *Story*, Eq. Jur. § 317; 1 L. C. Eq. p. 206; 7th ed., 272.

This rule is extended to third parties, creditors of the guardian, who knew, or might have known, of the relation between the parties, and claim the benefit of the transaction as creditors of or through the guardian: *Kempeon v. Ashbee*, 10 Ch. 15; *Maitland v. Irving*, 15 Sim. 437; *Maitland v. Backhouse*, 16 Sim. 58.

An infant, whether he has been actually in possession or not, may treat a person who enters upon his estate during minority as his bailiff, guardian, or trustee, and make him account on that footing, excluding the operation of the Statute of Limitations: *Newburgh v. Bickerstaffe*, 1 Vern. 295; *Yallop v. Holworthy*, 1 Eq. Ca. Ab. 7; *Morgan v. M.*, 1 Atk. 489; *Quinton v. Frith*, 1 R. 2 Eq. 396; *Wall v. Stanwick*, 34 Ch. D. 763, 767.

And this fiduciary relation continues until something is done to change the character of the bailiff's possession; and the majority, or marriage of the infant, is not alone sufficient to effect such change: *Wall v. Stanwick*, *sup.*; *Re Hobbs*, *H. v. Wade*, 36 Ch. D. 553.

The rule applies to the infant's father, but whether to a stranger in all cases, so as to enable the infant to treat him as bailiff, for the purpose of escaping the effect of the Statute of Limitations, *quære*: see *Thomas v. T.*, 2 K. & J. 79; *Quinton v. Frith*, 1 R. 2 Eq. 396, where the question is discussed, and the fiduciary position stated to attach: 1. Whenever the person entering is the natural guardian of the infant. 2. When he is so connected by relationship, or otherwise, as to impose upon him a duty to protect, or at least not to prejudice the infant's rights; and 3. When he takes possession with express knowledge or notice of the infant's rights. But see *Wall v. Stanwick*, 34 Ch. D. 766, that wherever it is proper to make a man accountable for the rents and profits of an infant's estate, and he cannot be shown to have been in possession in some other character than that of bailiff or agent, he must be presumed to be such.

The account will not be limited to six years before action: *Nanney v. Williams*, 22 Beav. 452; *Pelly v. Bascomb*, 4 Giff. 390; 13 W. R. 306; but is given from the time the infant's title accrued: *Dormer v. Fortescue*, 3 Atk. 123; or from the entry, and possession might be recovered twenty (now twelve) years after majority: *Thomas v. T.*, 2 K. & J. 79.

A delay of five months after attaining twenty-one did not prejudice the infant's right: *Blomfield v. Eyre*, 8 Beav. 250.

A condition as to infants marrying with consent of guardian or guardians was not rendered inoperative by the fact of there being no guardians, the testator having contemplated the possibility of an appointment of guardians by the Court, and the consent of a guardian appointed by the infant would not be sufficient: *Re Brown's Will*; *Re Brown's Settlement*, 18 Ch. D. 61, C. A.; and as to what is a sufficient consent, see *Re Smith*, *Keeling v. S.*, 44 Ch. D. 654; *Daley v. Desbouverie*, 2 Atk. 261.

SALE OF INFANT'S PROPERTY.

An infant not being able, from his legal incapacity, to enter into a binding contract for the sale or purchase of property, the Court in general has no authority to sell, or charge his estate, except under the statutory powers given by the Partition Acts, the Settled Estates Acts, Settled Land Acts (as to which, see Chap. XLV., "SETTLEMENT"; Chap. XLVI., "PARTITION"), and for certain special purposes (see *Dart, V. & P.* 2, 1306, 1315), or in a mortgagee's or creditor's action for payment of the ancestor's debt, where it is for the infant's benefit to direct a sale: see *Field v. Moore*, 7 D. M. & G. 691; *Fish. Mort.* § 1007, 482, 989; *Simpson, Infants*, 354, 506. And the infant being unable to sell, his contract of sale cannot be enforced by or against him: *Flight v. Bolland*, 4 Russ. 298; *Calvert v. Godfrey*, 6 Beav. 97, 109; *Hargrave v. H.*, 12 Beav. 408; *Re De Tessier's Settled Estate*, (1893) 1 Ch. 153; and see *Lumley v. Ravenscroft*, (1895) 1 Q. B. 683, C. A.

An *admiror durante minore etate* has full powers, only limited by the minority, and can sell the intestate's personal estate for payment of debts: *Re Cope, C. v. C.*, 16 Ch. D. 49.

By the Partition Act, 1868 (31 & 32 V. c. 40), s. 3, under certain specified circumstances, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property.

An infant Plt may under this section request a sale, the judgment being prefaced by a declaration of the request of the infant, and that a sale will be more beneficial than a division, &c., see *Grove v. Comyn*, 18 Eq. 387; *sup.* p. 985; and see *France v. F.*, 13 Eq. 173; *Young v. Y.*, *Ib.* 175, n.

And by the Partition Act, 1876 (39 & 40 V. c. 17), s. 6, a request for sale may be made in a partition action, or an undertaking to purchase given on the part of an infant or person under disability by the next friend, guardian, &c., or other person authorized to act on behalf of the person under such disability—"but the Court shall not be bound to comply with any such request or undertaking on the part of an infant, unless it appear that the sale or purchase will be for his benefit."

Under this section a request for sale may be made, or an undertaking to purchase given, on the part of the infant by his next friend or guardian *ad litem*: *Rimington v. Hartley*, 14 Ch. D. 630.

For the mode of carrying out a sale or partition of an infant's interest by declaring the infant a trustee under the Trustee Act, see Chap. XLI., "TRUSTEES," pp. 1267 *et seq.*

DEALING WITH INFANT'S OR LUNATIC'S ESTATE—CONVERSION OF INFANT'S ESTATE.

As a general rule the Court will not change the nature of an infant's property by directing a conversion of real into personal or of personal into real estate, except under particular circumstances, where it is manifestly for the advantage or the convenience of the infant; and what the Court might do in such a case by its own order, trustees or guardians will be allowed to do: see *Inwood v. Twyne*, Amb. 417; 2 Eden, 148, and cases there cited; *Witter v. W.*, 3 P. Wms. 100; *Marquis Camden v. Murray*, 16 Ch. D. 161, 171; *A. G. v. Marquis of Ailesbury*, 12 App. Ca. 672.

And the Court will not, in the absence of overwhelming necessity, control the discretion of trustees, at the request of the guardians, by directing, against the will of the trustees, the exercise of a power of sale over the infant's estate: *Marquis Camden v. Murray*, 16 Ch. D. 161.

With respect to laying out an infant's personalty in the purchase of land, the rule of the Court that the conveyance would be directed so as not to change the nature of the property as between the real and pers. represves (see *Ware v. Polhill*, 11 Ves. 268, 278; *Ashburton v. A.*, 6 Ves. 6), was based upon the fact that, prior to the Wills Act, 1 V. c. 26, infants (females after the age of twelve, males after the age of fourteen) had the power of disposing of their personal estate by will. On this ground, therefore, it being more beneficial for the infant (as distinguished from a lunatic), that his personal estate should not be converted, the Court effected the change, not to all in-

tents and purposes, but with this qualification, that if he lived he might take it as real estate, but without prejudice to his right over it during infancy as personal property: see *Exp. Phillips*, 19 Ves. 122 (explaining the distinction in this respect between the case of an infant and a lunatic); *Exp. Grimstone*, Amb. 708; *Webb v. L. Shaftesbury*, 6 Madd. 100; *Sergeson v. Sealey*, 2 Atk. 413; *Rook v. Worth*, 1 Ves. 461; *A. G. v. Marquis of Ailesbury*, 12 App. Ca. 693, referring to *Bridges v. B.*, Seton, 3rd ed. p. 692; and see 1 L. C. Eq. p. 1018; Story, Eq. Jur. § 1357; Lewin, 1180.

Where a policy of insurance has been kept up out of rents belonging to an infant tenant in tail under no obligation to repair or insure, money received under the policy belongs to the infant as personal estate as the person out of whose money the policy was kept up: *Warwicker v. Bretnall*, 23 Ch. D. 188.

In *Ashburton v. A.*, 6 Ves. 6, the land purchased was directed to be conveyed to a trustee in trust for the infant, his exors and admors, until he should attain twenty-one, and afterwards for him and his heirs.

Since the Wills Act, which provides, sect. 7, that no will made by any person under twenty-one shall be valid, this particular reason against allowing an infant's personal estate to be laid out in land, has ceased to have any force; and it would appear that when an infant's real or personal estate has been converted either by direction of the Court or by trustees and guardians, acting for the benefit of the infant, there is no equity on the part of the heir-at-law or of the legal pers. reprieve to take the property in any other form than that in which it is found at the death of the infant, unless the conversion has been wrongfully made; or an equity for reconversion arises, e.g., by virtue of 19 & 20 V. c. 120, ss. 23—25 (re-enacted by the Settled Estates Act, 1877, ss. 34—36), incorporated with the Partition Act, 1868, s. 8, and held to have this effect, see *Foster v. F.*, 1 Ch. D. 588; *Steed v. Preece*, 18 Eq. 192; *Mordaunt v. Benwell*, 19 Ch. D. 302; *Re Barker*, 17 Ch. D. 241, C. A.; *Re Morgan, Smith v. May*, (1900) 2 Ch. 474; *Arnold v. Dixon*, 19 Eq. 113, following *Flanagan v. F.* (cited in *Fletcher v. Ashburner*, 1 L. C. Eq. 327), and questioning the decisions in *Cooke v. Dealey*, 22 Beav. 196; *Jerry v. Preston*, 13 Sim. 356, to the effect that any surplus proceeds of a sale directed by the Court, after satisfying the purpose for which the sale has been directed, retain their original character. But it would seem that no conversion will be effected by a sale in a partition action under a judgment or order which is not grounded solely on the request of the infant: *Re Norton, N. v. N.*, (1900) 1 Ch. 101; and where an infant by a next friend is one of several Plts by counsel requesting a sale, and a sale is ordered upon this request, the proceeds of the infant's share ought to be earmarked as real estate: *Re Norton, N. v. N.*, *sup.*; *Howard v. Jalland*, W. N. (91) 210; and see Lewin on Trusts, 10th ed. p. 164.

When an unconditional order for sale is properly made, the conversion takes effect from the date of the order: *Hyett v. Meekin*, 25 Ch. D. 735; *Arnold v. Dixon*, 19 Eq. 113.

The jurisdiction to direct a mortgage of an infant's realty for the purpose of defraying the costs of repairs will be jealously exercised, and only in cases which amount to actual salvage: *Re Jackson, J. v. Talbot*, 21 Ch. D. 786; *Re De Tessier*, (1893) 1 Ch. 153; *Re Montagu, Derbishire v. M.*, (1897) 1 Ch. 685; 2 Ch. 8, C. A.; *Re Hawker's Settled Estates*, 66 L. J. Ch. 341; *Re Hurst, H. v. H.*, 29 L. R. Ir. 219; *Re Lord De Tabley*, W. N. (96) 162; Lewin on Trusts, 574. The case of *Conway v. Fenton*, 40 Ch. D. 512, must be regarded as exceptional, *Id.*

The Court cannot, it seems, direct a fine, in respect of copyholds to which an infant has become entitled as customary heir, to be raised by a mortgage of the copyholds: *Harbroe v. Combes*, 43 L. J. Ch. 336.

The powers under the Merchant Shipping Act, 1854, s. 99, of the guardian of an infant shipowner do not authorize him either to sell or to mortgage the ship, but are limited, it seems, to insuring, repairing, and doing all things necessary to preserve the ship: *Michael v. Fripp*, 7 Eq. 95.

Where residuary real and personal estate was devised and bequeathed to trustees in trust for A. for life, with remainder to his children who were infants, the trustees were authorized by the Court to advance to the tenant for life part of the residuary personal estate, for the purpose of stocking and

cultivating a farm forming part of the real estate, on evidence that the outlay would be for the advantage of the infant remaindermen: *Re Household, H. v. H.*, 27 Ch. D. 553, followed in *Conway v. Fenton*, 40 Ch. D. 512; *Re Hurst*, 29 L. R. Ir. 219, *sup.*

Timber cut down on the estate of an infant tenant in fee by his guardian with the sanction of the Court, or in a proper husbandlike manner, becomes personal estate for the purpose of devolution: *Dyer v. D.*, 34 Beav. 504; and see *Craig on Trees*, 110 (explaining *Tullit v. T.*, Amb. 370; 1 Dick. 322; and *Mason v. Goodrich*, West, 449); *Field v. Brown*, 27 Beav. 90, where the proceeds of deteriorating timber, directed by the Court to be cut down and sold for the benefit of all persons interested, were treated as real estate.

The guardian of an infant lady of the manor, and not the trustees, is the proper person to appoint a valuer under 4 & 5 V. c. 35, s. 11; *Griggs v. Gibson*, 14 W. R. 819.

Upon the compulsory purchase by a co. of an infant's real estate, the purchase-money, if paid in under sect. 69 of the Lands Clauses Act, retains the character of realty; but if paid in under sect. 78, will be treated as personality: see *Re Harrop's Estate*, 3 Drew. 726.

Service by a co. of notice to treat does not effect a conversion: *Haynes v. H.*, 1 Dr. & Sm. 426; there being no binding contract until the purchase-money has been settled: *Re Battersea Park Acts, Exp. Arnold*, 32 Beav. 591.

Where the infant was tenant in tail in remainder the Court declined to order that the costs of an application to Parliament for a private Act to carry into effect a proposed sale which was beneficial to the estate should be borne by the estate, whether the application were or were not successful, but the tenant for life consenting, the Court being of opinion that the proposed application would be for the benefit of the infant, sanctioned the application on the terms that the tenant for life should bear the costs, unless an Act of Parliament otherwise directing was obtained: *Stanford v. Roberts*, 52 L. J. Ch. 50; Form 13, *sup.* p. 1020.

MANAGEMENT OF LAND AND RECEIPT OF INCOME DURING MINORITY—CONVEYANCING ACT.

By the Conveyancing and Law of Property Act, 1881, s. 42,

"(1) If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply.

"(2) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course of sale, or for repairs, or otherwise, and to erect, pull down, rebuild, and repair houses and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land, or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is incapable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

"(3) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not pay-

able by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

"(4) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

"(5) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely):

"(i.) If the infant attains the age of twenty-one years, then in trust for the infant;

"(ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but

"(iii.) If the infant dies while an infant, and, being a woman, without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's pers. represes, as part of the infant's personal estate; but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

"(6) Where the infant's estate or interest is an undivided share of land, the powers of this section relative to the land may be exercised jointly with the persons entitled to possession of, or having power to act in relation to, the other undivided share or shares."

The provisions of the section enabling the Court to appoint trustees on the application of the next friend of an infant who is beneficially entitled to the possession of any land, include the case of an infant taking by descent: *Re Glover* (1899), 1 I. R. 337; *Re Cowley*, (1901) 1 Ch. 38.

For form of summons under the section, see D. C. F. 1225.

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So where a copyhold estate, as to which the rules of descent were different from those of freeholds, was enfranchised, the Court inserted a declaration in the order sanctioning the enfranchisement, carrying over the equitable interest in the enfranchised property, in the event of the lunatic dying intestate, to the persons who would have taken it if it had not been enfranchised: *Re Ryder*, 20 Ch. D. 514, C. A.

And where, under an order made in Lunacy, part of the personal estate of a lunatic was laid out in the purchase of real estate as a convenient mode of investment, and a declaration was inserted in the conveyance in conformity with the terms of the order, that the premises granted were, "to all intents and purposes, to be considered as part of the personal estate of the lunatic"; it was held that the value of the lands was part of the personal property of the lunatic at his death, and consequently subject to probate duty: *A. G. v. Marquis of Ailesbury*, 12 App. Ca. 672.

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And where, under an order made in Lunacy, part of the personal estate of a lunatic was laid out in the purchase of real estate as a convenient mode of investment, and a declaration was inserted in the conveyance in conformity with the terms of the order, that the premises granted were, "to all intents and purposes, to be considered as part of the personal estate of the lunatic"; it was held that the value of the lands was part of the personal property of the lunatic at his death, and consequently subject to probate duty: *A. G. v. Marquis of Ailesbury*, 12 App. Ca. 672.

But where the committee was directed by the Master in Lunacy to complete out of the personalty a purchase of real estate made by the lunatic before the lunacy, the purchased estate descended as realty: *Baldwyn v. Smith*, (1900) 1 Ch. 588.

A specific bequest of railway stock was held to be adeemed by a sale of it under an order in the subsequent lunacy of the testator: *Re Freer, Freer v. F.*, 22 Ch. D. 623.

Sums required for repairs and permanent improvements may be raised by mortgage of the estate of which a lunatic is tenant in tail: *Re Gist*, 5 Ch. D. 881, C. A.

The Lunacy Act, 1890 (53 & 54 V. c. 5), which repeals the Lunacy Regulation Act, 1853 (16 & 17 V. c. 70), provides by sect. 117, that the Judge in Lunacy may order that any property of a lunatic, whether present or future, be sold, charged, mortgaged, dealt with, or disposed of, as the Judge thinks most expedient for the purpose of raising, securing, or repaying money which is to be or has been applied in payment of debts of the lunatic, discharge of incumbrances on his property, or for his maintenance. Moneys expended for permanent improvement of a lunatic's property may be ordered to be a charge on the improved property or any other of his property, and the charge may be made either to the person advancing the money, or, if it is paid out of the lunatic's general estate, to some person as a trustee for him as part of his personal estate. By sect. 120, the Judge is empowered to authorize and direct the committee of the lunatic's estate to effect sales, exchanges, partitions, leases, surrenders, assignments, and other dispositions, including the carrying on of any trade or business, and the exercise of powers, or giving of consent.

Under these sections a sale in consideration of a perpetual rent-charge may be sanctioned: *Re Ware*, (1892) 1 Ch. 344.

Upon a person being found lunatic the jurisdiction of the Court in lunacy, under these sections immediately attaches to his property, and cannot be ousted by a subsequent adjudication in bankruptcy against the lunatic, made without the consent of the Court, even assuming such adjudication to be valid (as to which, *quære*): *Re Farnham*, (1895) 2 Ch. 799, C. A.

The maintenance of the wife of a lunatic is not provided for by sect. 117, but the rights of his execution creditor are subject to the maintenance allowed to the lunatic. But the order must be without prejudice to the rights of such creditor between himself and other creditors notwithstanding that the sheriff has given up possession: *In re Winkle*, (1894) 2 Ch. 519, C. A.

A charging order on the stock of a lunatic made after the Court in lunacy has assumed the control of the property of the lunatic, will not prevent the Court from disposing of the stock for the lunatic's benefit: *Re Plenderleith*, (1893) 3 Ch. 332, C. A.

The rule of administration in Lunacy does not affect funds in the High Court, and accordingly where a judgment creditor of a lunatic had obtained a charging order on funds of the lunatic in Court, the balance only of the funds, after satisfying the charge, was transferred to Lunacy: *In re Brown, Llewellyn v. Brown*, (1900) 1 Ch. 489.

By sect. 123, "the lunatic, his heirs, exors, admors, next of kin, devisees, legatees and assigns, shall have the same interest in any moneys arising from any sale, mortgage, or other disposition, under the powers of this Act, which may not have been applied under such powers, as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage, or disposition had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged or disposed of." Moneys received for equality of partition or exchange, under leases of unopened mines, or on grant or renewal of leases, are, as between the represes of the real and personal estate of the lunatic, to be considered as real estate, except as to leases of property of which the lunatic was tenant for life, in which case the moneys are to be personal estate.

This section corresponds with sect. 119 of the Act of 1853, which, however, was restricted in terms to land; and therefore on a conversion, by order in Lunacy, of a lunatic's personal estate, the surplus moneys, according to the old law, would, in the absence of any special direction, retain their converted character: see *Jones v. Green*, 5 Eq. 555; *Oxenden v. L. Compton*, 2 Ves.

jun. 69; *Exp. Phillips*, 19 Ves. 118; *Exp. Bromfield*, 1 Ves. jun. 453; *Re Barker*, 17 Ch. D. 241.

And under the corresponding provision in the Infants' Property Act, 1830 (11 G. IV. & 1 W. IV. c. 65), there having been no election to take them as personalty, the surplus proceeds of a lunatic's estate which had been sold continued to be impressed with the character of realty: *Re Wharton*, 5 D. M. & G. 33.

Under sect. 124 of the Act of 1853, the Court had no power to make an exchange of the lunatic's land without the minerals under it: *Re Dicconson*, 15 Ch. D. 316, C. A.; or to authorize the committee of a lunatic to sell the lunatic's undivided share of land to the owners of the other shares: *Re Weld*, 28 Ch. D. 514, C. A.; but this could be done under the powers of the Settled Land Act, 1882: *Re Gaiskell*, 40 Ch. D. 416.

There was no power under the Lunacy Regulation Act, 1853, s. 125, to order a sale for building purposes of land of which the lunatic was tenant for life: *Re Corbett*, 35 L. J. Ch. 793; and the Court, acting solely and entirely in his interest, would not lightly, or without sufficient cause, alter the state of his property: see *Re Mary Smith*, 10 Ch. 79; and 1 L. C. Eq. 1014, 5; 7th ed. 365, and cases there collected.

A grant for a term of years, for a gross sum payable by instalments, of the minerals on the estate of a lunatic tenant in common in fee, was treated as in the nature of an absolute sale of a portion of the real estate, so that the money belonged to his heir-at-law as real estate. *Secus*, as to the proceeds of such sales in which the lunatic had concurred while of sound mind: *Re Mary Smith*, 10 Ch. 79.

Under sect. 136 of the Act of 1853, the Court declined to authorize the committee of a lunatic mortgagee to sell and convey under the power of sale, but merely directed him to sell, leaving the transfer of the legal estate to be dealt with on a subsequent application under the Trustee Act, 1850: *Re Harwood*, 35 Ch. D. 470, C. A.

Even though a lunatic is insolvent, the Court will regard his benefit before the interests of creditors, and sums properly expended for his maintenance, whether before or after the inquisition, will in general be repaid in priority to other claims: *In re Pink*, 23 Ch. D. 577, C. A.

As to the mode of execution of a lease by committees of a lunatic on his behalf, see *Laurie v. Lees*, 7 App. Ca. 19.

For the provisions of the Lunacy Act of 1890, in substitution for repealed sections of the Trustee Acts, *v. inf.* Chap. XLI., Sect. X.

(II.) RENEWING OR GRANTING LEASES UNDER THE INFANTS' PROPERTY ACT, 1830 (11 GEO. IV. & 1 WILL. IV. C. 65).

1. *Order to renew Lease under Sect. 12.*

APPOINT B., the guardian of A., the infant, in the place of the said infant (by deed) to surrender to C. the term granted by the lease dated &c., granted by &c. to &c. of the hereditaments therein comprised, and to accept and take, in the place and for the benefit of the said infant, and the other persons interested, and to become interested, under the will of D. &c., one or more lease (a new lease) or leases of the said hereditaments during the lives of &c., such surrender and new lease or leases to be settled by the Judge.—See *Re Duckle*, V.-C. T., 1850, A. 976.

For forms of application under the Act, see D. C. F. 1141 *et seq.*

For inquiry, if for infant's benefit, to surrender old and take new lease, see *Re Atkinson*, M. B., 2 Aug. 1852, A. 1923; *Marq. Bath*, 23 Nov. 1841, B. 106 (Fur. Ord. 21 Jan. 1842, B. 937).

2. *Order on Petition to grant new Lease—Sect. 17.*

UPON petition of the infant by his next friend,—“This Court being of opinion that it is (fit and proper, and) for the benefit of L. the infant, that a lease of the land in the petition mentioned of [or to] which the said infant is seised [or possessed, or entitled], in fee [or in tail] should be granted to &c., upon the terms and conditions mentioned in the conditional contract in the petition and affidavit of &c. referred to, for the term of — years from the — day of —, Let the said contract be carried into effect, And Let a proper lease in conformity therewith be settled by the Judge; And Let the Deft E., the guardian of the infant, be at liberty in the name of the infant to make and execute such lease when so settled; And Let a counterpart of such lease be executed by the said &c., the lessees, and deposited for safe custody in the Central Office (until the said infant shall attain the age of twenty-one years), but with liberty to proper parties to have the use thereof, if required, in the meantime, for the purpose of enforcing any of the covenants therein contained.”—Liberty to apply.—See *Leycester v. L.*, V.-C. S., 13 July, 1855, B. 1185; *Halliwel v. H.*, M. R., 30 July, 1855, A. 1433.

For the like order where the infant was not solely interested, see *Richards v. R.*, V.-C. B., 31 July, 1876, B. 1528.

These orders are obtained on summons at Chambers: see O. LV, 2 (9).

3. *Another Form—Deposit of Counterpart dispensed with.*

UPON the petition &c., And this Court being of opinion that it is for the benefit of the said L., the infant Petr, that a lease of the lands and premises comprised in the conditional contract dated &c., of or to which the said infant is seised, possessed, or entitled for an estate in fee simple in remainder, as in the petition mentioned, should be granted to M. and P. upon the terms and conditions in the said contract mentioned, for the term of twenty-nine years from &c., doth order that the said contract be carried into effect; Let a proper lease in conformity with the said agreement be settled by the Judge; And Let R., the guardian of the infant, be at liberty, in the name of the said infant, to execute such lease when settled.—Dispense with a counterpart of such lease executed by the lessees being deposited for safe custody in the Central Office.—*Re Letchford*, V.-C. M., 26 May, 1876, B. 1005; *S. C.*, 2 Ch. D. 719.

This case was followed in *Re H. S. Escudier*, Kekewich, J., 5 August, 1893, A. 1325, with the exception that the guardian of the infant was to retain the counterpart.

4. *To surrender old and accept new Lease—Premium charged on Premises and raised by Mortgage—Sects. 12 and 14.*

UPON the petition of G., an infant, by R., her next friend &c., And this Court being of opinion that the agreement in the petition men-

tioned, dated &c., is fit and proper and for the benefit of the infant Petr G., Let the said agreement be carried into effect; And Let, pursuant to the 12th section of the Infants' Property Act, 1830, the said R. be appointed guardian of the said G., the infant, in the place of the said infant by deed to surrender to C. the said lease dated &c., granted by X. to Y. of the hereditaments and premises comprised therein (without prejudice to the said mortgage dated &c.), and to accept and take, in the place and for the benefit of the said infant, a new lease of the said hereditaments and premises at the premium of £—, and for the term and subject to the covenants and conditions in the said agreement mentioned; And, pursuant to the 14th section of the said Act, Let the said sum of £—, to be paid by the said R. as a premium for the renewal of the said lease, and all reasonable charges incident thereto, including the costs of this application and consequent thereon to be taxed &c., together with interest for the same, be a charge upon the premises comprised in the said lease (subject to the said mortgage dated &c.), and be raised by a mortgage or mortgages of the same leasehold premises; And the surrender and new lease, and mortgage or mortgages aforesaid, are to be settled by the Judge.—*Re Griffiths*, Pearson, J., 28 March, 1885, A. 447.

5. Order to grant Lease on Application in Chambers—Sect. 17.

THE Judge being of opinion that it is fit and proper, and for the benefit of A., the infant, that the conditional contract dated &c., entered into between B., the guardian, and C., for granting to the said C. a lease of the land therein comprised, of [*or to*] which the said infant is seised [*or possessed, or entitled*] in fee [*or in tail*], should be carried into effect, Let the same be carried into effect accordingly; And Let B., as such guardian, be at liberty in the name of the infant to execute the indenture marked X., intended to be made between the infant, of the one part, and the said C., of the other part, which has been settled and approved by the Judge as a proper lease in conformity with the said contract, and is identified by the signature of the Master in the margin of the engrossment of the said lease, and of the counterpart thereof, respectively; And Let the said counterpart be executed by the said C., the lessee, and be deposited for safe custody &c. [Form 2, *sup.* p. 1030].—For like order, see *Gosling v. G.*, M. R. at Chambers, 20 Dec. 1875, A. 1966; *Re E. Yarborough*, V.-C. M., 27 Nov. 1876, B. 1861.

For inquiry whether the petitioner A. was an infant, and seised, or possessed of, or entitled to the land "in fee or in tail," within the Act; and whether contracts for lease were for his benefit, see *Smith v. Jackson*, V.-C. E., 1842, B. 1048, 1349; 1843, B. 483.

For order authorizing the infant's guardians to grant a lease to be approved, see *Re Griffin*, V.-C. L. Cranworth, 9 Aug. 1861, A. 1490.

6. *Order as to Lease of Mines, &c., Infants being co-Tenants with other Persons.*

"THE Judge being of opinion that it is for the benefit of the infant Plts, who are possessed of, or entitled to certain undivided shares of, and in the mines, collieries, &c., mentioned and described in the indenture hereinafter mentioned as joint tenants in fee, that a lease should be made to H., of &c., of the said mines &c., for the term of years, and subject to the rents and covenants in and by the said indenture intended to be granted, reserved, and contained; And the Judge having accordingly settled and approved the lease proposed to be made by the indenture intended to be made between &c. (and the covenants and provisions therein contained), and of the counterpart thereof, which said indenture of lease and counterpart are respectively identified by the signature of the chief clerk, in the margin of the engrossments thereof respectively, Let, upon the said H. executing and delivering to B., &c., the guardians of the said infants, the said counterpart of the said indenture of lease, the said B., &c., be at liberty, in the names of the said infants respectively, to make and execute, or join with the said C. &c. (*the persons who are respectively entitled to the other undivided shares &c.*), in making and executing the said indenture of lease."—Direction for guardians to deposit counterpart [Form 2, p. 1030].—All parties' costs of application to be costs in the action.—*Bentley v. Landor*, V.-C. S., 10 Aug. 1861, A. 1859.

For orders relating to leases of infants' property granted under Settled Estates Acts, see *inf.* Chap. XLV., "SETTLEMENT," pp. 1791 *et seq.*

NOTES.

RENEWING OR GRANTING LEASES UNDER 11 GEO. IV. & 1 WILL. IV. c. 65.

By the Infants' Property Act, 1830 (11 G. IV. & 1 W. IV. c. 65), s. 12, where an infant or *feme covert* is entitled to renewable leases, such infant, or his guardian, or other person on his behalf, or *feme covert*, or any person on her behalf, may apply to the Court by motion or petition, (or now by summons), for the purpose of surrendering the same, and taking new leases, under the direction of the Court; by sect. 14, the expenses of renewal may be charged on the estates with interest, as the Court or L. C. shall direct; by sect. 15, the new leases are to be to the same uses; by sect. 16, where an infant or *feme covert* is liable to renew leases, such infant, or his guardian in his name, or such *feme covert*, may, by order to be made on the petition (now on summons) of such infant, guardian, or *feme covert*, or person entitled to renewal, accept surrenders and grant new leases.

By sect. 17, where an infant is entitled in fee or in tail, or to leaseholds absolutely, and it appears for his benefit to grant leases for building or repairing, or mining or improving, or farming or other purposes, he, or his guardian in his name, may, under an order to be made on his, or his guardian's, petition (now on summons), make such leases as the Court shall direct, without fine, to be settled by the Judge, and a counterpart to be deposited with the Clerk of Records and Writs (now in the Central Office), but no lease is to be made of the mansion-house, &c., beyond the minority.

By sect. 18, if persons bound to renew are out of the jurisdiction, the renewals may be made by a person appointed by the Court in the name of the person who ought to have renewed.

Applications on behalf of infants under this Act are now to be made in Chambers, in all cases where the infant is a ward of Court, or the admon of the estate of the infant or the maintenance of the infant is under the direction of the Court: O. LV, 2 (9).

When the application is made by petition, the order may be made in the first instance without inquiry, on sufficient evidence being produced to the Court (see Form 1, *sup.* p. 1029), or the petition may be adjourned to Chambers, and the further order made there, in which case the direction will be as in Form 2, *sup.* p. 1030.

For the form of adjourning petitions to Chambers, see Chap. XXIII., Vol. I., p. 386, and for the practice, *Ib.*, pp. 387 *et seq.*

The petition, summons, and every order thereon should be intituled in the matter of the infant, and of the Act.

See further as to this Act, Simpson, 368 *et seq.*; Seton, 5th ed., pp. 876, 877.

Leases of infants' lands are now commonly effected under the powers of the Settled Land Acts or Settled Estates Act, as to which, *v. inf.*, Chap. XLV., "SETTLEMENTS."

SECTION VI.—CUSTODY—RELIGIOUS INSTRUCTION—RESIDENCE ABROAD.

(I.) ORDERS RELATING TO THE CUSTODY, RELIGIOUS INSTRUCTION, AND RESIDENCE OF INFANTS.

1. *Infant to be delivered into the Custody of his Mother.*

UPON the petition of A. B. &c., Let X. forthwith deliver up his infant son, C. D., into the custody of A. B., his wife, the mother of the said infant, and that the said infant do remain in the care and custody of his said mother.—Directions where infant is to spend holidays.—*Re Witten*, Kay, J., 30 July, 1887, B. 1168; S. C., 57 L. T. 336.

For a similar order, see *Re Besant*, M. R., 18 May, 1878, A. 993; 57 L. T. 336.

For form of application, see D. C. F. 1196.

2. *Injunction against removing Infant out of the Jurisdiction.*

UPON petition of A. B., wife of C. D. &c.; And the Petr undertaking as to damages in favour of C. D., Let C. D. be restrained until after &c., from removing the infant X. out of the jurisdiction of this Court.—*Re Crookes*, North, J., 8 Feb. 1887, A. 100; S. C., W. N. (87) 29.

And see *Harris v. H.*, W. N. (90) 128; 63 L. T. 262, where an interim order was made *ex parte* upon affidavit of the wife, Petr in divorce proceedings.

3. *Custody of Infants given to both Parents—Guardianship of Infants Act, 1886, s. 5.*

LET the custody of the said infants A. and B. be committed until further order to the applicant [*the mother*] and respondent [*the father*] each for six months in the year at times to be agreed between them, and in default of any agreement as the Judge in Chambers shall direct, the applicant and her father by their counsel respectively undertaking that while the said infants are in the custody of the applicant, they shall be accompanied by their governess, and shall be well cared for, educated, clothed and maintained at the expense of the applicant and her father; And the respondent and his father by their counsel respectively undertaking that while the said infants are in the custody of the respondent they shall be accompanied by their governess and shall be well cared for, educated, clothed and maintained at the expense of the respondent and his father, the expense of the governess to be borne in moieties between the applicant and her father and the respondent and his father; And the applicant and her father by their counsel undertaking that in case at any time while the said infants are in the custody of the applicant she shall not be residing with her parents, she will have to live with her a suitable lady relation, friend or companion; And Let all reasonable access be allowed to either the applicant or respondent while the said infants are in the custody of the other.—*Liberty to apply.—Re A. and B. (Infants)*, (1897) 1 Ch. 786, C. A.

4. *Custody, Residence, and Leave to Visit.*

“Let B. [*father*], by 6 o'clock in the afternoon of this day, deliver E., the infant, to T. [*next friend*]; And the said T. (by his counsel) undertaking to deliver the said infant to the Petr. L. [*wife*], at the house of &c., the mother of the said E., Let the said infant remain in the custody of the said L. until the said infant shall attain the age of seven years, or during such shorter time as this Court shall direct; And Let the said infant not be removed from — without the leave of this Court, except for occasional visits to the seacoast of England or into the country for the sake of health or change of air, but not to a greater distance than 120 miles from London.”—Father to be at liberty to see the infant at stated periods, and to be informed of her leaving home, and as to her state of health.—Like directions on behalf of the mother as to the elder children remaining with the father.—*Re Bartlett*, V.-C. K. B., 4 July, 1846, A. 2275; 2 Col. 661.

This order was based upon 2 & 3 V. c. 54, since repealed, but re-enacted and extended by the Custody of Infants Act, 1873 (36 & 37 V. c. 12).

5. *Inquiry as to Property applicable for Maintenance of Adults.*

THE application of the Plts, who claim as two of the children of the testator to be interested in the relief sought as legatees entitled to maintenance out of the income of his residuary estate during the life of the Deft J. B. (a person of unsound mind not so found) by originating summons dated &c.; Let the following inquiries be made, that is to say: 1. An inquiry what property is in the hands of the trustees of the testator's will, and what is the income thereof. 2. An inquiry whether any and, if any, what advances have been made to any and, if any, to which of the testator's children on account of his or her share under the said will. 3. An inquiry whether any and, if any, what provision ought to be made for the maintenance of any and, if any, which of the testator's children out of the income of the testator's estate. And Let the Defts, the trustees of the said will, be at liberty to pay to the Plts the sum of [*one hundred*] pounds on account of such maintenance.—Liberty to apply after the Master's certificate and generally.—See *Re Booth*, B. v. B., North, J., 16 Mar. 1894, A. 376; (1894) 2 Ch. 282.

6. *Inquiry, what Provision—Guardian—Scheme—Residence—Maintenance—Custody—Father restrained from interfering.*

“LET an inquiry be made whether there is a sufficient provision for the maintenance and education of the Petr, the infant, during his minority, independently of any allowance or contribution from his father, and of what nature.”—*If so*, or if any proposal, “for making and securing such provision,” be approved—direction to appoint “some proper person or persons to act in the nature of a guardian or guardians of the said infant's person” during minority or until further order; All proper parties to have notice to attend, and leave to propose the guardian or guardians, and scheme for the infant's residence, maintenance, and education during minority, to be approved.—“And in the meantime, or until further order, the said infant is to remain in the care and custody of his mother A., and of his maternal grandmother the Deft E., widow, the said A. and E., and R., the next friend of the said infant, by their counsel undertaking that until the further order of this Court they will duly and properly provide for the care, maintenance, and education of the said infant. And Let T. [*the father*], in the petition named, and his agents, be restrained until such further order from removing the said infant from his present residence, or changing the present custody of the said infant, or disturbing or interfering with the same in any manner.”—Liberty to apply.—*Thomas v. Roberts*, V.-C. K. B., 22 May, 1850, B. 861; 3 Dr. & S. 758 (the Agapemone Case).

For order that the infants remain in the custody of the petitioner until they respectively attain the age of seven years, or during such shorter time, &c., and restraining the husband from prosecuting proceedings in the Queen's

Bench to obtain the custody of them, with leave to him to see the infants at all reasonable and proper times in the presence of the Petr or of such person as the Petr should appoint, see *Re Oakeley*, M. R., 28 Jan. 1867, B. 261.

7. *Order under the Infants' Custody Act, 1873 (36 & 37 V. c. 12), s. 1, for delivery of Infant to his Mother.*

UPON the petition of L. [*the mother*], the wife of H. &c., by C. her next friend, Let the respondent H. immediately deliver T., the infant in the petition named, to the Petr L.; And Let the said infant remain in the custody of the Petr until further order; And Let the respondent, and the paternal grandfather and paternal grandmother of the said infant, have access to the said infant at all reasonable times; And Let the Petr be at liberty to apply for a scheme for the maintenance and education of the said infant on his attaining the age of seven years. Respondent to pay to C. the next friend of the Petr the costs of the Petr of this application, to be taxed &c.—Liberty to apply.—*Re Taylor, an Infant*, M. R., 11 Nov. 1876, B. 1771; S. C., 4 Ch. D. 157.

For form of petition, see D. C. F. 1192.

8. *Custody of Infants committed to Mother—Guardians—Provision—Father excluded, except at stated Times.*

ON petition of the mother by her brother and next friend, and of the infants by the same next friend, "Let M. and J., the infants, remain in the care and custody of the Petr E., their mother."—Appoint Petr E. and F. [*next friend*] to act in the nature of guardians to the infants until further order; "And Let the Petr E. have the charge and superintendence of the education of the said infants, the said Petr E. and the said F., by their counsel, undertaking that, until the further order of this Court, they will duly and properly provide for the care, maintenance, and education of the said infants; And Let Y., the father of the said infants, have access not oftener than once in three months, to see the said infants, at his own expense, in the presence of such person as the said E. may appoint, within one mile of their residence in England, for the time being."—Liberty to apply.—*Re Young*, V.-C. S., 18 Jan. 1856, B. 392.

For order on the mother of children, residing with them at Paris, but both parents and children being English, to deliver the children to the father within a week, or otherwise to concur with him in taking the steps necessary for authorizing them to be delivered to him according to the laws of France, with declaration, for information of French Courts, that an appeal to House of Lords does not suspend the order of the L. C., see *Hope v. H.*, 4 D. M. & G. 355; L. C., 5 Aug. 1854, A. 1499.

For orders restraining the father, on ground of immoral conduct, from removing or attempting to remove the Plts, his infant children, or any of them, from the care and custody of the sisters of their deceased mother, see *Wellesley v. D. Beaufort*, 2 Russ. 44.

And for persons to be appointed to act as guardians, though the father was living, he being an improper person to have the care of his infant children, *S. C.*, *L. C.*, 9 Nov. 1825, B. 182; and for directions as to their custody, maintenance, and education, see same orders.

For order restraining the infant Plts' father and his agents from taking possession of their persons, and from intermeddling with them, until further order; with inquiry what would be a proper plan for their maintenance and education, and with whom and under whose care they should remain during their minority or until further order, see *Shelley v. Westbrook*, cited in *Lyons v. Blenkin*, Jac. 267, 268; and staying his interfering with their custody, *De Montaigne v. Cane*, M. B., 1 Feb. 1853, A. 423; continued at the hearing, *S. C.*, 3 Dec. 1853, A. 281.

9. *Order under the Guardianship of Infants Act, 1886.*

THE application by originating summons of A. B., an infant, by &c. that the nomination of C. D. and E. F. by the will of her late mother, G. H., as the guardians of her child, the said A. B., might be confirmed by the Court, and that the said C. D. and E. F. might be authorized and empowered to act as such guardians of the person of the said A. B., and to have the custody of the said infant, and the care of her maintenance and education during her minority, and for an allowance for maintenance &c., which upon hearing the solrs for &c. in Chambers was adjourned &c., and upon hearing counsel for the applicant, and for M. N. the father of the said infant, Let the appointment of the said C. D. and E. F. as guardians of the infant be confirmed jointly with the said father, and adjourn back to Chambers the rest of the said summons.—*Re G.*, Kekewich, J., 29 Oct. 1891, A, 1473; *S. C.*, (1892) 1 Ch. 292.

For form of application, see D. C. F. 1195.

10. *Order placing Infant at School and regulating Custody during Holidays and Access—Guardianship of Infants Act, 1886.*

THE application of the Plt, an infant, by the above-named Earl of A. [*father*], her next friend, which upon hearing the solrs for the applicant, and for the Defts, and for the Rt. Hon. E., Countess of A. [*mother*], in Chambers, was adjourned &c.; And upon hearing counsel &c., And upon reading &c., Let the infant Plt be sent after the expiration of the present [Christmas] holidays for the purpose of her education to the boarding-school at R., in the county of S., conducted by the Religious of the —, — Convent, at R. aforesaid, And Let the said Plt remain there for the purpose aforesaid until further order; And Let each of them the said Earl of A. and Countess of A. have the custody of the said infant during one moiety of the period allowed for holidays at the said school (the respective times during which each of them the said Earl and Countess shall have such custody to be such as have already been determined by agreement between themselves); And Let each of them the said Earl and Countess, while the said infant shall be residing at the said school, have reasonable access to

the said infant, subject to the regulations of the school authorities relating to the visits of parents to their children while residing at the said school.—See *Ashburnham v. Ashburnham*, and *Re The Lady M. C. C. Ashburnham, an Infant*, North, J., 21 Dec. 1899, A. 4775.

11. *Order regulating Residence during Holidays.*

UPON the appeal &c., Let the Deft H. [*the husband*] forthwith deliver up the Plt I. to her mother the Plt A. for the purpose of allowing the said infant to pass the rest of her present holidays with her said mother; And Let the Deft H. be restrained from preventing the infant Plt H. the younger from passing the first month of the coming Midsummer holidays with his mother, the Plt A., as directed by the trustees of the indenture dated &c., by their notice dated &c., set forth in the third paragraph of the statement of claim; And Let the said Deft be also restrained from preventing the Plt A. from having access to or communication with her said children the Plts I. and H. the younger, or either of them, at their respective schools in the statement of claim mentioned, subject only to the ordinary regulations of such schools for the time being.—See *Hamilton v. Hector*, L. C., 19 July, 1871, A. 1941; *S. C.*, 6 Ch. 701, reversing, 13 Eq. 511.

12. *Mother having become a Roman Catholic removed from being Guardian.*

AND S., the mother of the infants, by her counsel admitting that since &c., the date of the said order, she has adopted the Roman Catholic faith, Let her be removed from being guardian of the persons of said infants; And Let M. be appointed sole guardian of the persons of the said infants during their respective minorities, or until further order; And Let the said S. deliver up the said infants to the said M.; And Let the said S. have reasonable access to the said infants, she by her counsel undertaking not to speak to them on religion or religious subjects.—*Re Fell*, V.-C. S., 22 Feb. 1870, A. 1289.

13. *Infant to be brought up in the Roman Catholic Religion.*

UPON the application of H. by G. H., his mother, testamentary guardian and next friend for the purpose of this application; And upon hearing the solrs for the applicant and for the Plt; And upon reading &c.; And the applicant being present in person and expressing his wish to be brought up in the Roman Catholic faith, Let the applicant, the Plt H., be henceforth brought up in the communion, doctrines, and worship of the Roman Catholic religion.—*Re Hassall, H. v. H.*, Fry, J., at Chambers, 16 March, 1883, A. 509.

For a declaration that a child ought to be brought up in and, when

capable of receiving religious education, educated as a member of the Roman Catholic Church, into which she was baptized, and of which her deceased father at his marriage and down to the time of his death continued a member; but that having regard to her tender age and condition of health, the Court deemed it requisite that the child should continue under the care of her mother (who had during her first marriage conformed to her husband's religion, but since his death returned to Protestantism), her mother's husband and W. (who were appointed guardians), until she should attain the age of seven years, when application should be made to the Court respecting her guardianship, education, and religious instruction, see *Austin v. A.*, L. C., 27 May, 1865, A. 1092; 4 D. J. & S. 717, varying M. B., 34 Beav. 257.

14. *Infant to be brought up in the Church of England.*

ON the petition of the infants by their next friend, and of two of their testamentary guardians, against their mother and co-guardian (*the will containing no special direction as to the infants' bringing up*),—"Declare that the Petrs, the infant Plts, ought to be brought up in the communion, doctrines, and worship of the Church of England as by law established, and that the said infants ought to attend the public worship of the said Church, and that they ought not to be taken to attend the chapel in the petition and in the affidavit of E. referred to; And Let the said E. be restrained from taking the said infants, or any of them, or causing or procuring (or permitting) the said infants, or any of them, to be taken to the said chapel, or to any places or place of worship where worship is performed otherwise than according to the rites and ceremonies of the Church of England as by law established."—*Bligh v. B.*, M. R., 4 Aug. 1836, A. 1091.

For a similar order that infants in their fifteenth and twelfth years be brought up in the Church of England, the professed faith of their deceased father, and restraining the mother from taking them to a Plymouth Brethren Chapel, of which sect she had become a member, see *Re Newbery*, 1 Ch. 263; 1 Eq. 431. For the like order, with injunction against the mother (a Roman Catholic), see *Re Agar Ellis, Agar Ellis v. Lascelles*, V.-U. M., 5 Aug. 1878, A. 1788; affirmed, C. A., 23 Nov. 1878, A. 1859; 10 Ch. D. 49, C. A.

For the like order, pending the settling a scheme, with liberty for the mother (who had turned Roman Catholic) to have reasonable access, and to be allowed unrestricted correspondence, on her undertaking not to speak or write on the subject of religion, see *Byng v. Gwallim*, M. R., 5 June, 1860, A. 1025.

For order appointing guardians of an infant which had been placed at the Patriotic Fund School on the death in action of its father (a Protestant), on their undertaking to allow the mother (a Roman Catholic) access to the infant at reasonable and proper times, to be appointed for the purpose by the governors of the establishment, and the mother conforming to the regulations of the establishment as to the visiting of children by their friends, see *Re Race*, V.-C. K. in Chambers, 15 Dec. 1857, B. 284.

For order restraining the testamentary guardian, appointed by a Roman Catholic father, from removing an infant, aged eleven, from the custody of her grandmother, with whom she had been allowed to live for ten years, and with whom she had been brought up in the Anglican faith, see *Andrews v. Salt*, L. J.J., 6 May, 1873, A. 1299; S. C., 8 Ch. 622.

15. *Custody given to Foreign Guardian.*

UPON motion &c., Declare that the order dated &c. [*order appointing guardian in England*] is to be without prejudice to the power and right

of the Deft V. as the guardian appointed by the Austrian Vice-Consular Court at Constantinople, And that the said Deft, as such guardian, has the sole and exclusive right to the custody and control of the infant Plts B.; and the said Deft V. is to be at liberty to apply as to the removal of the infant Plts out of the jurisdiction of this Court, and otherwise as he may think fit.—*Nugent v. Vetzera*, V.-C. W., 12 July, 1866, B. 1664; *S. C.*, 2 Eq. 704.

16. *Additional Guardian of the Person—Leave to Travel.*

UPON motion &c. by counsel for infant Plts, Let A. B. of &c. be appointed guardian of the persons of the infant Plts during their minorities, or until further order, in addition to and to act jointly with the Deft C. D. Leave to infants to travel abroad on usual undertaking of the guardian to bring the infant within the jurisdiction when required.—*Re Callaghan, Elliott v. Lambert*, C. A. 1 Dec. 1884, A. 1649; *S. C.*, 28 Ch. D. 186, C. A.

17. *Temporary Absence Abroad.*

“THE said W. undertaking that the said infant B. shall return to this country (within the jurisdiction of this Court) on or before the — day of — [or within — from this time], and having signed the Registrar's book (summons) accordingly, Let the said infant be allowed to accompany the said W. on her intended tour to &c.; And Let the sum of £— be allowed to &c., the said infant's guardian, in addition to the sums already allowed for the maintenance and education of the said infant by the orders dated &c.; And Let the said guardian out of such sums pay to the said W. the sum of £—, for the said infant's travelling and other expenses on the journey.”—Costs to be costs in the action.—*Bank v. B.*, M. R., 19 July, 1851, A. 1232; *Shirley v. E. Ferrers*, V.-C., 8 Dec. 1834, B. 264.

For form of application, see D. C. F. 686.

For orders for maintenance of infants out of the jurisdiction, see *Stephens v. James*, 1 M. & K. 633; *Wyndham v. L. Ennismore*, 1 Ke. 468; *De Weever v. Rockport*, 6 Beav. 392.

Where the mother's health required residence abroad, see *Westcomb v. Dorien*, V.-C. E., 1842, B. 1182.

For order for appointment of guardian in India to infant residing there, the guardian, by her solr, undertaking to inform the Judge, once every six months by letter, of the progress of the infant in his education, and of his state of health, and for allowance for the infant's maintenance out of the funds here, to be paid to the attorney under power from the guardian, see *Re Bentley*, M. R. at Chambers, 31 Dec. 1859, A. 377.

18. *Guardian having removed Infant Ward out of Jurisdiction, to bring her within.*

ON infant's petition by her guardian to have settlement approved,—“Let L., the mother and guardian of the Petr B., the infant, bring

the said infant within the jurisdiction of this Court, and produce the said infant, and personally attend with the said infant before Mr. Justice A. &c. (in his private room), at the Royal Courts of Justice, at half-past ten o'clock of the forenoon on —, the — day of —; And in the meantime Let the said petition stand over."—See *Re Bickersteth*, V.-C. S., 24 May, 1856, A. 1064; affirmed by L. JJ.; but the order to be intituled also in a cause in which the infant was Deft.

For leave, with concurrence of the testamentary guardians, for infant Plt, with his tutor, to reside and travel abroad with the Deft, the Earl of S., to whose title he was presumptive heir, Deft, by his counsel undertaking to bring the said infant back within the jurisdiction of this Court by a day named, or at such other time as this Court shall direct, with leave to his mother to visit him, and trustees to defray her expenses, see *Talbot v. E. Shrewsbury*, 4 M. & Cr. 677.

For undertaking by guardians to bring infant within jurisdiction, see *Re Clarke*, 21 Ch. D. at p. 830.

19. *Infant restored to his Friends Abroad.*

UPON motion &c., "This Court being of opinion that the infant Deft should return to Paris forthwith, Let the Plt be appointed joint guardian with the said Y. of the person of the infant Deft, and Let V., the infant Deft, be delivered into the custody of some person or persons to be appointed by the said guardians, or by one of them, and be by them or him taken to Dover and placed upon a steam-packet bound for Calais, with a view to his immediate return to Paris."—*Castel-Florite v. Griesbauer*, M. R., 5 May, 1876, A. 743.

In this case the circumstances rendered it expedient that the infant should be under the care of his friends at Paris, and not allowed to remain in England.

NOTES.

CUSTODY.

By the Jud. Act, 1873, s. 25 (10), "in questions relating to the custody and education of infants the rules of equity shall prevail."

The distinction that existed between the rules of equity and common law in this respect is well illustrated by the decisions in *Andrews' Case*, L. R. 8 Q. B. 153; 8 Ch. 640; and in *Alicia Race's Case*, 7 E. & B. 186, *sup.* p. 1039.

At common law the right of the father, or testamentary guardian of his appointment, and of the mother as guardian for nurture after the death of the father, there being no testamentary guardian, was treated as paramount, and could be enforced by writ of *habeas corpus*, which, when the infant was too young to select his custody (under fourteen in the case of a male, under sixteen in the case of a female: *Reg. v. Clarke*, 7 E. & B. 186; *Reg. v. Howes*, 3 E. & E. 332; *Mallinson v. M.*, L. R. 1 P. & M. 221; *Ryder v. R.*, 9 W. R. 440; independently of mental capacity: *Re Andrews*, L. R. 8 Q. B. 153, 159; *Reg. v. Clarke*, 7 E. & B. 186, 197), the Court had no jurisdiction to refuse, unless cruelty, or contamination from the gross immorality of the father or guardian, was to be apprehended: *Re Hakewill*, 12 C. B. 223; *Re v. Greenhill*, 4 A. & E. 624; *Re v. Isley*, 5 A. & E. 441; *Reg. v. Clarke*, 7 E. & B. 186.

In equity a discretionary power has been exercised to control the father's or guardian's legal rights of custody where their capricious exercise would

materially interfere with the happiness and welfare of the child, or where such rights have been forfeited by conduct or acquiescence; or where the father has so conducted himself or is placed in such a position "as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be superseded or interfered with": *Fynn's Case*, 2 Dr. & S. 457, 474; *Andrews v. Salt*, 8 Ch. 636; *Re Curtis*, 7 W. R. 474; *Swift v. S.*, 34 Beav. 266; *Lyons v. Blenkin*, Jac. 245; *Re McGrath*, (1892) 2 Ch. 496, 511.

Accordingly, in *Re Andrews*, L. R. 8 Q. B. 153, the Court of Queen's Bench having, though with reluctance, granted to the testamentary guardian a *habeas corpus*, subject to the validity of his testamentary appointment, the Court of Chancery restrained the guardian from removing the infant, then aged eleven, from the custody of the grandmother, by whom she had been brought up for ten years in the English Church, the father having been a Roman Catholic: *Andrews v. Salt*, 8 Ch. 640; and *v. inf.* p. 1045.

And under the modern practice the Queen's Bench Division, on the ground of the father's gross and habitual intemperance, violence, and constant use of improper and outrageous language, declined to restore the child, a boy of nine years, to the custody of his father from that of his maternal grandfather: *Goldsworthy's Case*, 2 Q. B. D. 75.

The absolute right of a father to the custody of his children, except in cases where by gross and extreme misconduct he had shown himself unfit to discharge the parental trust, or the children would be injured by remaining under his custody (see cases collected, Simpson, *Infants*, 118—126), was first modified by 2 & 3 V. c. 54 (*Talfourd's Act*), which gave the Court, on the application of the mother, an absolute discretionary power as to the custody of and access to the infant when under seven.

See as to the effect and operation of this Act (repealed by the *Infants' Custody Act*, 1873), and as to the principles on which the Court granted or refused a mother access to her child under it, *Warde v. W.*, 2 Ph. 786; *Re Halliday's Estate*, 17 Jur. 56; *Re Tomlinson*, 3 De G. & S. 371; *Exp. Young*, 4 W. R. 127; *Skilto v. Collett*, 8 W. R. 683, 696; *Re Wincom*, 2 H. & M. 540.

In the case of an illegitimate child, the mother has a natural right to its custody (coupled with a legal and inalienable right and duty to maintain it: *Humphrys v. Polak*, (1901) 2 K. B. 385, C. A.), and the Court, in exercising its jurisdiction with a view to the benefit of the child, will primarily consider her wishes: *Barnardo v. McHugh*, (1891) A. C. 388; *Reg. v. Nash*, 10 Q. B. D. 454, C. A.; but after her death the putative father will be preferred to her relatives claiming as guardians appointed by her: *Re Kerr or McLlwraith*, 22 L. R. Ir. 842; 24 L. R. Ir. 59. But it would seem that in such a case no person has all the rights of a legal parent, and that the legal rights of the mother as to the custody of an illegitimate child are not necessarily the same as those of a father in respect of his legitimate child: *Barnardo v. McHugh*, *sup.*; *Re Ullee*, 53 L. T. 711; 54 L. T. 286.

For the principles regulating the custody of and access to infants, where their parents have been judicially separated, see *D'Alton v. D'A.*, 4 P. D. 87.

For case in which the Court will disregard the paternal right, see *Re Elderton*, 25 Ch. D. 220.

And as to the custody of an infant born and domiciled out of the jurisdiction, whose father was born and domiciled out of the jurisdiction, see *Re Willoughby*, 30 Ch. D. 324, C. A.

Where the wife refused to live with her husband, the custody of the infant was given to the husband: *Constable v. C.*, 34 W. R. 649.

INFANTS' CUSTODY ACT, 1873.

By the *Infants' Custody Act*, 1873 (36 & 37 V. c. 12), the right of the mother to the custody of her children as against the father was recognized and greatly extended. Sect. 1 provides that on petition of the mother of infants under sixteen, the Court of Chancery may order that she shall have access to and the custody or control of such infants, subject to such regulations as to access by the father or guardian of the infants as the Court shall deem proper.

Sect. 2 provides that no agreement in any separation deed made between the father and mother of an infant shall be held to be invalid by reason only of its providing that the father of such infant shall give up the custody or control thereof to the mother; but such agreement shall not be enforced if the Court be of opinion that it will not be for the benefit of the infant to give effect thereto.

The effect of this Act is to place the custody of the infants entirely within the discretion of the Judge, in the exercise of which their interests will be the primary consideration: see *Re Taylor*, 4 Ch. D. 157, *sup.* p. 1036.

And atheistical opinions, not merely held, but openly proclaimed, by the mother, who refused to allow the child to receive religious instruction, and had also published a book which, in the opinion of the Court, was obscene (see *Re Besant*, 11 Ch. D. 508), or constant drunkenness of the mother (*Re Carnegie*, M. R., 30 March, 1878, A. 595), will induce the Court to refuse to enforce the father's agreement to give up the custody and control of the children, and order them to be delivered to him.

"Custody and control," in sect. 2 of the Act, includes control of religious education, so that where, on a separation, a Roman Catholic father agreed that the wife, a Protestant, should have the absolute control of the infant without interference from him, the wife was entitled to bring up the child in her own faith: *Condon v. Vollum*, 57 L. T. 154; W. N. (87) 121.

In the exercise of its discretion, the Court will hesitate to remove a girl of tender years from the custody of the mother and other relatives whose conduct is unimpeached, and to place her under the control of her father: *Re Ethel Brown*, 13 Q. B. D. 614.

An application to vary an order made under sect. 1 of the Act should be made to the Judge who made the order: *Re Holt*, 18 Ch. D. 115, C. A.; and may be made by a respondent to the original petition: *S. C.*

In determining whether the custody of an infant child ought to be given to or retained by the mother, the Court will consider (1) the paternal right, (2) the marital duty, (3) the interest of the child; and the marital duty includes the responsibility of each parent so to live that the children shall have the joint care and affection of both: *Re Elderton*, 25 Ch. D. 220.

GUARDIANSHIP OF INFANTS ACT, 1886.

By sect. 5 of this Act (49 & 50 V. c. 27) it is enacted that the Court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant, and the right of access thereto of either parent, having regard to the welfare of the infant and the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under the Act; and in every case may make such order respecting the costs of the mother, and the liability of the father for the same, or otherwise as to costs as it may think just.

Under this section the Court has full jurisdiction to override entirely the common law rights of a father in relation to the custody of his infant children. The Court will not treat the parents differently, but will take the whole conduct and wishes of both parents into consideration, and may, where both parents are in *pari delicto*, give the mother the custody notwithstanding her matrimonial misconduct: *In re A. and B. (Infants)*, (1897) 1 Ch. 746, 786, C. A.; Form 3, *sup.* p. 1034.

The order as to custody need not fix any limit of time: *Re Witten*, W. N. (87) 167; 57 L. T. 336.

In *Re Russell* (83 Law Times, 202) the mother was preferred to the relatives of the lunatic father.

The jurisdiction over children affected by a divorce continues after the decree absolute, and an application for access must be made not to the Ch. Div., but to the P. D.: *Re Manders, M. v. M.*, W. N. (90) 222; 63 L. T. 627.

As to the circumstances in which the Court, under this Act, in proceedings for judicial separation, will declare a father to be an improper person to have

the custody of his infant child, see *Handford v. H.*, 63 L. T. 256; *Webley v. W.*, 64 L. T. 839.

CUSTODY OF CHILDREN ACT, 1891.

By this Act (54 V. c. 3), s. 3, "where a parent has (a) abandoned or deserted his child; or (b) allowed his child to be brought up by another person at that person's expense, or by the guardians of a poor law union, for such a length of time, and under such circumstances, as to satisfy the Court that the parent was unmindful of his parental duties, the Court shall not make an order for the delivery of the child to the parent, unless the parent has satisfied the Court that, having regard to the welfare of the child, he is a fit person to have the custody of the child;" and by sect. 4 the High Court is empowered, upon refusing the application of the parent for the custody, to give special directions as to the religious education of the child. As to what amounts to an abandonment or desertion within the meaning of the Act, see *Re O'Hara* (1900), 2 Ir. R. 232, C. A.

PRODUCTION ENFORCED BY HABEAS CORPUS.

Production of the infant may be enforced by writ of *habeas corpus*, which will be issued at the instance of the person having the legal right to his custody, in order that the infant may be brought up, or that it may be ascertained by the return how he has been disposed of: *Re Matthews*, 12 Ir. C. L. R. 233; and see *Reg. v. Williams*, 58 L. J. Q. B. 176; and for Forms see *inf.* pp. 1047 *et seq.* On such an application by *habeas corpus* the Court, exercising equitable jurisdiction by virtue of the Judicature Act, 1873, will, if so to do is essential for the welfare of the infant, refuse to give the custody to the mother, although she has not been guilty of any misconduct: *Reg. v. Gynghall*, (1893) 2 Q. B. 232, C. A. And under the modern practice the Q. B. D., on the ground of the father's gross and habitual intemperance, violence, and constant use of improper and outrageous language, declined to restore the child, a boy of nine years, to the custody of his father from that of his maternal grandfather: *Goldsworthy's Case*, 2 Q. B. D. 75; and see *Simpson*, 140.

It is not a sufficient answer to the writ of *habeas corpus* that the child was not, at the time of issuing the writ, or at any time since, under the custody or control of the Deft to whom the writ is addressed, or of any person employed by him, and he must state whether he knows where the child is and by whom he was taken: *R. v. Roberts*, 2 F. & F. 272; *Re Matthews*, 12 Ir. C. L. 233; and a return showing that he had wrongfully handed over the child to another person, who had taken the child out of the jurisdiction, is bad: *Reg. v. Barnardo*, 23 Q. B. D. 305, C. A.; 24 Q. B. D. 283; but see *Barnardo v. Ford*, *Gossage's Case*, (1892) A. C. 326; *Cox v. Hakes*, 15 App. Ca. 586; but an appeal lies from an order of the Q. B. D. directing the issue of a writ of *habeas corpus* to bring an infant before the Court in order to determine who is to have the custody and control of him: *Barnardo v. McHugh*, (1891) A. C. 388; *Barnardo v. Ford*, *Gossage's Case*, (1892) A. C. 326.

RELIGIOUS EDUCATION.

The rights of the father as to directing the religious education of his children are analogous to his right to the custody of their persons.

Religio sequitur patrem; and except under very special circumstances the child must be brought up in the religious faith of the father; and this rule is not affected by the Guardianship of Infants Act, 1886: *Re Scanlan*, 40 Ch. D. 200; *Re McGrath*, (1892) 2 Ch. 496; (1893) 1 Ch. 143, C. A.; but inasmuch as the welfare of the infants is always the paramount consideration, the Court has jurisdiction in a proper case to deprive a father of the custody of his children, and to disregard his wishes as to their religious education; and where a Roman Catholic father allowed his two children by a deceased Protestant wife to be brought up in the Protestant faith until one of them was fifteen and the other eleven years of age, and had abdicated

his parental rights, the Court refused to allow him to resume the control of their religious education: *In re Newton (infants)*, (1896) 1 Ch. 740, O. A.

The father cannot release this right (which the law gives him for the benefit of his children and not of himself), nor bind himself conclusively as to the exercise of it: *Andrews v. Salt*, 8 Ch. 636; *Agar Ellis v. Lascelles*, 10 Ch. D. 49, C. A.; *Re Nevin*, (1891) 2 Ch. 299, O. A.; *Re McGrath*, (1892) 2 Ch. 496, 507, 508; and although the Court, having regard to the child's physical well-being, will not remove it during tender years (under the age of seven) from the mother's custody, the order may provide for the education of the child, when capable of receiving religious instruction, in the faith of its deceased father: *Austin v. A.*, 4 D. J. & S. 717; 34 Beav. 257, *sup.* pp. 1038, 1039.

And in *Hawksworth v. H.*, 6 Ch. 539, following the principle enunciated by Lord Westbury in *Austin v. A.*, the child of a deceased Roman Catholic father, who died when the child was six months old, was, when eight years and a half old, ordered to be brought up in the Roman Catholic faith, though up to that time brought up by the mother as a Protestant: and see *Re Clarke*, 21 Ch. D. 817.

Under special circumstances, such as a long-continued course of religious training by the mother, without opposition from the testamentary guardian, and fixed religious convictions formed by the child, the Court has refused to interfere with the mother's teaching: *Stourton v. S.*, 8 D. M. & G. 760; *Re Broune*, 2 Ir. Ch. R. 151; *Re O'Malleys*, 8 Ir. Ch. R. 291.

In the English decisions to this effect there have been special grounds (*e.g.*, the intimation of a wish by the deceased father that the child should be brought up in the mother's faith, and the benefit of the infant: *Re Clarke*, 21 Ch. D. 817) for departing from the general rule: see *Hawksworth v. H.*, 6 Ch. 539; *Davis v. D.*, 10 W. R. 245; and the Court will not usually control the discretion of guardians as to the faith in which they educate their wards: *Talbot v. Shrewsbury*, 4 M. & Cr. 672.

If the father had died without appointing a testamentary guardian, the mother, as guardian for nurture, acquired the father's right of directing the religious education of the children: see *Reg. v. Clarke*; *Alicia Race's Case*, 7 E. & B. 186, subject to the jurisdiction of Equity to control the right under special circumstances.

In that case an order was subsequently made by V.-C. Kindersley, the child having been made a ward of Court, restraining the mother from interfering with the religious education of the child in the faith of its father, and from proceeding under the writ of *habeas corpus* granted by the Court of Q. B. The case was heard in private; but it appears (see 3 Jur. N. S. Part II., p. 92) that the judgment proceeded upon the grounds: 1. That the religion of the father, in the absence of any other circumstances, governs that of his children; 2. That the mother had expressly admitted that the father's will was that the children should be brought up as Protestants; and, 3. That the child had been brought up from her birth until ten years old, and since the father's death for a year and a half, with her mother's acquiescence, in the religion of her father (Church of England), and that the fixed course of education would not be changed at the risk of unsettling the child's principles.

And even in the case of wards of Court, the Court will not interfere with the authority of the father, except (1) where by his gross moral turpitude he forfeits his rights; or (2) where he has by his conduct abdicated his paternal authority; or (3) where he seeks to remove his children, being wards of Court, out of the jurisdiction without the leave of the Court: *Re Agar Ellis*, A. E. v. *Lascelles*, 24 Ch. D. 317, C. A.

A ward of Court should not, without the consent of the Court, become a postulant or novice in a convent: *Re Gills*, 27 L. R. Ir. 129.

Infants interested in real estate in England, whose father was dead, were living in charge of their mother, who was resident out of the jurisdiction and was one of their testamentary guardians. At the instance of their other two guardians, an order was made declaring in what faith they ought to be educated: *Re Wroughton*, *Montagu v. Festing*, 28 Ch. D. 82.

If the father has left no instructions, it will be presumed that he intended the child to be brought up in his own religion: *Re Newbery*, 1 Ch. 263; and see *Re Nevin*, (1891) 2 Ch. 299, 312, C. A.

The father may by his conduct lose or abandon his right to have his

child educated in his own religion, even in his own lifetime, and much more after his death: *Andrews v. Salt*, 8 Ch. 622, 639; *Re Meades*, I. R. 5 Eq. 98; *Re O'Malleys*, 8 Ir. Ch. R. 172; *Re Kellers*, 5 Ir. Ch. R. 328; *Re Ullee*, 54 L. T. 286; *Re Nevin*, (1891) 2 Ch. 299, 316, O. A.; *Re McGrath*, (1892) 2 Ch. 496, 508; *Re Newton*, (1896) 1 Ch. 740, O. A.; *sup.* p. 1044; *Simpson on Infants*, 132—136.

If he has shown himself careless, and allowed his wife to have the religious education of the children, directions in his will that the children be brought up in his own faith may be disregarded: *Hill v. H.*, 10 W. R. 400; 31 L. J. Ch. 132; 6 L. T. 99; 8 Jur. N. S. 609; *Garnett's Case*, 20 W. R. 222; *Re Nevin*, *sup.*; *Re McGrath*, *sup.*; on the ground of risk to the child by a change of religious education: *Witty v. Marshall*, 1 Y. & C. C. 68. And although, before the Infants' Custody Act, 1873, s. 2, an agreement by the father to abandon his right to the custody or control over the religious education of his children was not binding at law, and would not be specifically enforced in equity (see *Vansittart v. V.*, 2 D. & J. 249; *Hope v. H.*, 8 D. M. & G. 731; *Re Meades*, I. R. 5 Eq. 98; *Re Nevin*, (1891) 2 Ch. C. A. 299), a promise to the wife before marriage that the children shall be educated in her religion is a circumstance of importance in the exercise by the Court of its discretion: *Andrews v. Salt*, 8 Ch. 622; *Hill v. H.*, *sup.*; *Re Nevin*, (1891) 2 Ch. 312, O. A.; and see *Hamilton v. Hector*, 6 Ch. 701, that effect will be given to an agreement by the husband, in a compromise of proceedings in the Divorce Court, giving the trustees discretion as to where the children should spend their holidays.

A child born in India of a European British subject (a Christian) will be removed from the custody of the mother who has turned Mohammedan, and placed under a Christian guardian: *Skinner v. Orde*, L. R. 4 P. C. 60; but pending an appeal from the Indian Court, liberty was given to the mother to have access to the infant at suitable times: *Re Skinner*, L. R. 3 P. C. 451.

In many instances the Court has taken the course of seeing and conversing with the infant, to ascertain what his inclinations were on the subject of religious faith: see *Witty v. Marshall*, 1 Y. & C. C. 68; *Stourton v. S.*, 8 D. M. & G. 760; *Re Lyons*, 22 L. T. 770; 18 W. R. 238. But when the infant is of tender years (under ten) this practice seems to have been discouraged: *Hawkeworth v. H.*, 6 Ch. 539; *Re Agar Ellis*, 10 Ch. D. 49, O. A.; *Re Nevin*, (1891) 2 Ch. 307.

RESIDENCE ABROAD.

Wards of Court must not be taken out of the jurisdiction without leave: see 2 L. C. Eq. 747; 1 L. C. Eq., 7th ed. 522, 523, and cases there cited. And, except in cases of necessity on the score of health or otherwise, or from manifest advantage to the child, and upon proper guarantees, permanent residence abroad will not be allowed: see *Jeffreys v. Vantewarstwarth*, Barn. Ch. 144; *Re Medley*, I. R. 6 Eq. 339.

Although a case of necessity is not shown, yet if satisfied that so to do is for the interest of the infant, the Court will permit her to go abroad and live with her mother, taking security for her return, and for obedience to the orders of the Court: *Re Callaghan, Elliott v. Lambert*, 28 Ch. D. 186, O. A.; see Form 16, *sup.* p. 1040.

The order should provide for the education of the infants, for submitting (at least once in every twelve months) proper and necessary information to the Court as to their condition, progress, and well-being, and security for their return, when so required, upon reasonable notice; and the maintenance in such a case has been limited to one year only, with liberty to apply: see *Campbell v. Mackay*, 2 My. & Cr. 31; *Wyndham v. L. Ennismore*, 1 Ke. 467; *Re Medley*, I. R. 6 Eq. 339.

And in the case of female infants being allowed to go to live abroad with their aunts, their only relations, recognizances were required for their return to England, and that they should not marry without leave of the Court: *Jeffreys v. Vantewarstwarth*, Barn. Ch. 144.

Upon due security for his return, an infant has been placed at the University of Dublin, to be near his father and sisters: *Lethem v. Hall*, 7 Sim. 141; and allowed to visit his father abroad: *Biggs v. Terry*, 1 My. & Cr. 676.

Where the father, who was a medical officer in the army, had agreed that full liberty of access to the children should be accorded to his wife, who was to have the opportunity of spending one day in every fortnight with them, he was not restrained from taking a daughter (aged fifteen) and a son (aged nine) with a governess to Egypt, where he was ordered on duty: *Hunt v. H.*, 28 Ch. D. 606.

And see cases collected, *Simpson, Infants*, 157 *et seq.*

The Court will not compel a ward born abroad, but who is a British subject, to leave this country: *Dawson v. Jay*, 3 D. M. & G. 764; but will not interfere with the right of a foreign guardian, duly constituted by a foreign Court of competent jurisdiction, to remove his wards, who are foreign subjects, from England: *Nugent v. Vetzera*, 2 Eq. 704.

In the case of a ward of Court who has been removed and his residence concealed, there is no privilege for concealing his residence on the part of a solicitor who has acquired the knowledge professionally, or of any other person: *Ramsbotham v. Senior*, 8 Eq. 575; *Burton v. E. Darnley*, *Ib.* 576, n.

A summary order may be made for the personal attendance of any persons who are supposed to be able to give information as to the place of concealment of a ward: *Rosenberg v. Lindo*, 48 L. T. 478.

An injunction may be granted to restrain a father from removing his child out of the jurisdiction until the hearing of a petition under the Infants' Custody Act, 1873: *Re Ada Crookes*, W. N. (87) 29; and an interim injunction against removal has been granted on an *ex parte* application: *Harris v. H.*, W. N. (90) 136.

(II.) ORDERS TO ENFORCE PRODUCTION OF THE PERSON OF THE INFANT.

1. *Order to produce Infant in Court.*

LET the petition stand over until &c.; And Let A. and B., and C., the infant, then personally attend this Court on the matter of the said petition, before &c. at &c., on the — day of &c., at the hour of &c.; And Let the said A. then produce before his Lordship the said C., the infant; And Let all other parties concerned then also attend his Lordship (by their agents), in the matter of the said petition; And Let notice hereof be forthwith given.

For order for guardian to attend at Chambers with the infant, see *Re Stedman*, V.-C. H., at Chambers, 27 June, 1874, B. 1698. For order on infant to attend, see *Smith v. Gooch*, V.-C. H., 25 Nov. 1875, B. 1793.

2. *Order for Mother to deliver Infant to Father's Nominee.*

UPON the application of the Plts, as to the infant Plt T. V. S. G. by the Plt A. S. G., his father and next friend, And upon hearing counsel for the applicants and for the respondent A. E. G., the wife of the Plt A. S. G., And upon reading the order dated &c. (whereby the respondent was ordered on the — day of — to deliver up the infant Plt T. V. S. G. to the father's nominee), &c., Let the respondent A. E. G., at her own expense, deliver the infant Plt on the — day of — to E. G. on behalf of the Plt A. S. G., the father of the said infant, at — in the county of — between the hours of — and —.—The respondent to pay the costs of application to be taxed.—See *Gooch v. Lea*, Chitty, J., 1 June, 1891, A. 644.

3. *Injunction against inducing Infant to take Monastic Vows—
Serjeant-at-Arms to bring Infant before the Court.*

UPON motion &c., Injunction to restrain L., in the order dated &c. named, from imposing on the Plt T., or inducing, encouraging, or permitting the Plt to take or enter into any vows, oaths, or engagements of a monastic character, or in particular of obedience to the said L., or any vows, oaths, or engagements for the purpose of binding or inducing him to remain under the orders, control, or direction of the said L., or of inducing him not to return to the care and custody of the said J. T., his father and natural guardian, until further order; And Let the Serjeant-at-Arms attending the Court take the said infant Plt, R. T., into his custody, and bring him before this Court at 11 o'clock in the forenoon on &c.; whereupon such further order shall be made as shall be just; and the Serjeant-at-Arms is to be at liberty to allow the Plt, during the interval between his arrival in London and his being so brought before this Court, to stay at the house of his father the said J. T.; And Let service of this order by leaving the same at the house or monastery, New Llanthony, in the County of M. mentioned in the said affidavit of &c., be deemed good service on the said L.—*Todd v. Todd*, V.-C. M., 22 July, 1873, B. 1888 (*Llanthony Abbey Case*).

4. *Serjeant-at-Arms to take and deliver Infant to Custodian appointed by the Court.*

UPON motion &c. by counsel for the Plt (the father), and upon reading an order dated &c., whereby it was ordered that A. B. (the mother) should on &c., deliver up the infant C. D. to E. at &c., and an order dated &c., whereby it was ordered that the said A. B. should, at her own expense, deliver the said infant C. D. on &c., between the hours of 10 o'clock a.m. and 12 o'clock at noon, and an affidavit of &c., whereby it appears that the said A. B. has not delivered the said infant as directed by the said order, Let the Serjeant-at-Arms attending this Court take the said infant C. D. into his custody, and deliver him to the said E. at her residence situate at &c., or elsewhere.—*G. v. L.*, Chitty, J., 13 June, 1891, A. 717; *S. C.*, (1891) 3 Ch. 126.

This order is obtained *ex parte*.

For order for Serjeant-at-Arms to bring infant before the Court, see *Wellesley v. W.*, L. C., 16 July, 1831, B. 1776; *Arnott v. Archbold*, 4 Jan. 1879, A. 11.

The "Serjeant-at-Arms attending the Court" is still the proper officer to execute and enforce all orders for the production or custody of a ward of Court: *G. v. L.*, *sup.*; *q. v.*, as to the nature of the office and of that of tipstaff.

5. *Order for Habeas Corpus.*

LET a writ of *habeas corpus* issue [returnable immediately], directed to E. and W., to bring before this Court (the bodies of) D. and N., at

(his Lordship's room) at the Royal Courts of Justice, on the — day of —, at — o'clock.—See *Re Westmeath*, L. C., 16 June, 1819, A. 1359; *Exp. Thomson*, 24 Jan. 1815, B. 144; *Erskine v. Lawrie*, L. C., 15 Jan. 1830, A. 462; *Lyons v. Blenkin*, L. C., 15 Jan. 1820, B. 208; Jac. 247; *Re North*, V.-C. K. B., 17 Dec. 1846, B. 148.

This order is now made on motion.

For *habeas corpus* against mother, on payment of £20 to her solrs, to defray the expense of bringing up the infants, and to deliver them to their father, see *Re Wilson*, 12 May, 5 Aug. 1814, B. 843; and for mother to return infants to the care of their schoolmistress; service on solr to be good service; and to produce them, with like service, and in default committal, see *Cumming v. C.*, 17, 31 March, 1818, A. 987, 1046.

For an order, upon an undertaking by a lady, with whom the female infant, a Jewess, aged nearly twenty, had lived two years, to produce the infant, upon the hearing of an application for a *habeas corpus*, restraining the father from attempting to obtain possession of the infant otherwise than by legal process, see *Re Esther Lyons*, L. J. G., 17 Dec. 1870; 22 L. T. 770; 18 W. R. 238.

6. Order on return of *Habeas* to deliver Custody.

LET (the bodies of) the said D. and N., the children of the said W., be delivered to him.—*Re Westmeath*, L. C., 23 June, 1819, A. 1534; Jac. 251, n.

For order for *habeas* to bring up adult, removed from home and alleged to be *non compos*, see *Edwards v. Kennedy*, V.-C. W., 6 Nov. 1854, A. 293.

For orders for *habeas corpus*, directing three sons to produce their father, and show cause why they removed him from his house, and for substituted service on his son-in-law and daughter, see *Re Taylor*, V.-C., 22, 26 July, 1836, B. 793, 842.

For the form of the writ of *habeas*, see Braith, 222, 225; Chitty, 333; Edwards on Execution, 430, 431; the words *cum causis* are not inserted in the order or the writ: Braith. *sup*.

An appeal lies from an order of the Q. B. D. directing the issue of a writ of *habeas* to bring an infant before the Court in order to determine who is to have the custody and control of him: *Barnardo v. McHugh*, (1891) A. C. 388.

SECTION VII.—MARRIAGE OF INFANT.

(I.) MARRIAGE AND SETTLEMENT OF INFANT'S PROPERTY.

1. *Proposals of Marriage.*

UPON the application of A. B., spinster, an infant, by C. D., her guardian, Let the applicant be at liberty to accept the proposals of marriage made to her by K. of &c.—*Re Kretschman*, North, J., 3 Aug. 1887, B. 1901.

This order goes on to direct payment of the fund in Court to the infant on her separate receipt after proof of her marriage.

2. *Order in Chambers on Adjourned Petition of proposed Husband for leave to marry a Ward of Court.*

AND the Judge being of opinion that the proposed marriage between the said B. and (the Plt or Deft) A., the infant, is a fit and proper marriage for the said infant; and that the settlement proposed to be effected by the indenture hereinafter mentioned is a proper settlement to be made upon or in contemplation of such marriage; and that the indenture (marked X) intended to be made between &c., and identified by the signature of the Master in the margin of the engrossment thereof, is a proper indenture for giving effect to such settlement, Let, upon the execution of the said indenture by such parties thereto as the Judge shall direct, being certified [*or* and upon the execution of the said indenture by &c., *name the parties to execute*; Let], the said B. and the said (Plt or Deft) A., the infant, be at liberty to intermarry; And Let, after the execution of the said indenture by &c., and the solemnization of the said marriage, to be also certified [*or, if so, to be verified by affidavit*], the funds in Court be dealt with as directed by the schedule hereto.—[Add Payment Schedule, Form No. 55.]

By S. C. F. R. r. 18, the execution of a document in existence at the date of the order, and sufficiently identified in the schedule, may be directed to be verified by affidavit.

The application is now by summons. For forms, see D. C. F. 696, 697.

3. *Marriage of Infant Ward—Wife's Fund in Court settled by Order.*

(AFTER approval of marriage and of sale to pay costs and to raise £200 for outfit); Let the funds in Court be dealt with as directed in the schedule hereto; And declare that the anns thereby directed to be carried over are to be held in trust for the said C. for her life, and during her said coverture, for her separate use, without power of anticipation; and from and after her decease in trust for the said P. during his life, or until he shall do or suffer some act or deed whereby he shall be deprived of the beneficial interest in such anns; and from and after the decease of the survivor of them the said C. and P., or other determination of the interest of the said P., in trust for such children or child of the said marriage and in such manner as the said C. and P. shall by deed appoint; and so far as there shall be no such appointment, then as the survivor of them shall by deed or will appoint; and so far as the same shall be unappointed, in trust for all the children of the said marriage equally, who shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry under that age, or if there shall be but one child, then for such only child, but so that no child shall take an unappointed share without bringing his or her appointed share into account; and if there shall be no child of the said marriage who shall acquire a vested interest, then if the said C. shall survive the said P. in trust for her, her exors or admors, but if she shall die in

his lifetime, then in trust as the said C. shall by will appoint, and in default thereof [*in trust for her next of kin according to the Statutes of Distributions, as if she had died intestate and unmarried*].—[Add Payment Schedule, with direction to carry over residue of New Consols after sale to raise costs and £200 (outfit) to “The account of the settlement of C. on her marriage with P.”]—See *Re Cox's Trusts*, V.-C. S., 9 Nov. 1866, A. 2422.

4. *Order in Chambers on Adjourned Petition of intended Husbana and Ward of Court, sanctioning her Marriage, and a Settlement of her Property under the Infants' Settlement Act, 1855 (18 & 19 V. c. 43).*

AND the Judge being of opinion that &c. [*approval of marriage and settlement, as in Form 2, sup.*], doth, pursuant to the said Act of Parliament, sanction and approve of the same [*i.e., the settlement*]; And doth order that the said Petr A., the infant, be at liberty, upon or in contemplation of her marriage with the said B., to execute the said two indentures accordingly; And it is ordered that upon the execution of the said indentures by such parties thereto as the Judge shall direct being certified, the said B., and the said A., the infant, be at liberty to intermarry; And it is ordered that after the execution of the said indentures and the solemnization of the said marriage, the Defts C. and D. &c. do transfer £— Consols, standing in the books of the Bank of England in the name of &c. into the names of &c., the trustees of the said indentures, and that the said Defts C. and D. be at liberty to pay the sum of £— cash in their hands to the said &c. as such trustees. —*McLean v. Ramsay*, V.-C. H. at Chambers, 22 Dec. 1875, B. 1993.

For order, on joint petition, as above, extending only to leave to marry and to outfit, see *Hood v. L. Bridfort*, *inf.* p. 1053.

For like order on summons by the intended husband to approve the marriage, and on petition by the ward for the Court's sanction to the settlement, see *Skellon v. Barstow*, V.-C. W. at Chambers, 30 March, 1858, B. 781.

For order, the Court being of opinion that the marriage will be fit and proper, when the infant shall have attained the age of seventeen years, for leave for petitioner to propose a proper settlement, and on the execution of a proper settlement, leave to intermarry, after the infant has attained the age of seventeen, see *Morgan v. Hatchell*, M. R., 21 July, 1855, B. 1446.

For order embodying the trusts, *Chamberlain v. C.*, 1 S. & G. xxviii.

For order directing inquiries whether marriage proper, and for settlement, under the former practice, see *Gould v. Hayes*, M. R., 1828, A. 598; *Tempest v. Ord*, L. C., 1817, B. 784; and in case of male ward, *Parker v. L. De Tabley*, M. R., 1831, B. 675; *Peyton v. P.*, V.-C. 1838, B. 187; and for the further orders, *Parker v. L. De Tabley*, 1831, B. 2940; *Peyton v. P.*, 1838, B. 258.

5. *Order sanctioning the Marriage of an Infant Ward, and an Advance for Outfit, with Adjournment to Chambers to approve a Settlement under 18 & 19 V. c. 43.*

UPON the petition &c.; And this Court being of opinion that the proposed marriage between the said G. and the Petr E. [*the infant*

ward] is a fit and proper marriage for the said infant, doth order that a proper settlement of the property of the said infant to be made upon or in contemplation of such marriage be settled by the Judge; And Let the said infant be at liberty to execute such settlement under the provisions of the above-mentioned Act (18 & 19 V. c. 43); And Let the fund in Court be dealt with as directed in the schedule hereto; and the sum of £300 thereby directed to be paid to the Petr S. [*the father and next friend of the female infant E.*] is to be applied by him for the outfit and other expenses of the Petr E. incident to her said marriage, the Petr S. by his counsel undertaking within three months from this date if the said proposed marriage shall not have been solemnized in the meantime, to lodge in Court to the credit &c. a sum of consols equal in amount to the anns which shall be sold to raise the said sum of £300.—Rest of petition adjourned to Chambers.—[Add Payment Schedule, Form No. 56, and Lodgment Schedule, Form No. 2.]—See *Exp. Smith*, V.-C. H., 23 Jan. 1874, B. 79.

In this case, the intended husband having shortly to return to his post abroad, the marriage, on evidence that it was desirable, and the advance for outfit, were at once sanctioned, the settlement only being referred to Chambers: see 22 W. R. 294.

6. *Order approving Settlement of Fortune of Infant (not a Ward) on Adjourned Petition, under 18 & 19 V. c. 43.*

UPON the petition of A., an infant, by B., her mother and next friend and [testamentary] guardian, and of the said B. on the — &c.: And the Judge being of opinion that the settlement proposed to be effected as hereinafter mentioned is a proper settlement to be made upon or in contemplation of the intended marriage of the said infant A. with C., in the petition named, of the property of the said infant comprised therein, and that the indenture marked N. intended to be made between &c. and identified by the signature of the Master in the margin of the engrossment thereof, is a proper indenture for giving effect to such settlement, doth, pursuant to the said Act of Parliament, sanction and approve of the same; And Let the Petr A. be at liberty, upon or in contemplation of her marriage with the said C., to execute the said indenture accordingly.—See *Re Mitchelson*, M. R., 28 July, 1875, B. 1268.

The usual course is to make the order in Chambers upon summons.

7. *Outfit from Fund in Court—Costs.*

“And Let, after the execution of the said indentures and the solemnization of the said marriage, to be also certified [or verified by affidavit, see note to Form 2], the fund in Court be dealt with as directed in the schedule hereto, the sum of £— thereby directed to be paid to the Defts T. and H. being towards the outfit of the Plt C., the

infant, on her marriage; Tax costs of &c., of and relating to this application and consequent thereon, excluding the costs of the preparation and engrossment of the drafts of the said indentures (and deed-poll), but including the costs of settling the said drafts by the Judge in Chambers."—And the sums for outfit and costs directed to be paid are to be attributed to the infant's share not yet payable.—[Add Payment Schedule, Form No. 56.]—See *Hood v. L. Bridport*, V.-C. K. at Chambers, 16 Dec. 1859, A. 480; And for subsequent order to transfer infant's share to the trustees, *S. C.*, 27 July, 1860, A. 1646.

8. Restraining Interference with Infant Ward.

LET G. of &c., be restrained until further order from having any intercourse or communication with the infant Plt M., directly or indirectly, and from preventing her from returning to, or being in the custody of, H. N. as her guardian.—*Re Ormond, Norris v. O.*, V.-C. B., 20 March, 1883, B. 360; W. N. (83) 58.

For form of petition, see D. C. F. 692.

9. Order restraining Marriage or Intercourse with Ward.

LET the infant Plt M. (*male ward*) and L. be restrained from intermarrying; And Let the said L. be restrained from having any interview with the infant Plt M., and from having any intercourse or communication with him, directly or indirectly, by letter or message, or by any messenger, or by any other manner whatever, and from (knowingly) receiving any letter from the said infant, or resorting to any place for the purpose, or with the view of meeting him, or showing to him that she is present; And Let the said infant Plt M., and the said L. be also restrained from having any interview, intercourse, or communication with each other, by the means aforesaid, or in any other manner whatsoever; And Let — and —, and all other relations and friends of the said L., and all others acting in privity with her, be restrained from aiding or assisting in, or procuring, or endeavouring to procure, the marriage of the said infant Plt with the said L., or in procuring, or endeavouring to procure, any intercourse or communication whatever between them, until the further order of this Court; And Let the said L. attend the Judge (in his private room) at the Royal Courts of Justice, at the sitting of the Court, on the — day of — at (ten) o'clock in the forenoon.—See *Mortimer v. Wilkin*, V.-C. W., 19 July, 1853, B. 1113.

For like order as to female ward, see *Thornhill v. T.*, L. C., 5 Nov. 1852, B. 11, settled by L. C., in which case the word "knowingly" was purposely omitted: *Horrocks v. H.*, L. C., 20 Aug. 1808, A. 983; *Grant v. G.*, L. C. 24 June, 1828, A. 1652; *Bailey v. Ryves*, V.-C. B., 13 Nov. 1874, A. 2673.

In *Verner v. Atkinson*, L. C., 12 Aug. 1876, the latter part of the form restraining the relatives and friends was also omitted. See also *Allen v. A.*, V.-C. M., 26 July, 1876, A. 1305, where "A. B., or any other clergyman" were restrained.

For subsequent orders—

(a) that notwithstanding the restraint &c., petitioner's solr be at liberty to communicate personally, or by letter, with the female ward, with inquiry whether a marriage with petitioner was proper for the ward, and for proper settlements to be approved, see *Bailey v. Ryves*, 17 Nov. 1874, A. 2763;

(b) that petitioner be at liberty to meet the ward twice a week in the presence of a lady (named), at her house or elsewhere, and to correspond with the ward by letter until further order, *S. C.*, 18 Dec. 1874, A. 3102.

For order appointing guardian to have the custody of the infant, with restraint against his consenting to the marriage of the infant without the leave of the Court, see *Duff v. Pulleteston*, L. C., 10 Aug. 1795, A. 644.

For order declaring Deft guilty of a contempt, in attempting to have communication with, and obtain access to, an infant ward, after he had been served with minutes of injunction to restrain all intercourse, and for his committal, see *White v. Coze*, V.-C. P., 15 Nov. 1851, B. 19.

For orders to commit for improper conduct towards infant ward, see *Hatchell v. Whitmore*, V.-C. S., 8 Nov. 1861, A. 2112; *Meldola v. Portbury*, V.-C. W., 22 March, 1872, B. 1070; *Smith v. Lewis*, V.-C. B., 17 Feb. 1876, B. 193.

For declaration that A. had been guilty of a contempt in contriving and attempting to procure the ward to be clandestinely taken out of the custody of her mother and guardian and married to his brother, without leave of the Court, and in corrupting the infant's uncle to assist him, and order that A. stand committed, and ward not to be married without leave, see *Villareal v. Mellish*, L. C., 4 Aug. 1741, B. 417.

For like declaration of A.'s contempt as an abettor, and it being alleged in affidavit of A. that he was not acquainted with the fact of C. being a ward of Court until —, and it being alleged on his behalf that what A. did subsequently to that day was under the belief that a marriage irrevocable, however irregular, had been in fact contracted between infant Plt C. and B., the Court did not under the circumstances think fit at present to order A. to be committed for such contempt. Injunction restraining A. from having any interview, intercourse, &c. [see Form 9, *sup.*], without the sanction of Court. Order to be without prejudice to the contempt which A. had committed as above mentioned, and without prejudice to any further order the Court might make touching such contempt: *Henry v. Wyatt*, V.-C. B., 18 March, 1871, A. 1123.

For order to discharge A. from his contempt, see *S. C.*, 25 March, 1871, A. 705.

In *Horsfall v. Hulbert*, V.-C. B., the following orders were made:—

Order restraining principal and conniving parties from all intercourse with ward, 29 Nov. 1870, A. 2840.

Order for principal and conniving parties to attend the V.-C., A. 2833.

Order for principal to attend V.-C., and for substituted service of same order, 2 Dec. 1870, A. 2869.

Order for committal of conniving parties to (City) Prison, 2 Dec. 1870, A. 2910.

Order for infant's next friend to proceed to Scotland and bring her back, 10 Dec. 1870, A. 2947.

Order for principal to attend V.-C., and directing service in Scotland, 10 Dec. 1870, A. 2960.

Order for party suspected of connivance to attend V.-C., 13 Dec. 1870, A. 2968.

Order for committal of principal to (City) Prison, 15 Dec. 1870, A. 2996.

Order of L. C. dismissing appeal petition by conniving parties for release, 15 Dec. 1870, A. 3099.

Order for release of conniving parties, and taxation, and payment of costs, 20 Dec. 1870, A. 3063.

Order for release of principal party concerned, on undertaking and payment of costs, 14 March, 1871, A. 578.

Order dismissing with costs petition for leave to marry infant Plt, 29 April, 1871, A. 1751.

10. *Order Nisi to commit for Contempt in interfering with a Ward.*

UPON motion &c., Let F. stand committed to Holloway prison for her contempt in not complying with the provisions of the said orders, whereby the said F. was restrained from interfering with the infant V., and from having any interview &c. [see Form 9, *sup.*], without leave of the Court, and from removing the said infant out of the jurisdiction of the Court, and from preventing him from being in the custody of his guardian, unless the said F., having notice hereof, shall at the sitting of the Court, before the Right Hon. the M. R., on &c., show good cause to the contrary.—*Castel-Florite v. Griesbauer*, M. R., 19 April, 1876, A. 651.

11. *Committal for Improper Conduct towards the Person of a Ward.*

WHEREAS by an order dated &c., it was ordered that the Deft T. by himself or his counsel should attend the Court to show cause why he should not be committed to Holloway prison for his contempt of Court for his conduct with regard to the property and person of the infant Plt S.; And the Deft T. this day attending in person and by his counsel accordingly, upon hearing counsel &c. and upon reading &c.; And this Court being of opinion, upon consideration of the facts disclosed by the said affidavits, that the Deft T. has been guilty of a contempt of this Court by reason of his improper conduct towards the person of the infant Plt S., Let the Deft T. stand committed to Holloway prison for his said contempt.—*Spyer v. Haswell*, V.-C. S., 27 May, 1870, B. 1240.

For like order for committal of contemnor and his father, see *Highitt v. Dampier*, V.-C. M., 20 Nov. 1876, A. 1685.

12. *Habeas Corpus to bring up Prisoner in Contempt for Misconduct towards a Ward.*

UPON motion &c. by counsel for L. of &c., who alleged that the said L. was a prisoner in Holloway prison for his contempt of this Court in procuring the infant Plt H. to abscond with him, and is desirous of being discharged therefrom, and upon hearing counsel for the Deft W. H., this Court doth order that a *habeas corpus* do issue directed to the governor of Holloway prison to bring the said L. to the bar of this Court at the hour of — in the afternoon of &c.—*Hunt v. H.*, V.-C. M., 17 Nov. 1876, A. 1773.

13. *Husband committed—Inquiry as to Abettors.*

LET P. stand committed to Holloway prison for his contempt in marrying (the Plt A. the infant) a ward of this Court; And Let an inquiry be made by whom, and where, the Plt was placed at school,

immediately previous to her marriage with the said P., and where they were married, and by whom, and who applied to the minister to publish the banns, and how far any of the family with whom the Plt was placed for her education, their servants and domestics, were previously to the transaction aiding or privy to such marriage, and what fortune the Plt is entitled to.—*Lambe v. L.*, L. C., 10 June, 1801, B. 525.

14. *Husband committed—Minister and Witnesses to attend Court.*

DECLARE that W., in the petition named, has committed a contempt of this Court in procuring the Plt S., the infant, to abscond with him from the house of R. W., and H., his wife, the stepfather, and the mother and guardian of the said infant at —, and in procuring the ceremony of marriage to be solemnized between him the said W. and the said infant, without the leave of this Court; And Let the said W. stand committed to Holloway prison for such contempt; And Let J. R. and S. W., the witnesses at such alleged marriage, and the Rev. G., the curate of &c., attend this Court on the matter of the said petition on &c.—*Shepherd v. Wilson*, V.-C. W., 29 May, 1845, B. 877.

For forms of application, see D. C. F. 693, 694.

For inquiry, "whether the infant has contracted a valid marriage," and if so, order for settlement and transfer of fund in Court to trustees, see *Vider v. Parrott*, L. C. 1827, B. 521.

For inquiry limited to validity of the marriage, see *Heath v. Lake*, V.-C. E., 21 Jan. 1842, B. 297; *Kent v. Burgess*, 11 Sim. 363.

For order for settlement after marriage of female ward without leave of the Court, so as to exclude the interference of the husband during her life, see *Wade v. Scruton*, L. C., 2 March, 1816, B. 645, 1235, 1554.

For order directing inquiry whether marriage valid, and if valid, ordering a proper settlement, to be approved of by the Judge, of the infant's fortune, upon trusts stated in the order, viz., the income of the said infant's fortune accruing from and after her marriage to be paid to her during her life for her separate use, and with restraint upon anticiopation during coverture; after her death the capital to be held in trust for the issue of the said marriage as the husband and wife should jointly by deed appoint; and in default of such joint appointment, as the wife, if she should survive, should by deed or will appoint; and in default of such appointment, among the children of the marriage equally, to vest, as to sons, on attaining twenty-one, and as to daughters on attaining that age or marriage; and in default of children attaining a vested interest, as the wife should, notwithstanding coverture, by will appoint; and in default of appointment, among the next of kin of the wife, according to the Statute of Distributions, excluding her said husband, as if she were sole and unmarried; such settlement to contain the usual provisions for advancement, maintenance, and accumulation, and usual powers for the appointment of new trustees, and for their indemnity, and also to contain a provision for the issue of any future marriage which might be contracted by the said infant, and a covenant to settle all property of the said infant to be acquired during the joint lives of herself and her husband to the amount of £100 at any one time, upon similar trusts; proper persons to be the trustees of such settlement, to be approved by the Judge; the husband and all proper parties as the Judge should direct to execute such settlement accordingly. Payment by husband to the petitioner T. (*trustee of testator's will*), and to F., the Plt's next friend, of their costs of the motion to commit, and the petition for a settlement, and consequent thereon, except the costs of the inquiry respecting the infant's fortune and of the said settlement, such costs to be taxed &c. Copies of the several affidavits, together

with a copy of this order, to be laid before Her Majesty's A. G. in order that he might, if he should think fit, prosecute the husband for perjury in making the declaration referred to in the affidavit of &c.: see *Jessett v. Tozer*, M. R. 1853, A. 2724.

Upon motion to commit &c., and the husband personally expressing his willingness to make a settlement of all the infant's property, for order directing a proper settlement to be approved, and a transfer of the property comprised in such settlement to the persons for that purpose to be named in the certificate; payment by the husband of the costs of the application and of the reference; and the application for his committal to stand over, see *Trevena v. Juleff*, M. R., 28 March, 1865, B. 613.

For order for B. and C. and Plt. A. the infant (alleged to be now the wife of B.) personally to attend [as in Form 1, Sect. VI. (II.), *sup.* p. 1047], see *Vincent v. Corney*, 1841, B. 1171; *Scrutton v. Spenceman*, V.-C. W., 1854, B. 761; and see *Mortimer v. Wilkin*; *Shepherd v. Wilson*, Forms 9, 14, *sup.* pp. 1053, 1056.

For order for leave for ward, *enceinte* by the intended husband, to marry, at Boulogne or in England, see *M. v. C.*, V.-C. K., 8 Nov. 1852, A. 16.

15. *Infant apprehended for Breach of Order to attend.*

WHEREAS by an order &c., It was ordered that the infant Plt D. and W. should respectively personally attend the Judge in his private room adjoining his Court at &c., on &c., at 10 o'clock in the forenoon; And whereas the infant Plt D. and the said W. have not obeyed the said order, although they were duly served therewith, as appears by the affidavit of &c.; And whereas on counsel for the said W. this day moving this Court that the said order might, as to the said W., be discharged in the presence of counsel for R., the father and next friend of the said Plt, This Court, taking notice that the said infant Plt D. was not personally present and had not attended as directed by the said order, doth order that the Serjeant-at-Arms attending this Court do apprehend the infant Plt D. and bring him to the bar of this Court at the sitting of the Court on &c.—See *Dawson v. Thomson*, V.-C. W., 3 May, 1865, A. 758; 12 L. T. 176.

16. *Husband, undertaking to execute Settlement, discharged.*

AND the said W. by his counsel undertaking to execute such settlement as the Court shall direct, and to hold no communication with the Plt S., the infant, his alleged wife, until such settlement shall have been duly executed, and by consent of R. W., and H., his wife (by their counsel), Let the Petr W. be discharged out of the custody of the keeper of Holloway Prison, as to his contempt in this action.—See *Shepherd v. Wilson*, 1844, B. 925.

For orders for committal of husband and abettor, the latter superseded as J. P. and degraded as barrister, with directions for securing ward's property, see *Hughes v. Science*, 20 March, 1740, A. 229; leave for abettor to visit his son, *S. C.*, 8 Ap. 1740, A. 310; restraining from acting as barrister, *S. C.*, 24 Ap. 1741, A. 339; for husband to lay proposals for settlement, *S. C.*, 30 May, 1741, A. 425; and where abettor obtained licence on false affidavit of being guardian, see *Moore v. M.*, 6 Ap. 1740, B. 135; 19 March, 1740, B. 94; 8 May, 1741, B. 270.

And for orders for committing husband, see *Wellesley v. D. Beaufort*, L. C., July, 1831, B. 1852; *Walker v. Strickland*, L. C., July, 1829, B. 2173; *Mallett v. Rouse*, L. C., July, 1798, B. 529; and for inquiry, as to guardian and prosecution for conspiracy, *S. C.*

17. *Discharge on Undertakings of the Contemnor and his Father.*

"UPON the petition of C. &c., and the said C., by his counsel, undertaking not to intermarry with the Plt T., the infant, nor to have any interview &c. [Forms 8 and 9, p. 1053], without the sanction of the Court; And E., the father of the Petr, being present in Court, and personally undertaking that the costs hereby directed to be taxed shall be paid in forty-eight hours after the date of the certificate of taxation; and also personally undertaking that the said C. shall not have any intercourse, interview, or communication with the said infant as aforesaid, and having signed the registrar's book accordingly, Let the said C. be discharged out of custody of the keeper of Holloway Prison" (as to his said contempt).—Direction for C. to pay all the costs, and the discharge to be without prejudice to any further order touching the contempt.—Injunction continued.—See *Thornhill v. T.*, L. C., 9 Dec. 1854, B. 107.

For order refusing to reverse an order of the V.-C., by which a motion by the contemnor for his discharge out of custody was refused, and payment of the costs of such motion by the contemnor directed, see *Smith v. Lewis*, C. A., 7 July, 1876, B. 1256.

18. *Settlement after Marriage of Ward—Contempt condoned.*

AND it appearing that the said infant Plt F. G. H., then F. G., had on &c., contracted a valid marriage with the said H. [*the husband*], but without the knowledge or consent of her guardians, or the sanction of this Court, and that at the time of such marriage the said infant Plt was residing with her guardian, the Deft A. T., at &c., and that for upwards of twelve months previous thereto the said infant Plt had accepted the addresses of the said H., with the knowledge and consent of the said infant's guardians, and of the father of the said H., with a view to a marriage when the said parties should have attained a maturer age, under the circumstances the Judge being of opinion that the settlements proposed to be effected by the deeds dated &c., respectively, constitute a proper marriage settlement of the fortune of the said infant, F. G. H., doth order that the said deeds, being the deeds of conveyance and settlement hereinbefore referred to, be respectively executed by the said H. and F. G. H., his wife; and that B., C., and P. [*trustees*], be at liberty to execute such deeds as trustees of the said settlement.—Costs to be taxed and paid by trustees out of settlement funds.—*Tootal v. Dickenson*, V.-C. H., 11 Nov. 1876, B. 1760:

19. *Infant Ward to be at liberty to re-marry.*

UPON the further hearing of the petition of the Plt and L. on &c., preferred unto this Court, and upon hearing counsel for the Petrs and

for the respondents &c., and upon reading the petition &c., the Master's certificate, whereby it is certified to be doubtful whether a valid marriage has been solemnized between W. and B., Let the said W. and B. be at liberty to re-marry, and the fact of such re-marriage is to be certified; And Let the restraint imposed upon the said W. by the order dated &c., be continued until &c.; And Let an inquiry be made of what the fortune of the said W. consists, and whether any and what settlement or provision ought to be and can, under the power of advancement contained in the will of P. or otherwise, be made on the said W. and B., his wife, and the issue, if any, of their marriage; And the rest of the petition stands adjourned.—*Re Wood, Brooking v. B.*, Chitty, J., 28 March, 1882, B. 542.

NOTES.

MARRIAGE OF WARD OF COURT—CONTEMPT OF COURT.

Marriage, or connivance at marriage, with a ward, male or female, without obtaining leave from the Court, is a contempt on the part of the principal and all persons engaged in the transaction, including the clergyman, which will be punished by committal (or, in the case of a peer or peeress, by sequestration: see *Eyre v. C. Shaftesbury*, 2 L. C. Eq. 693, 755; 1 L. C. 7th ed., 473, 500): see *Priestley v. Lamb*, 6 Ves. 421; *Millet v. Rowse*, 7 Ves. 419; *Bathurst v. Murray*, 8 Ves. 74; *Re Anne Walker*, Ll. & Goo. t. Sugd. 299, and cases cited in *Eyre v. C. Shaftesbury*, 2 L. C. Eq. 693, 751; 1 L. C. Eq. 7th ed., 473, 503.

In flagrant cases the jurisdiction is not confined to committal for contempt, but prosecutions for conspiracy or perjury (in making a false declaration as to age or consent) may also be directed: see *Ball v. Coutts*, 1 V. & B. 292; *Wade v. Broughton*, 3 V. & B. 172; *Millet v. Rowse*, 7 Ves. 419; and see *Cox v. Bennett*, 22 W. R. 819; 31 L. T. 83; *Jessett v. Tozer*, *sup.* pp. 1056, 1057.

It is no excuse that the offending parties were ignorant that the infant was a ward of Court: *Herbert's Case*, 3 P. Wms. 115; *Moor v. M.*, Barn. Ch. 404; 2 Atk. 157; *Nicholson v. Squire*, 16 Ves. 259; or that the infant had a parent or guardian: *Butler v. Freeman*, Amb. 301; or it seems, if the marriage be improper, that they have consented: *Wellesley v. Beaufort*, 2 Russ. 1, 29; *L. Raymond's Case*, Ca. t. Talb. 58. The endeavour to marry without leave is equally a contempt: *Warter v. Yorke*, 19 Ves. 453; as also a marriage which is invalid: *Salles v. Savignon*, 6 Ves. 572; and in the case of a female ward whose marriage without leave was found to be invalid, a marriage by banns has been directed: *Bathurst v. Murray*, 8 Ves. 74; and see *Re Walker*, Ll. & Goo. t. Sugd. 299.

In *Re Murray*, 3 Dr. & War. 83, the private marriage of a male ward was directed to be re-celebrated; but, on the other hand, in *Warter v. Yorke*, 19 Ves. 451, the Court directed proceedings to be instituted for nullity of marriage with the male ward at the expense of his estate.

In the case of an attempted marriage with a ward, not only the marriage but also all intercourse or communication, either personal or by letter, between the parties, will be restrained: *Dawson v. Thompson*, 12 L. T. 178; *L. Shipbrook v. L. Hinchinbrook*, 2 Dick. 547; and see *sup.* Forms 8; 9; and see *Smith v. S.*, 3 Atk. 307, where, on an application for a return of letters, a distinction seems to have been drawn between such as contained a promise of marriage and "*billets-doux*, or letters of civility."

The husband who has been committed for contempt in marrying a ward of Court will not be discharged until a certificate that the marriage is valid has been produced, and a proper settlement has been prepared, approved, and executed, and payment by him of the costs: see *Cox v. Bennett*, 22 W. R. 819; 31 L. T. 83; *Field v. Brown*, 17 Beav. 146; *Millet v. Rowse*, 7 Ves. 419; *Stevens v. Savage*, 1 Ves. jun. 154.

Although a marriage without consent may not from its circumstances call for punishment by committal, it is for all purposes of jurisdiction over the female ward's property a contempt: *Martin v. Foster*, 7 D. M. & G. 98.

SETTLEMENT DIRECTED BY COURT.

The provisions of the settlement which is directed by the Court upon the marriage of an infant, will vary according as the marriage has taken place with the consent of the Court, or is a contempt; and if a contempt, whether it is aggravated or comparatively innocent: see *Simpson, Infants*, 342, and cases there cited; *Davidson, Conv.* vol. iii. p. 654.

If the contempt has been flagrant, the rule has been to exclude the offending husband by the settlement from all interest in the wife's fortune: *Kent v. Burgess*, 11 Sim. 361; *Wade v. Hopkinson*, 19 Beav. 613; unless the exclusion of the husband would be clearly to the detriment of the ward, whose interest must be regarded rather than the punishment of the offending husband: *Birkett v. Hibbert*, 3 M. & K. 227; and see *Martin v. Foster*, 7 D. M. & G. 98.

Where the contempt is not very aggravated, a portion of the wife's income is sometimes, though rarely, given to the husband during coverture: *Bathurst v. Murray*, 8 Ves. 74; and generally, under such circumstances, a settlement more favourable to the husband will be directed: *Richardson v. Merrifield*, 4 Dr. & S. 161. Even in flagrant cases the wife has not been deprived of all power of benefiting him by will: *Millet v. Rouse*, 7 Ves. 419.

And in *Wilkinson v. Joughin*, 41 L. J. Ch. 234, where both husband and wife were ignorant when they married that she was a ward of Court, the property was settled upon her for life, for her separate use, with remainder to her children, with power to appoint the property by will to her husband for life.

Where a male ward has been married without leave his property will not be settled so as entirely to exclude the offending wife: *Re Murray*, 3 Dr. & W. 83.

The trustees of the settlement should be persons with whom the parties can hold friendly intercourse, and persons personally distasteful to the wife ought not to be imposed upon her as trustees: *Re Sampson and Wall*, 25 Ch. D. 482, C. A.

The Court retains control over the property of a ward after she attains twenty-one, while it remains in Court: *Austen v. Halsey*, 2 Sim. & S. 123, n.; *Re Anne Walker*, Ll. & Goo. t Sugd. p. 325; and where, by postponing her marriage until that time, she has effected an improvident settlement, such settlement has been reformed: *Money v. M.*, 3 Drew. 256; *Long v. L.*, 2 Sim. & S. 109. She has not been permitted to defeat the provisions of a settlement sanctioned on her behalf by the Court during her minority, by substituting others after she has attained twenty-one: *Hobson v. Ferraby*, 2 Coll. 412; *Blackie v. Clark*, 15 Beav. 597. So also proposals for a settlement laid before the Court upon an application for leave to marry have been enforced as a contract entered into with the Court, in the absence of any settlement *bonâ fide* and properly substituted for it: *Cook v. Fryer*, 1 Ha. 498.

And as to the continuing powers of the Court over the property of a ward married without sanction, subject to the rights and interests of persons who have since come into *esse*, see *Cave v. C.*, 15 Beav. 227.

The offending husband was not permitted to purge his contempt in marrying the ward without the consent of the Court, except upon the terms of making a proper settlement of her property: *Ball v. Coutts*, 1 V. & B. 292; *Field v. Brown*, 17 Beav. 146; failing which the Court declined to make any order as to the payment of her dividends on funds in Court: *Cator v. Mason*, 2 W. R. 667.

But it has been held that the Court has no jurisdiction to compel a ward to make a settlement of his or her property: *Leigh v. L.*, 40 Ch. D. 290, C. A.; or to interfere with her marriage after she has attained twenty-one, make her sign any settlement, or refuse to give her her money immediately after she attains twenty-one. And in *Bolton v. B.*, 23 July, 1881, A. 1047; (1891) 3 Ch. 270, the Court of Appeal discharged an order made by the Court below after the ward had attained twenty-one, refusing leave to marry, and

directing a settlement; and *quære* whether the jurisdiction against the husband can now be exercised having regard to the provisions of the Married Women's Property Act, 1882 (*v. sup.* Chap. XXXVII. p. 915 *et seq.*).

The jurisdiction of the Court to protect the interests of wards upon their marriage is not excluded by the fact that the ward is domiciled in Scotland or elsewhere where a wife has no equity to a settlement: *Re Tweedale*, Joh. 109.

Where the marriage is a contempt, the Court has refused to permit the wife's fund to be transferred, even after twenty-one and with her consent, until such a settlement as the Court thought discreet and proper under the circumstances had been made: *Martin v. Foster*, 7 D. M. & G. 98; *Gynn v. Gilbard*, 1 Dr. & S. 356 (overruling *Leeds v. Barnardiston*, 4 Sim. 538, where, upon the application, after she attained twenty-one, of husband and wife, married without the Court's consent, the funds were, upon her consent being taken, transferred to the trustees of a settlement made without the sanction of the Court).

And see *Biddles v. Jackson*, 3 D. & J. 544; 26 Beav. 282, where the marriage having been fourteen days after the female ward attained twenty-one, and the M. R. having treated the marriage as a contempt, the L. J. refused to do more than order payment of the income to the husband during the joint lives of himself and wife, or until further order, without prejudice to any question.

But in *White v. Herrick*, 4 Ch. 345, followed in *Sams v. Cronin*, 22 W. R. 204; 29 L. T. 885, the right of a ward, who married the day after she attained twenty-one, to a transfer, without settlement, of a small fund, standing in Court to her separate use, upon her separate examination, was treated as established by *Longbottom v. Pearce*, 3 D. & J. 544, n.; and see *Leigh v. L.*, 40 Ch. D. 290, C. A., *sup.* p. 1060.

As to the validity of marriage settlements, by infants before 18 & 19 V. c. 43, and that the Court had no further power than was possessed by the infants themselves, or by their parents and guardians on their behalf, of effectually binding their property, though the husband of the female ward might have been held bound, see *Field v. Moore*, 7 D. M. & G. 691, 706, 721; Davidson's Conv., vol. iii. pp. 647—651.

INFANTS' SETTLEMENT ACT.

By the Infants' Settlement Act, 1855 (18 & 19 V. c. 43), extended to Ireland by 23 & 24 V. c. 83, s. 1, an infant with the sanction of the Court (*now* the Chancery Division of the High Court of Justice), may, upon or in contemplation of marriage, settle his or her property, or property over which he or she has any power of appointment, whether real or personal, in possession, reversion, remainder, or expectancy; and every conveyance, &c. or contract, &c., so executed by the infant, is to have the same effect as if he or she were then twenty-one, if the power does not prevent its exercise by an infant.

Property acquired by the settlor under the will of a person who dies after the execution of the settlement is property "in expectancy" within the meaning of this section: *Re Johnson, Moore v. J.*, (1891) 3 Ch. 48.

By sect. 2, the death of an infant under twenty-one avoids any appointment or disentailing assurance executed under the Act.

By sect. 3, the sanction of the Court to any such settlement, or contract for settlement, may be given upon petition (now by summons) by the infant or guardian, without suit; and if there be no guardian, the Court may require one to be appointed, or not, as it shall think fit; and also may require any persons interested, or appearing to be interested, to be served with notice of such petition.

By sect. 4, the powers of the Act are not applicable to males under twenty, nor to females under seventeen: and see *Re Phillips*, 34 Ch. D. 67.

Some doubt was expressed in *Re Strong*, 5 W. R. 107; 26 L. J. Ch. 64; 2 Jur. N. S. 1241, whether an application under this Act made the infant a ward of Court, so as to render it necessary to inquire into the propriety of

the proposed marriage, as well as into the propriety of the proposed settlement: and see *Re Dalton*, 6 D. M. & G. 201; but according to the present practice the infant does not thereby become a ward of Court.

By O. LV, 2 (10), applications under the Act for the settlement of any property of an infant on marriage may now be made by summons in Chambers: Dan. 929; and see D. C. F. 697, note.

By O. LV, 26, evidence must be produced to show (a) the age of the infant; (b) whether the infant has any parents or guardians; (c) with whom or under whose care the infant is living, and, if the infant has no parents or guardians, what near relations the infant has; (d) the rank and position in life of the infant and parents; (e) what the infant's property and fortune consist of; (f) the age, rank, and position in life of the person to whom the infant is about to be married; (g) what property, fortune, and income such person has; (h) the fitness of the proposed trustees, and their consent to act.

For forms of summons for sanction to a settlement under the Act, affidavit in support of summons, and as to preparation and completion of settlement, see D. C. F. 697 *et seq.*; Dan. 929, 930.

If the order extends only to leave to marry, on the usual proof of execution of the settlement by all parties, and of the marriage, a subsequent order may be made for transfer and payment, or other disposition of the ward's fortune, according to the settlement.

It has been held that the Act extends to a post-nuptial settlement of the estate of an infant ward of Court when made with the approbation of the Court: *Re Sampson and Wall*, 25 Ch. D. 482, C. A.; *Powell v. Oakley*, 34 Beav. 575; and the Court has directed a settlement under the Act after a married female infant had attained the age of seventeen: *Re Phillips*, 34 Ch. D. 461; but in *Seaton v. S.*, 13 App. Ca. 61, the House of Lords expressly refused to decide that the Act extended to a post-nuptial settlement. Where the infant is not a ward of Court, and does not consent to the application, there is no jurisdiction under the Act or otherwise to direct a post-nuptial settlement: *Re Potter*, 7 Eq. 485.

The Act removes the disability of infancy only, and leaves the disability of coverture unaffected: *Seaton v. S.*, *sup.*; and consequently a settlement by an infant married woman of her reversionary interest in personalty not limited to her separate use is ineffectual.

Although the Act enables an infant to execute a binding marriage settlement, it does not alter his legal *status* as to the alienation of property or the exercise of a power which goes to defeat his own estate or interest: see *Re Armit*, 1 R. 5 Eq. 352, in which case the Irish Court refused to transfer funds under its jurisdiction to the appointee of an infant, although the settlement sanctioned by the English Court gave her power of appointment over the funds notwithstanding coverture, and either before or after attaining twenty-one.

In the event of the death of an infant under twenty-one, after making an appointment under sect. 1, sect. 2 does not render the appointment void, except in the case of an infant tenant in tail: *Re Scott, S. v. Hanbury*, (1891) 1 Ch. 298.

For the purpose of making a settlement under the Act, it is competent for the infant, under a general power, to make a complete appointment, so that on the failure of the limitations of the settlement the appointed property will become his own: *Re Scott, S. v. Hanbury*, (1891) 1 Ch. 298.

The settlement should provide for the female ward's children by any future marriage: *Rudge v. Winnall*, 11 Beav. 98; but such a provision will not be inserted in a settlement where not contained in the ante-nuptial agreement or draft settlement to which before marriage the husband has assented: *Re Hoare*, 4 Giff. 254.

On a female infant's marriage, a clause as to taking the name and arms of the testator was sanctioned, but not a provision that no Roman Catholic should take any interest under the settlement: *Re Williams*, 6 Jur. N. S. 1064; 8 W. R. 678.

The costs of a settlement of the property of an infant ward of Court under the Infants' Settlement Act are payable out of the corpus of the settled property: *De Staepoole v. De S.*, 37 Ch. D. 39.

(II.) ORDERS UNDER MARRIAGE ACTS, 4 G. IV. c. 76 (MARRIAGE ACT, 1823), AND 19 & 20 V. c. 119.

1. *Marriage sanctioned under 4 G. IV. c. 76, Sect. 17.*

ON petition, and affidavit showing father abroad, "Declare that the marriage in the petition mentioned is a fit and proper marriage within the intent and meaning of the said Act": *Re Townsley*, Chitty, J., 15 Dec. 1891, B. 1399.

As the declaration of the Court is by the Act made equivalent to the consent of the father, it is not right to add a direction that the infant be at liberty to contract the marriage: *Re Townsley*, *sup.*

2. *Previous Inquiry—Father Non-compos—4 G. IV. c. 76, Sect. 17.*

LET an inquiry be made whether W., the father of the Petr A., the infant, is *non compos mentis*, and if so, whether the intended marriage between the said infant and B. in the petition named is a fit and proper marriage for the said infant.—*Re Wheeler*, M. R., 15 July, 1834, B. 1091, where the father had been found by inquisition of unsound mind: *Re Rawson*, V.-C. E., 12 Jan. 1844, B. 321.

For order under 4 G. IV. c. 76, s. 17, declaring marriage proper, where the guardian unreasonably refused consent, and for direction for settlement, see *Lee v. Hutton*, V.-C. E., 3 May, 1850, B. 715.

For form of decree declaring a forfeiture and declaring trusts of the property of the infant *feme*, see Seton, 5th ed. pp. 904, 905.

For forms of petition, &c. under the Act, see D. C. F. 694 *et seq.*

NOTES.

By the Marriage Act, 1823 (4 G. IV. c. 76), s. 16, the persons whose consent is required to the marriage of an infant, not being a widower or widow, are the father; if the father shall be dead, the guardians of the person of the infant, or one of them; if no guardians, the mother, if unmarried; if no mother unmarried, the guardians of the person appointed by the Court, if any, or one of them.

By sect. 17, if the father be *non compos mentis*, or if any of the other persons whose consent is required by sect. 16 be *non compos mentis*, or beyond the seas, or shall unreasonably or from undue motive withhold consent, an application may be made to the Court by petition, and if the proposed marriage appear proper, a judicial declaration to that effect may be made, which shall be as effectual as if a consent had been duly had from guardians.

This provision does not apply to the case of a father beyond seas, or unreasonably refusing consent, but only to the case of a father *non compos*: *Exp. I. C.*, 3 My. & Cr. 471 (overruling *Exp. Cooper*, 19 Aug. 1834, there cited).

The marriage is valid, though the requisite consent be not obtained: *R. v. Birmingham*, 8 B. & C. 29; *R. v. Clark*, 2 Cox, C. C. 183; and the consent may be presumed after a lapse of time: *Harrison v. Southampton*, 4 D. G. M. & G. 137; 22 L. J. Ch. 722.

Where a father beyond seas consented, and then died before the marriage, the infant was allowed to marry, without any reference as to the property of the marriage: *Exp. Reilly*, 12 L. J. 436.

By sect. 23, in the case of a marriage between persons who are under age, or one of whom is under age, without the proper consent (see sect. 16), if the licence has been procured, or banns have been published by falsely swearing or fraud (see sect. 14 as to the oath to be taken, and the requisites before

grant of licence), the A. G., at the relation of a parent or guardian of the minor whose consent has not been given to such marriage, may sue by information for, and the Court may declare a forfeiture of, all property which accrued by the marriage to the offending party; and thereupon the property shall be secured for the benefit of the innocent party, or of the issue of the marriage, as the Court shall think fit, for the purpose of preventing the offending party from deriving any interest in real or personal estate or pecuniary benefits from such marriage. If both the parties so contracting marriage shall be guilty of any such offence, the Court may settle and secure such property, or any part thereof, immediately for the benefit of the issue of the marriage, subject to such provisions for the offending parties by way of maintenance &c., as the Court, under the particular circumstances, shall think reasonable, regard being had to the benefit of the issue of the marriage during the lives of their parents, and of the issue of the parties respectively by any future marriage, or of the parties themselves.

Sect. 24 avoids all agreements, settlements &c., made upon such marriages. Since the Married Women's Property Acts it rarely happens that property accrues by the marriage to the offending party, and consequently cases under the Act of 1824 are less frequent than formerly.

By the Marriage and Registration Amendment Act, 1856 (19 & 20 V. c. 119), s. 19, the same penalties are extended to the case of a marriage before a registrar under 6 & 7 V. c. 85, had by means of any wilfully false declaration, notice, or certificate.

For the extension of these provisions to marriages according to the usages of Quakers or Jews, see 19 & 20 V. c. 119, s. 21; 23 V. c. 18, s. 2.

By 12 & 13 V. c. 68 (an Act for facilitating the Marriage of British Subjects resident in Foreign Countries), the same penalties attach where a marriage is celebrated abroad under the provisions of that Act by means of any wilfully false notice, oath, affirmation, or declaration made by either party to such marriage.

Where a forfeiture has been incurred under 4 G. IV. c. 76, s. 23, the Court has no discretion to mitigate the penalty, but is bound to settle and secure all property, present and future, of the wife, for the benefit of herself, or the issue of the marriage: *A. G. v. Mulla*, 4 Russ. 329; so as to prevent the offending husband from deriving any interest or pecuniary benefit from the marriage *jure mariti*: *A. G. v. Lucas*, 2 Ph. 753.

In *A. G. v. Mulla* (2), 7 Beav. 397, where the husband alone had incurred a forfeiture, it was held that no provision could be made for the issue of any second marriage.

The Act applies to the case of a woman marrying an infant by means of a false affidavit that he is of full age: *A. G. v. Severne*, 2 Coll. 313.

In *A. G. v. Read*, 12 Eq. 38, V.-C. B., following with great reluctance the decision and order made in *A. G. v. Lucas*, *sup.*, did not exclude the offending husband from the general power of appointment to the wife in default of children. And see *A. G. v. Akers*, Seton, 5th ed. pp. 905, 906.

In *A. G. v. Clements*, 12 Eq. 32, V.-C. B. allowed 50*l.* out of a fund of 795*l.* to be paid to the guardian *ad litem* of the infant wife, to be applied for her separate use upon her separate receipt, but with great reluctance, as such payment would practically be for the offending husband's benefit.

The A. G. need not appear separately from the relator: *A. G. v. Teather*, 43 L. T. 749; 29 W. R. 347; except upon applications by the relator for a compromise of the information upon the terms of execution by the husband of a proposed settlement: *A. G. v. Read*, 12 Eq. 41.

To sustain the information it is not necessary to show that the infant with whom the marriage was procured was entitled at the time thereof to any property, either in possession, reversion, remainder, or expectancy: *A. G. v. Severne*, 1 Coll. 313.

The offending husband will not be allowed his costs out of the fund: *A. G. v. Akers*, W. N. (72) 45; *A. G. v. Clements*, 12 Eq. 33, 6.

As to enforcing execution of the settlement by attachment, after personal tender of it for execution, see *A. G. v. Wareing*, 28 W. R. 623.

CHAPTER XXXIX.

PAUPERS AND PAUPER LUNATICS.

SECTION I.—PAUPERS.

1. *Order to admit Plaintiff to sue, or Defendant to defend, in Formâ Pauperis.*

Plt.—The Plt in respect of his poverty, whereof affidavit is made, is this day admitted by this Court to prosecute this action *in formâ pauperis*; And Mr. —, who hath signed the Plt's petition, signifying his just cause of action, is hereby assigned for his counsel, and Mr. — for his solr.

Deft.—The Deft, in respect of his poverty, whereof affidavit is made, is this day admitted by this Court to defend this action *in formâ pauperis*; And Mr. — is hereby assigned for his counsel, and Mr. — for his solr.

In *Chipperfield v. Walsh*, V.-C. M., 8 Dec. 1870, a Deft in person who applied for leave to defend as a pauper was examined orally in Court.

For order discharging, upon the ground that he had property, an order admitting a Deft to sue *in formâ pauperis*, see *Ridgway v. Edwards*, L. JJ., 15 Jan. 1874, B. 30; 9 Ch. 143.

An order under 23 & 24 V. c. 149 (Court of Chancery Act, 1860), s. 5, assigning a solr and counsel to a pauper Deft, in custody under an attachment for default in pleading, was of course: *Layton v. Mortimore*, 2 D. F. & J. 353. For form of petition, see D. C. F. 40.

2. *Leave for Person not a Party to prosecute Claim in Formâ Pauperis.*

UPON motion &c. by counsel for A., claiming &c., who alleged that the said A. has just grounds in respect of his said claim; And upon reading an affidavit of the said A., filed &c., in respect of his poverty, This Court doth order that the said A. be at liberty to prosecute his claim in this action *in formâ pauperis*; And Mr. — is hereby assigned for his counsel, and Mr. — for his solr.—*Re Shard, Partington v. Reynolds*, V. C. K., 28 May, 1858, B. 1028.

This order may be made on motion, but not on petition of course: see Dan. 89; D. C. F. 42.

3. *Leave to appeal in Formâ Pauperis.*

UPON motion &c., who alleged that by the decree [or judgment] &c., it was ordered &c. [*Recite it shortly*], that the Plts [or Defts] are

desirous of appealing from the said decree [*or judgment*], but by reason of their poverty they are unable to present or prosecute their said appeal, unless they shall be permitted to do so *in formâ pauperis*; And upon reading an affidavit of the Plts [*or Defts*] in respect of their poverty, the notice of the said appeal, dated &c., and the certificate of counsel subscribed at the foot of the said notice that the said appeal is proper to be heard, This Court doth order that the said appeal be set down for hearing, and that the Plts [*or Defts*] be at liberty to prosecute the same *in formâ pauperis*, and that Mr. — be assigned counsel, and Mr. — solr for the said —, in the said appeal.

After an order has been obtained, at any stage of the action, to defend *in formâ pauperis*, a further order for leave to appeal is not required, the original pauper order being sufficient: *Drennan v. Andrew*, 1 Ch. 300.

For form of application, see D. C. F. 42.

NOTES.

The form of the order has generally given leave to prosecute the particular suit, but as to Defts added by amendment, *quære* whether the proper course would not be to obtain fresh leave.

Under O. xvi, 22, "any person may be admitted in the manner heretofore accustomed to sue or defend as a pauper, on proof that he is not worth £25, his wearing apparel, and the subject-matter of the cause or matter, only excepted."

Before this rule, the sum of £5 was the amount which the pauper's property was to be proved not to exceed.

The opinion of counsel must be obtained, whether or not the proposed pauper has a reasonable ground for proceeding: r. 23.

By r. 24, no person shall be permitted to sue as a pauper unless the opinion of counsel, with an affidavit of the party, or his solr, that the case laid before counsel contains a full and true statement of all the material facts, to the best of his knowledge and belief, shall be produced before the Court or Judge, or proper officer, to whom the application is made, and no fee shall be payable by a pauper to his counsel or solr; and, by r. 25, a person admitted to sue or defend as a pauper is not to be liable to any Court fee. The case and opinion are for the information of the Court, and therefore production of them for inspection by the Deft will not be ordered, although they have been made exhibits to the affidavit: *Sloane v. Britain Steamship Co.*, (1897) 1 Q. B. 185, C. A., distinguishing *Re Hinchliffe*, (1896) 1 Ch. 117, C. A.

By r. 26, where a person is admitted to sue or defend as a pauper, the Court or a Judge may, if necessary, assign a counsel or solr, or both, to assist him, and a counsel or solr so assigned shall not be at liberty to refuse his assistance, unless he satisfies the Court or Judge that he has some good reason for refusing; and, by r. 29, no notice of motion shall be served, or summons issued, and no petition shall be presented, on behalf of any person admitted to sue or defend as a pauper, except for the discharge of his solr, unless it is signed by his solr.

It has been suggested that, looking at the language of these two rules, it was never intended that a person should be admitted to sue *in formâ pauperis* without a solr or counsel, or both, and that the words "if necessary" were meant to apply to a case in which the applicant is not already provided with professional advisers; but in *Tucker v. Collinson*, 16 Q. B. D. 562, C. A., a pauper having no counsel was allowed to be heard in person; and if no solr has been assigned to the pauper, he is entitled to move the Court without the notice being signed by a solr: *Jacobs v. Crusha*, (1894) 2 Q. B. 37, C. A.

Several applications have been made to the Court of Appeal for leave to appeal *in formâ pauperis* in person, as in *Davenport v. Reid*, and *Chaffers v.*

Lord Esher, but each of these cases was referred to the official solr, whose report to the Court as to the applicant's case has not resulted in leave being given in either of these instances.

The official solr ought not to be assigned to assist a pauper under the rule except in very special circumstances: *Moutrie v. Mitchell*, (1901) 1 K. B. 596, C. A.

On applications for leave to appeal *in formā pauperis*, the Court follows the analogy of O. XVI, 22—24, and requires the usual affidavit and opinion of counsel: *Re Roberts, Kiff v. R.*, 33 Ch. D. 265, C. A.

If the pauper has not sued or defended *in formā pauperis* in the Court below, the application for leave to appeal should be made *ex parte* to the Court of Appeal: *Exp. Goldberg*, (1893) 1 Q. B. 417, C. A.; but a party who has sued or defended *in formā pauperis* in the Court below is entitled to appeal as a pauper, without either giving security for costs or obtaining special leave so to appeal: *Biggs v. Dagnall*, (1896) 1 Q. B. 207.

A petition for leave to prosecute an appeal *in formā pauperis* was refused where it appeared that the petitioner sought, as one of the public, to establish a right of fishing in a tidal river adjoining land belonging to the Deft, and subscriptions had been collected to assist the petitioner in litigation: *Bowie v. Marquis of Ailes*, 13 App. Ca. 371.

DISPAUPERING.

By O. XVI, 28, if any person admitted to sue or defend as a pauper, gives, or agrees to give, any fee, profit, or reward, he is forthwith to be dispaupered, and not to be afterwards admitted again in the same cause to sue or defend as a pauper.

The order dispaupering is made (on motion) if it is shown that the pauper is of ability, or has been guilty of vexatious conduct.

COSTS.

By r. 31, "costs ordered to be paid to a person admitted to sue or defend as a pauper, shall, unless the Court or a Judge otherwise direct, be taxed as in other cases," i.e., upon the same principle as in other cases, and the pauper is not to be allowed costs which he was never obliged to pay, simply because he has chosen to pay them after obtaining judgment: *Carson v. Pickersgill*, 14 Q. B. D. 859, C. A.; and, as against the Deft, a successful pauper Plt is only entitled to costs out of pocket, and not to remuneration or fees for solr or counsel: *S. C.*

A chief clerk's certificate was ordered to be delivered out without payment of Court fees where the Plt had obtained leave to sue *in formā pauperis* after the certificate was ready: *Thomas v. Ellis*, 8 Ch. D. 518, C. A.

Where the pauper being in default (as e.g., where the case at the trial has been struck out because of his non-appearance) asks for indulgence, he may be required as a condition to pay the costs occasioned to the other party: *Jacobs v. Crusha*, (1894) 2 Q. B. 37, C. A.

As to costs to be allowed in House of Lords to a successful pauper appellant, see *Johnson v. Lindsay*, (1892) A. C. 110; and that in such a case, the Rules of the Supreme Court not being applicable, and there being no rules or practice of the House prescribing the assignment of a solr to a pauper appellant, or regulating the liability of such appellant for costs as between him and his solr, the pauper appellant is liable to pay costs in the same way as any other impecunious litigant would be liable: *In re Raphael, Exp. Salomon*, (1899) 1 Ch. 853 (reversed on appeal on the facts of the case); *Richardson v. R.*, (1895) P. 276 (affirmed on appeal, (1895) P. 346); *White v. W.*, (1898) P. 124.

SECTION II.—PAUPER LUNATICS.

1. *Funds in Court, belonging to Pauper Lunatic, applied to pay Expenses incurred in his Support.*

UPON the petition of &c., Let it be referred to the taxing master to tax, as between solr and client, the costs of all parties of and relating to this application, and also to certify what sum will be proper to be allowed annually for the costs of the affidavit which will be required for the purpose of ascertaining the amounts from time to time to be raised, as directed in the schedule hereto.—Deal with funds in Court as directed in the said schedule.

PAYMENT SCHEDULE.

IN THE HIGH COURT OF JUSTICE.

Chancery Division.

Date of Order —, 18—.

Re A. B., &c.

Ledger Credit as above ———.

Funds in Court £——— New Consols.

Particulars of Payments, Transfers, or other Operations ordered.	Payees and Transferees or Separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Sell sufficient New Consols to raise, with any interest, the costs to be taxed under this order and £—.			
Pay the said costs.....			
Pay (amount due in respect of A. B., a lunatic, up to the — day of — &c.).	C. D., of &c., as Treasurer of the county of &c.		
During the life of A. B., or so long as he shall continue a lunatic and chargeable to the county of &c., sell sufficient New Consols to raise, with any interest, the amount which up to the — day of —, 18—, and up to the same day in each succeeding year, shall have been paid under any order or orders of the justices of the county of &c., for the lodging, maintenance, clothing, medicine, and care of the said A. B., as a lunatic chargeable to the said county, and the amount certified as proper to be allowed for costs on each sale.			
Pay amount due in respect of A. B. as above.	The same.....		
Pay amount certified in respect of costs	X., of &c., Solr.....		

The order in *Elderfield v. Goodall*, L. JJ., 24 Nov. 1853, A. 504, from which the above form is adapted, was made on the petition of the treasurer of the county, and on an affidavit setting forth certain orders of two justices of the peace for the payment by him of sums paid by the guardians of the union to the lunatic asylum for the pauper lunatic's maintenance; and the Court, after consideration, extended the order to future payments.

2. Declaration as to Arrears of Maintenance of Pauper Lunatic entitled to a Fund.

THE application of the Plts by originating summons dated &c., which upon hearing counsel for the Plts and for the Deft [*the legal pers. represve of deceased pauper lunatic*] was adjourned to be heard in Court coming on this day &c., And upon hearing counsel &c., And upon reading &c., Tax the costs of the Plts of this action up to the — day of — and also the costs as between solr and client of the Deft of this action; And this Court being of opinion that the Plts can only recover from the intestate's estate the sums expended by them in her maintenance during the period of six years prior to the institution of this action, and the Plts and Deft by their counsel agreeing the amount of such arrears and of the funeral expenses of the intestate paid by the Plts at the sum of £—; And the Deft by her counsel undertaking to pay to the Plts such sum together with the Plts' costs when taxed; Let the funds in Court be dealt with as directed in the schedule hereto.—[Add payment schedule, directing payment of costs of Deft to be taxed under the order and of residue of funds and interest to the Deft.]—See *Re Watson, Guardians of the Poor of Stamford Union v. Bartlett*, Stirling, J., 10 Nov. 1898, B. 1426, (1899) 1 Ch. 72.

For an order for the sale of part of a sum of stock in Court, representing the separate estate of a lunatic married woman in Australia, and for payment of the proceeds, and of the dividends on the remaining stock, to an attorney for the Master in Lunacy of the colony of Victoria, for her past and future maintenance and expenses during such time as he should have charge of her, see *Re Baker's Trusts*, 15 Dec. 1871, A. 3172; 13 Eq. 168.

For an order, on the petition of the overseers of the parish, for payment to them of the arrears of dividends on a fund in Court belonging to the lunatic (after providing for costs as between solr and client) in discharge of sums ordered to be paid by them under an order of two justices for the past expenses of the lunatic, for the amount of which the lunatic's property had by another order been authorized to be seized, on their undertaking to pay over the same to the treasurer of the parish, and to apply the surplus for the lunatic's benefit, and for payment of the future dividends to them during her life, or till further order, see *Simpson v. Earles*, L. JJ., 22 July, 1863, B. 1212.

In *Re Drewery*, V.-C. K., 8 Aug. 1854, A. 1655; 2 W. R. 436, where a fund had been paid into Court under the Trustee Relief Act (10 & 11 V. c. 96), a similar order was made on the petition of the guardians and overseers of the poor and the churchwardens of the parish, for repayment to the treasurer of the union of the amount expended, or to be expended, out of the union fund in the maintenance of the lunatic, and also of the amount expended by the parish in the maintenance of the lunatic's wife and child, to the extent authorized to be seized by the order of two justices.

In *Re Upfull's Trusts*, L. C., 19 July, 1851, B. 1062; 3 Mac. & G. 281, where the fund had also been paid in under the Trustee Relief Act, payment out of the capital of the fund of sums paid by the parish to the county lunatic

asylum for the past maintenance of the lunatic was directed on the petition of the guardians of the poor, and a stop order granted as to the residue.

NOTES.

By the Lunacy Act, 1890 (53 V. c. 5), s. 299 (repealing and replacing the Lunatic Asylums Act, 1853, 16 & 17 V. c. 97, s. 104): (1.) If it appears to any justice that a lunatic chargeable to any union, or local authority, has any real or personal property more than sufficient to maintain his family, if any, such justice may by order direct a relieving officer of the union, or the treasurer or some other officer of the local authority, to seize so much of any money, and to seize and sell so much of any other personal property of the lunatic, and to receive so much of the rents of any land of the lunatic, as the justice may think sufficient to pay the expenses of maintenance and incidental expenses respectively incurred, or to be incurred, in relation to the lunatic.

(2.) If any trustee, or the bank, or any other society or person having possession of any property of a lunatic, shall pay or deliver to a relieving officer of a union, or to the treasurer or other officer of the local authority to which respectively a lunatic is chargeable, any money or other property of the lunatic, to repay the charges in this section mentioned, whether pursuant to an order under this section, or without an order, the receipt of such relieving officer, treasurer, or officer, shall be a good discharge.

By sect. 300, an order may be made by a Judge of County Courts upon an application by the guardians of any union for payment of the expenses incurred by them under this Act in relation to a lunatic, and such order may be enforced against any property of the lunatic in the same way as a judgment of the County Court.

By the Lunacy Act, 1891 (54 & 55 V. c. 65), s. 22, the provisions of the Act of 1890, for the payment of expenses in relation to pauper lunatics, are made applicable with respect to lunatics in institutions for lunatics who become paupers.

Before the 16 & 17 V. c. 97, similar provisions had been made by the Poor Law Amendment Act, 1844 (7 & 8 V. c. 101), s. 27, repealed by the Stat. Law Rev. Act, 1874 (No. 2) (37 & 38 V. c. 96).

Under these enactments the capital, as well as the income, of a fund in Court may be paid out to the guardians or other officers: *Re Buckley*, Joh. 700; *Re Upfull*, 3 Mac. & G. 284; *Re Drewery*, 2 W. R. 436. But only six years' arrears of maintenance are recoverable: *Re Newbegin*, *Eggleton v. N.*, 36 Ch. D. 477; from the commencement of the action by the guardians: *Re Watson*, *Guardians of Stamford Union v. Bartlett*, (1899) 1 Ch. 72, Form 2, *sup.*, distinguishing *Stedman v. Hart*, Kay, 607.

The arrears are a legal debt, enforceable after the lunatic's death, notwithstanding an order in lunacy withholding part of the arrears in order to provide for future maintenance: *Re Taylor*, *Edmonton Union v. Deeley*, (1901) 1 Ch. 480, O. A.

Where expenses had been incurred by a lunatic's friends, and afterwards by the county, in her maintenance, her friends were entitled to be recouped their outlay in preference to the claims of the county: *Re Gibbon*, 7 Ch. 52.

Where a married woman becomes lunatic, provision is made by the Poor Law Amendment Acts, 13 & 14 V. c. 101, s. 5, and the 39 & 40 V. c. 61, s. 20, for recovering from her husband in a summary way any expenses incurred by the guardians for her maintenance.

Notwithstanding the husband's obligation to provide for a lunatic wife, the expenses of her past maintenance were allowed out of a fund in Court: *Peters v. Grote*, 7 Sim. 238.

Where a lunatic resident out of the jurisdiction is entitled to a fund in Court, the foreign or colonial officer having charge of him is (at least if his powers are those of a committee) entitled to have the fund applied for the past and future maintenance of the lunatic: *Re Smeaton's Will*, V.-C. S., 21 March, 1870, B. 885; *Re Baker's Trusts*, 13 Eq. 168.

So where a lunatic married woman resident abroad was entitled to a fund in Court for her separate use, with a restraint on alienation, the expenses of her past maintenance were repaid out of accrued dividends, and the future dividends were directed to be applied for her future maintenance: *Re Baker's Trusts*, *sup.*

The jurisdiction to direct payments to guardians, &c. for the maintenance of a lunatic ceases with his death, but the expenses previously incurred are recovered from his representatives like any other debt: *Re Marman's Trusts*, 8 Ch. D. 256, C. A.; though no steps were taken by the guardians in his lifetime: *Re Webster, Derby Union v. Sharratt*, 27 Ch. D. 710.

As to the powers of guardians to reimburse themselves for expenses incurred in the relief of any pauper during the twelve months preceding such reimbursement, see 12 & 13 V. c. 103, s. 16.

Admon was granted to the nominee of the guardians, to whom the pauper lunatic was indebted for maintenance, without citing the next of kin: *Re Everley*, (1892) P. 50.

CHAPTER XL.

SOLICITORS.

SECTION I.—SOLICITOR'S AUTHORITY—RETAINER—NOMINATION
BY COURT—CHANGE OF SOLICITOR.1. *Solicitor to pay Plt's Costs of Action brought without Authority.*

UPON motion &c., by counsel for the Deft A. B., that C. D. the legal pers. repesve of the deceased Plt E. F., and the Plts G. H., &c., might be ordered to proceed with the action, or that the action might be dismissed, and upon motion at the same time &c., by counsel for the Deft I. J., to dismiss action against him for non-prosecution; And upon motion &c., by counsel for the Plt G. H., that his name might be struck out as a Plt on the ground that it had been inserted without his knowledge, consent, or authority, and that the costs occasioned by the insertion of his name as Plt might be paid by Messrs. Z., the solrs on the record for the Plts; And upon hearing counsel for the said Messrs. Z.; Let the action stand dismissed out of this Court; Let Messrs. Z. pay to the Defts I. J. and A. B., and to the Plt G. H., their costs of this action as between solr and client, including in the costs of the Defts their costs of all motions.—*Nurse v. Durnford*, M. R., 21 Nov. 1879, B. 2238.

For order to amend an order made on petition by striking out the names of persons joined as co-petitioners, who had not authorized and had no notice of the petition, see *Re Savage*, M. R., 4th Aug. 1880, B. 3291; 15 Ch. D. 557.

2. *Another Form—Directions as to Costs.*

UPON motion by way of appeal from the order dated &c. by counsel for the Plt W. H. W.; And upon hearing counsel for the Defts W. H., E. A., H. T., and A. P., and for S. T., the solr for the Plts. And upon reading &c. reverse the said order dated &c., Stay all further proceedings so far as the Plt W. H. W. is concerned as Plt, and all further proceedings against the Plt W. H. W. by the Defts under the orders dated &c.; And Let the said S. T. pay to the Defts L. S. L. V. G., W. F., E. A., H. T., A. P. and L. L. their costs of action incurred since the said W. H. W. was added as a co-Plt, and

also their costs which the Plt W. H. W. has been ordered to pay, and their costs occasioned by the said appeal, and also their costs of the summons (to be taxed as regards costs which have not been already taxed as between party and party); And Let the said S. T. pay to the Deft J. T. his costs directed to be taxed under the order dated &c. Tax as between solr and client the costs of the Plt W. H. W. of the said summons and occasioned by this appeal; And Let the said S. T. pay to the Plt W. H. W. his said costs when so taxed. And Messrs. R. B. & Co., the solrs for the Defts W. T., E. A., H. T. and A. P. undertaking to repay to the Plt W. H. W. £—, the amount received by them under the execution under the order dated &c., the Plt. W. H. W. by his counsel undertakes upon the receipt of the said sum of £— not to take any proceedings in respect of the said execution; And Let the name of the said W. H. W. be struck out as a co-Plt in all further proceedings in this action.—*Fricker v. Van Grutten*, C. A., 29 July, 1896, A. 3687, (1896) 2 Ch. 649, C. A.

3. *Order for Taxation of Costs of Defts where Name of Infant Plt used without Authority, and Payment by the Plts' Solrs.*

REFER it to the taxing master to tax the costs of the Defts of this action so far as they are attributable to making W. G. (the infant) a Plt, but not the costs of the Defts' motion to expunge from the register the design registered in the name of the said W. G., No. —; And Let M. E. W. and G. N., carrying on business as Messrs. W. and N., the Plts' solrs, pay to the Defts (*names*) the said costs when so taxed.—*Geilinger v. Gibbs*, Kekewich, J., 2 Feb. 1897, A. 568, (1897) 1 Ch. 479.

4. *Order striking out Name of Company, used without Authority, and for Solrs so issuing Writ to pay Costs.*

UPON motion &c. by counsel for the Plt co., And upon hearing counsel for Messrs. W. D. & Co., solrs; And upon reading &c. Let the name of the Plt co. be struck out of the said writ of summons, the same having been used without the authority of the said co.; And Let the said Messrs. W. D. & Co., the solrs by whom the said writ was issued, pay to the said co. their costs of this action including their costs of this motion, and also the costs for which they are liable under the notice of discontinuance dated &c. to be taxed as between solr and client.—See *Gold Reefs of Western Australia, Ltd. v. Dawson*, North, J., 18 Dec. 1896, A. 4989, (1897) 1 Ch. 115.

5. *Solicitor to pay Costs of Action instituted without Authority.*

UPON the appeal of A. B., a solr of the Supreme Court, from an order dated &c., coming on &c., and upon hearing counsel for the

appellant, for the Plts and Deft; Let the order dated &c. be affirmed, and in addition thereto Let the said solr, by whom this action was instituted without the authority of the Plts, pay to the Deft his costs of this action; Let the said solr pay to the Plts and Deft their costs of this appeal, &c.—*The Newbiggin &c. Co. v. Armstrong*, C. A., 10 Dec. 1879, B. 2377.

In the Court below the costs of the Plts were taxed as between solr and client: *S. C.*, 9 May, 1879, B. 1273.

6. *To amend Writ by striking out name of a Plaintiff used without Authority.*

UPON motion &c., by counsel for the Plt A. B., and upon hearing &c., for the Plt C. D., and for the Deft, and for E. F., the solr for A. B.; Let the writ be amended on or before &c., by striking out the name of the said A. B. as a Plt, the same having been used without her authority; And Let E. F., the solr by whom the said writ was issued, pay to the said A. B. her costs (if any) of this action as between solr and client.—*Wray v. Kemp*, Chitty, J., 18 Jan. 1884, B. 33; *S. C.*, 26 Ch. D. 169.

For form of application, see D. C. F. 1018.

7. *Order on Summons nominating Solicitors to represent a Class.*—*O. LV*, 40.

LET Messrs. P. &c., the solrs in these actions for the Defts W. &c., three of the trustees of the will of the testator F., be nominated the solrs to represent the Defts H. and K., the other trustees of the said will, for the purposes of the proceedings in these actions before the Judge in Chambers.—See *Fletcher v. Moore*, V.-C. K., 27 May, 1859, A. 1798.

See also *Re Docwra*, D. v. *Faith*, *Westwood v. D.*, W. N. (84) 174, 232, where official solicitor appointed.

NOTES.

ACTION BROUGHT WITHOUT AUTHORITY.

A person whose name had been added as co-Plt, or as next friend, or on behalf of whom a bill had been filed without his authority, was entitled to have his name removed from the record, with costs to be paid by the solr: *Fenton v. Queen's Ferry Rope Co.*, 7 Eq. 267; *Atkinson v. Abbott*, 3 Drew. 251; *Ward v. W.*, 6 Beav. 251; *Wright v. Castle*, 3 Mer. 12; *Wray v. Kemp*, 26 Ch. D. 138.

Under the former practice the solr might be ordered to pay the costs of unauthorized proceedings: *Malins v. Greenway*, 10 Beav. 564; *Lander v. Ingersoll*, 4 Ha. 59; *Exp. Hollington*, 22 W. R. 106; 43 L. J. Ch. 99; 29 L. T. 502; and to indemnify the Plt, wrongly so made, from claims by the Defts to costs, to which, it seems, the Plt, though the bill was filed without his authority, remained liable: *Hood v. Phillips*, 6 Beav.

176; *Wade v. Stanley*, 1 J. & W. 674; *Tarbuck v. Woodcock*, 6 Beav. 581.

But since the Jud. Acts (see Jud. Act, 1875, s. 21) the practice of the common law Courts, whereby the solr was held liable to pay the costs of both Plt and Deft, is to be preferred: *Newbiggin Gas Co. v. Armstrong*, 13 Ch. D. 310; *Nurse v. Durnford*, 13 Ch. D. 764; *Cape Breton Co. v. Fenn*, 17 Ch. D. 198, C. A.; and see *Fricker v. Van Grutten*, (1896) 2 Ch. 649, C. A.; *Cordery*, 117.

In *Newbiggin Gas Co. v. Armstrong*, *sup.* (see Form 5, *sup.*), and *Cape Breton Co. v. Fenn*, 17 Ch. D. 210, C. A., the action was dismissed, and the solrs were ordered to pay all the costs, those of the Plts as between solr and client, and those of the Defts as between party and party. The costs will include the costs of the application by the person named as Plt to be dismissed from the proceedings: *Fricker v. Van Grutten*, *sup.*

In *Nurse v. Durnford* (see Form 1, *sup.*), the Deft also had costs as between solr and client; and see *Andrews v. Barnes*, 39 Ch. D. 133, C. A. (*sup.* Vol. I. p. 139), deciding that the Court has jurisdiction in all cases to give costs as between solr and client.

The general rule will apply against the solr although he has been deceived by a forged power of attorney (*Cordery*, 117), or believes an infant Plt to be of full age: *Geilinger v. Gibbs*, (1897) 1 Ch. 479, the remedy of the solr being against the person who misled him (*Cordery*, 16; *Nurse v. Durnford*, *sup.*).

The fact that notice of discontinuance has been given under O. xxvi, 1, does not prevent the Plt from applying by motion or summons in a summary way: *Gold Reefs of Western Australia v. Dawson*, (1897) 1 Ch. 115.

The motion to stay proceedings may be made by the Deft: *Geilinger v. Gibbs*, *sup.*; but not in the absence of the Plt: *Cordery*, 118; *Thatcher v. D'Aguilar*, 11 Exch. 436; 4 W. R. 149.

An order to attend proceedings obtained by a solr without his client's written authority may be discharged on application by the client: *Bird v. Harris*, 29 W. R. 45; 43 L. T. 434. And an order made on petition may be amended by striking out the names of persons joined as co-Petr who had no notice of the petition, or had not authorized the use of their names: *Re Savage*, 15 Ch. D. 557.

As to the use, without their authority, of the names of shareholders as co-Plts, see *Keppell v. Bailey*, 2 M. & K. 548; 1833, A. 1391.

A person alleged to be of unsound mind, but proved to be sane, on whose behalf a bill had been filed by a next friend, was entitled to be indemnified by the next friend against all consequences of the suit having been instituted in his name: *Palmer v. Walesby*, 3 Ch. 732.

Where a solr, himself a Deft, and acting under an implied authority to act for his co-Defts, put in fraudulently a defence admitting their liability, and denying his own, leave was given on appeal to withdraw the defence and deliver a fresh one: *Williams v. Preston*, 20 Ch. D. 672, C. A.

RETAINER OF SOLICITOR.

For commencing proceedings a general authority to act as solr is not sufficient, but the solr, for his protection should have instructions in writing: *Wiggins v. Peppin*, 2 Beav. 403; *Norton v. Cooper*, 3 Sm. & Giff. 375; *Re Gray*, 20 L. T. 730.

And a special authority is required to enable a solr to enter an appearance: *Re Gray, G. v. Cole*, 65 L. T. 743; W. N. (91) 201; *Cordery*, 78; and as to the position of a solr defending a suit under a general authority, see *Wright v. Castle*, 3 Mer. 52; *Heinrich v. Sutton*, 6 Ch. 220; *Steel v. Cobb*, 1 N. R. 302; 11 W. R. 298.

In the absence of express retainer, the relation of solr and client may be inferred from the acts of the parties: *Blyth v. Fladgate*, (1891) 1 Ch. 337.

As to retainer by acquiescence, see *Hall v. Laver*, 1 Ha. 571; *Bright v. Legerton*, 2 D. F. & J. 606.

Retainer of a country solr does not justify an action in which his London agents are solrs on the record: *Wray v. Kemp*, 26 Ch. D. 169 (where the Plt in such a case was held entitled to have her name struck out).

A retainer to a solr "to investigate accounts of mortgagee and take steps" as thought fit does not justify him in commencing a redemption action: *Wray v. Kemp*, 26 Ch. D. 169.

A solr must be very careful to have his retainer explicitly worded, especially when given on behalf of an ignorant uneducated person: *Wray v. Kemp*, 26 Ch. D. 169; *Atkinson v. Abbott*, 3 Drew. 251.

Retainer by the managing partner of a firm (whether to sue or defend) is sufficient: *Tomlinson v. Broadsmith*, (1896) 1 Q. B. 386, C. A.; *Court v. Berlin*, (1897) 2 Q. B. 396, C. A.; and partners who retire during the action remain (in the absence of notice to the solr) liable for subsequent costs: *Court v. Berlin*, *sup.*

A solr whose managing clerk is a member of a committee of inspection in bankruptcy ought not to accept a retainer from the trustee: *Re Gallard*, (1896) 1 Q. B. 68, C. A.

The Court has no power to give a solr, to whom costs are due from a co., authority to use the co.'s name in litigation against others: *Cape Breton Co. v. Fenn*, 17 Ch. D. 198, C. A.

NATURE AND EXTENT OF AUTHORITY.

The retainer of a solr in a common law action is an entire contract to conduct the case to its conclusion, and he cannot withdraw and sue for his costs except for good cause and after reasonable notice: *Underwood, Son and Piper v. Lewis*, (1894) 2 Q. B. 306, C. A., explaining *Vansandau v. Brown*, 9 Bing. 412; but this rule does not necessarily apply to administration actions or bankruptcy or winding-up proceedings: *Re Hall*, 9 Ch. D. 538; *Re Romer and Haslam*, (1893) 3 Ch. 518; *Cordery*, 106. As to change of solr, *v. inf.*, p. 1079.

The authority of a solr continues after judgment in an action to the extent of binding his client by a compromise (see *Butler v. Knight*, L. R. 2 Ex. 109), or for the purpose of being served with notice of appeal: *Delapole v. Dick*, 29 Ch. D. 351; and by O. VII, 3, until the notice of change has been filed in the Central Office or in the District Registry, the former solr shall be considered the solr of the party until the final conclusion of the cause or matter in the High Court or the Court of Appeal; but when execution has been levied the solr is *functus officio*, and cannot, without special instructions, engage in proceedings in interpleader: *James v. Bicknell*, 20 Q. B. D. 164.

It is not within the scope of the implied authority of a solr of a judgment creditor issuing a *fi. fa.* to direct the sheriff to seize particular goods: *Smith v. Keal*, 9 Q. B. D. 340, C. A.; *Cordery*, 96, 145.

As to the authority of a bank to use the name of their trustee in any action or proceeding, and of their solr to enter an appearance for their trustee as co-Defendant without his knowledge, and conduct his defence, see *Heinrich v. Sutton*, 6 Ch. 220.

Trustees of a creditors' deed having acted, were held liable to the solr for the costs of its preparation (one of the trusts of the deed being for payment of those costs), although the retainer of the solr has been by the debtor only: *Re Sadd*, 34 Beav. 650.

When money is directed to be paid out to solrs, and the judgment is reversed on appeal, to which the solrs are not parties, there is no jurisdiction to order them to refund, as the client is the responsible party: *Lydney and Wigpool Co. v. Bird*, 33 Ch. D. 85, C. A.

If several Defts separately retain a solr, each is liable only for his share of the general costs: *Re Colquhoun*, 5 D. M. & G. 35; and see *Frazer v. Thompson*, 1 Giff. 337; *Anderson v. Boynton*, 13 Q. B. 308; *Re Allen, Davies v. Chatwood*, 11 Ch. D. 244; and in strictness the right of each is to have the solr's bill taxed without serving any other person than the solr: *Re Salaman*, (1894) 2 Ch. 201, C. A., *ante*, p. 275.

But when it is a joint retainer, as by two or more trustees, the whole bill of costs can be enforced against either of them: *Watson v. Row*, 18 Eq. 680; *Smith v. Dale*, 18 Ch. D. 516.

A solr employed in trust business is solr for the trustees personally, and has no direct claim on the estate for costs: *Stanier v. Evans*, 34 Ch. D. 470.

A trustee may retain a solr on the terms that he is to look only to the trust estate for payment: *Blyth v. Fladgate*, (1891) 1 Ch. 337, 359.

A solr employed by trustees is not thereby *ipso facto* authorized to accept notice on their behalf of incumbrances created by a c. q. t.: *Saffron Walden Bldg. Soc. v. Rayner*, 14 Ch. D. 406, C. A.; *Arden v. A.*, 29 Ch. D. 702, 709.

A solr retained for the purpose of bringing an action is not justified in compromising his client's claim before action brought: *Macaulay v. Polley*, (1897) 2 Q. B. 122, C. A.

Separate liability must have been asserted by the clients at the trial of an action against them for his costs by the solr, and cannot be raised for the first time on taxation: *Burridge v. Bellew*, 32 L. T. 807.

In general, separate solrs retained by the same clients in the same business, being jointly responsible, share the profits equally: *Robinson v. Anderson*, 7 D. M. G. 239; 20 Beav. 98.

A solr cannot pledge his client's credit to counsel, so as to enable counsel to recover from the client: *Mostyn v. M.*, 5 Ch. 457; *Hobart v. Butler*, 9 Ir. C. L. 157; and as to counsel's fees, see Vol. I. pp. 301, 302.

Where a solr has received costs payable to his client, with knowledge that an appeal is pending, he cannot, in the absence of misconduct or undertaking to pay, be ordered personally to repay: *Hood-Barra v. Crossman*, (1897) A. C. 172, H. L., affirming C. A., (1896) 1 Q. B. 610 (*nom. Hood-Barra v. Heriot*).

The mere fact that a solr is in possession of a mortgage deed executed by his client, does not authorize him to receive the mortgage money for the client: *Exp. Swinbanks, Re Shanks*, 11 Ch. D. 525, C. A.; but by the Conveyancing Act, 1881, s. 56, "where a solr produces a deed having in the body thereof, or indorsed thereon, a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solr, without the solr producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt." This section does not alter or enlarge the powers of trustees as to giving an authority to an agent to receive purchase-money for them, and therefore, in the absence of special circumstances, a purchaser could insist upon paying the money to the trustees personally, or to their joint account at a bank designated by them: *Re Bellamy*, 24 Ch. D. 387, C. A.; and see *Day v. Woolwich Equitable Building Soc.*, 40 Ch. D. 491, 494. But by the Trustee Act, 1893, s. 17 (replacing sect. 2 of the Trustee Act, 1888), sub-sect. 1, a trustee may "appoint a solr to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solr to have the custody of, and to produce, a deed containing any such receipt as is referred to in sect. 56 of the Conveyancing Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solr shall have the same validity and effect, under the said section, as if the person appointing the solr had not been a trustee." This enactment does not enable trustees to appoint one of themselves to receive purchase-money; and, *semble*, if the money is to be paid to them directly, the purchaser can require *all of them* to attend personally to receive it: *Re Flower*, 27 Ch. D. 592.

Production of the deed pursuant to sect. 56 of the Conveyancing Act is "equivalent to a special authority given to the solr to receive the money": *Re Bellamy, sup.*; and the person producing the deed must be the solr acting for the party to whom the money is expressed to be paid: *Day v. Woolwich Equitable Building Soc.*, 40 Ch. D. 491; but see *King v. Smith*, (1900) 2 Ch. 425, referring to *Hood and Challis*, 138, as to the right and duty of the person paying the money to assume that the solr producing the deed is acting as solr for the person having power to give a discharge.

The appointment of the solr and permission as to the custody must be made and given by the trustee personally, and not by attorney under a power: *Re Haling and Merton*, (1893) 3 Ch. 269, C. A.

By the Trustee Act, 1893, s. 17, sub-sect. 2, "a trustee may appoint a banker

or solr to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or solr to have the custody of and to produce the policy of assurance with a receipt signed by the trustee"; but (sub-sect. 3) the trustee is to be liable in respect of the money in case he permits it to remain in the hands or under the control of the banker or solr longer than is reasonably necessary.

The solr to a person having the conduct of a sale by the Court has authority to receive from the auctioneer the amount of the deposit for the purpose of paying it into Court: *Biggs v. Bree*, 51 L. J. Ch. 263; 46 L. T. 8; 30 W. R. 278, C. A.

The Plt's solr has authority to consent to add a co-Plt under O. XVI, 11: *Cox v. James*, 19 Ch. D. 55.

For the authority required in the case of proceedings by or against a public co., see *East Pant Du Co. v. Merryweather*, 2 H. & M. 254; *Wandsworth Gas Co. v. Wright*, 18 W. R. 728; 22 L. T. 404; *Heinrich v. Sutton*, 6 Ch. 220; and that a solr having authority to represent a co. is not liable for acting on that authority after it had been revoked by the dissolution of the co. until he knows or, by the exercise of due diligence, might have known, of the dissolution, see *Salton v. New Beeston Cycle Co.*, (1900) 1 Ch. 43.

As to the position of a solr acting for the promoter of a co., and that he cannot, in the absence of ratification by, or an independent contract with, the co., hold them liable, see *Re Rotherham Alum and Chemical Co.*, 25 Ch. D. 103, C. A.; *Re Empress Engineering Co.*, 16 Ch. D. 125, C. A.; *Re Northumberland, &c. Co.*, 33 Ch. D. 16, C. A.

In the absence of express contract, an official liquidator is not personally liable for the costs of the solr employed by him in the winding-up with the sanction of the Court: *Re Anglo-Moravian Co.*, 1 Ch. D. 130; *Trueman's Estate, Hooke v. Piper*, 14 Eq. 278; *Re Massey*, 9 Eq. 367; *Cordery*, 67. As to the priority of the costs over the liquidator's remuneration, see *Re Sanitary Burial Assoc.*, (1900) 2 Ch. 289, C. A.

The retainer of a solr by the liquidator of a co. which is being wound up by the Court must be made with the sanction of the Court obtained before the employment, except in cases of urgency, and in general only in such cases will the Court give its subsequent sanction; and an order directing the liquidator to call up uncalled capital does not relieve him from the necessity of obtaining the sanction: *Re London Metallurgical Co.*, (1897) 2 Ch. 262.

Costs incurred subsequently to the death of the client, but before the solrs received notice of it, were disallowed: *Pool v. P.*, 58 L. J. P. D. 67; 61 L. T. 401.

When a solr puts his managing clerk in his place to conduct a matter, notice of an act of bankruptcy to the clerk is notice to the solr: *Exp. M'Gowan, Re Ashton*, 39 W. R. 320; 64 L. T. 28; 8 Morrell, 72; and see *Brewin v. Briscoe*, 28 L. J. Q. B. 329; 2 E. & E. 116; 7 W. R. 584; *Pike v. Stevens*, 12 Q. B. 465.

NOTICE TO SOLICITOR—CONVEYANCING ACT, 1882.

By the Conveyancing Act, 1882 (45 & 46 V. c. 39), s. 3, it is provided that "a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless (i.) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (ii.) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solr or other agent, as such, or would have come to the knowledge of his solr or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solr or other agent." The section is not to exempt a purchaser from any liability under any covenant or provision contained in the instrument under which his title is derived mediately or immediately, but it applies to purchases made either before or after the commencement of the Act.

The section does not affect the ordinary rule that a purchaser cannot avoid constructive notice by omitting to investigate the title to the property: *Parman v. Harland*, 17 Ch. D. 353; or set up the legal estate as against the title of a third person when he himself "did not take the usual ordinary

precaution to make inquiry about it, but was content to accept the title, to take a conveyance, and to advance his money without inquiry of any sort or kind": *Gainborough v. Watcombe Terra Cotta Co.*, 54 L. J. Ch. 994; 53 L. T. 116 (and see *Oliver v. Hinton*, (1899) 2 Ch. 264, C. A.); but it was intended to remedy the evil consequences of such a doctrine as that in *Hargreaves v. Rothwell*, 1 Ke. 154, 160; whereby, where a solr had acted in a former transaction with reference to the estate, "notice was imputed to the client if there was such a distance only between the former transaction and the present transaction in which he was engaged as left the Court under the impression—it could not be more than an impression—that the solr had actually remembered the former transaction; and in that way knowledge was imputed to the solr, and through the solr notice was imputed to the client": *Re Cousins*, 31 Ch. D. 671, 676.

CHANGING SOLICITOR.

Under the former practice a party could not change his solr except by order on motion or petition of course, and until such order was obtained and served, and notice thereof given to the clerk of records and writs, the former solr was considered as the solr of the party.

But by O. VII, 3, a party suing or defending shall be at liberty to change his solr in any cause or matter without an order for that purpose, upon notice of such change being filed in the Central Office, or in the District Registry, if the cause or matter is proceeding therein; but until such notice is filed, and a copy thereof served, and (in causes or matters pending in the Ch. Div.) left in the Chambers of the Judge to whom the cause or matter is assigned, the former solr shall be considered the solr of the party until the final conclusion of the cause or matter, whether in the High Court or in the Court of Appeal. It is peremptory that the notice required by this rule should be given: *Hunt v. Fineburg*, 22 Q. B. D. 259, C. A., in which case the action, having been dismissed at the trial by reason of the name of the former solr (who had been suspended from practising) still appearing on the record, was reinstated upon the terms of the Plt paying the costs thrown away. For forms of notice, see D. C. F. 1039.

Where there had been a joint retainer by several co-Plts, an order to change the solr on the application of one or more of them was irregular: *Norwich and Norfolk Building Soc.*, 22 W. B. 856; *Wedderburn v. W.*, 17 Beav. 158. For form of application by co-Plt to appoint solr for separate application, see D. C. F. 1040.

The conduct of a consolidated action, where some of the co-Plts had applied to change their solr, was given to those Plts who had not so applied, and those applying were made Defts, though their claim was larger: *Holden v. Silkstone, &c. Co.*, 30 W. B. 98.

In case of refusal to appoint a new solr, the opposite parties may sue out a *subpœna* for the naming of a solr: *Gibson v. Ingo*, 2 Ph. 402; *Dean v. Lethbridge*, 26 Beav. 397. See D. C. F. 1041.

Where the Deft's solr had been struck off the rolls, and the Deft could not be served personally, the Court allowed substituted service on the Deft of the *subpœna* to name a new solr: *Hamilton v. Thomas*, W. N. (83) 31.

In *Waldon v. Thompson*, 6 Eq. 7, the record and writs clerk was directed to file a bill by two Plts, although the indorsement stated that it was filed by a firm of London solrs as agents on behalf of two solrs not in partnership and acting jointly for Plts.

A direction by a testator that his solr shall be solr to the estate, and to the trustees in carrying out the trusts of the will, will not bind the trustees to continue to employ such solr: *Foster v. Elsley*, 19 Ch. D. 518.

The exor or admor of a deceased sole Plt, or any new sole Plt coming in by change of interest, need not employ the former solr in the cause; but, *semble*, notice should be given under O. VII, 3.

Where the suit of a Plt become bankrupt is continued by his assignee, the assignee is under no obligation to employ the same solr: *Simmonds v. G. E. Ry. Co.*, 3 Ch. 797.

The former practice at law did not allow a solr to be changed unless his costs were paid: *Witt v. Ames*, 11 W. B. 751; 8 L. T. 425; but, following the practice in equity, the order will now be made in all Divisions of the

High Court, without any provision for payment of his costs: *Grant v. Holland*, 3 C. P. D. 180.

Where, after a change of solrs, an action is remitted to the County Court, the former solr does not, by virtue of County Courts Act, 1888, s. 118, lose his right to costs on the High Court scale: *Boydell v. Millar*, 60 L. J. Q. B. 251; 39 W. R. 335; 64 L. T. 299.

As to the obligation of a displaced solr to hand over documents to his successor, *v. inf.* p. 1086; and as to the importance of the question whether the solr has been discharged or has discharged himself in reference to his power to act for other parties, and the delivery or production of documents, see *Re Hawkes, Ackerman v. Lockhart*, (1898) 2 Ch. 1, C. A.; Cordery, 366, 367, and *inf.* p. 1086.

And as to the practice generally on change of solr, see Dan. 1703 *et seq.*

SECTION II.—SOLICITOR'S LIEN.

(1.)—LIEN ON PAPERS.

1. Changing Solr—Lien on Papers—Delivery.

THE Plt H. having filed a notice to change her solr in this action, Let Y. [*the present solr*], within seven days after service of this order, deliver up, on oath, to the Plt H., or to Messrs. X. as her solrs, the papers in this action, and all other deeds, papers and writings whatsoever in his custody or power belonging to the Plt, or in anywise relating to this action, the said X. undertaking to hold the same subject to Y.'s lien, if any, for what shall be found due to him in any taxation of costs in this action.

2. Solr to hand Papers to New Solr, subject to Lien, and undertaking to return them.

AND the said A. [*new solr*] undertaking to prosecute this cause on behalf of the Plt [*or if client Deft*, act on behalf of the Deft in this cause], with all due diligence, and undertaking that such briefs of pleadings in this cause, office and other copies, deeds, papers, documents, and proceedings, as shall be delivered to him under this order, shall be received by him without prejudice to any right of lien; and shall be returned undefaced within ten days after the hearing of this action (this action shall be disposed of) or after he shall at any time cease or decline diligently to prosecute [*or act on behalf of the Deft in*] this action; Let the said B. [*late solr*] deliver over to the said A. all such briefs of pleadings in this action, office and other copies, and all such other deeds and papers, documents, and proceedings in or connected with this action, as, upon inspection, the said A. shall deem necessary upon the Plt's behalf for the further prosecution of this

action [or to enable him to act as aforesaid for the Deft]; (And the said A. is to be at liberty to add his costs of this application to his costs already incurred.)—Liberty to apply.—See *Cane v. Martin*, M. R., 16 July, 1840, B. 1519; 2 Beav. 84, on petition of Plt; *Englehart v. Ordell*, V.-C. S., 11 May, 1854, A. 905, on motion of Deft; and costs to be costs in the action.

3. *Plt's Solr to hand Papers to Solr of Creditor conducting Action.*

"LET F., the solr of the Plt, within &c., deliver to S. [creditor], or to D., his solr, the several judgments, orders, and office and other copies relating to or made in these actions or either of them, in his possession or power, the said S. undertaking to hold the same subject to such lien as the Plt or the said F., or any solr the Plt may have employed from time to time, shall be lawfully entitled to thereon; And Let the said S. (his solrs and agents) be at liberty at all seasonable times, and on giving reasonable notice, to inspect at the office of the said F. all the briefs and drafts in his custody relating to the matters in question in these actions."—Costs of the said S. and of Plts to be costs in the action.—See *Baron Alvanley v. Kinnaird*, V.-C., 23 June, 1842, A. 1133; Jur. (44) 114.

4. *Delivery of Papers—Security by Lodgment in Court—Lien on Fund.*

UPON the appeal of the Deft, Let the Plts, the L. B. of N., be at liberty to lodge in Court, as directed in the schedule hereto, £1,000; And Let the Deft have the same lien (if any) on the fund so lodged as he has on the papers of or belonging to the Plts, or relating to the property thereof in his custody or power, which he shall deliver up pursuant to this order; Let upon such lodgment being made, the Deft deliver to the Plts on oath all books, minute books, books of account, rentals, maps, bills, receipts, vouchers, leases and counterparts, securities, muniments, pleadings, affidavits, exhibits, briefs, office copies, records and papers, of or belonging to the Plts, relating to the property thereof in his custody or power, and all briefs &c. in his custody or power necessary to enable the clerk of the Plts to instruct counsel, and do all necessary acts for the purpose of prosecuting the appeal in the action *A. v. B.*—Plts to pay Deft's costs.—[Add Lodgment Schedule, Form No. 1.]—See *Newington Local Board v. Eldridge*, 25 July, 1879, B. 2691; S. C., 12 Ch. D. 349, C. A.

5. *Delivery of Papers by Solr without Prejudice to Taxation and Lien, the Client giving Security, and undertaking to produce them.*

"LET B. and C. [clients], or one of them, on or before &c., lodge the sum of £— in Court as directed in the schedule hereto, without

prejudice to the taxation of the bill of fees and disbursements of the said D., directed by the order dated &c. ; And Let the said D., within two days after notice to him of such payment, deliver up to the said B. and C., or one of them, or to their solrs, all deeds, books, papers, and writings in his custody or power belonging to the said B. and C., as directed by the order dated &c., the said B. and C. by their counsel undertaking to produce to the taxing master at all proper times (and seasons) all or any of such deeds, books, papers, and writings as by the said taxing master they, or either of them, shall be required ; But this order is without prejudice to the lien (if any) of the said D. upon such deeds, books, papers, and writings for costs alleged to be due to him, the said D., from the estate of A. deceased."—No costs to D. of this application.—See *Re Jewitt*, M. R., 25 July, 1864, A. 1801 ; 34 Beav. 22.—[Add Lodgment Schedule, Form No. 1, heading account as follows : "The account of B., C., and D."]

6. *Delivery of Deeds &c., relating to Action but retaining Solr's Lien.*

THE application of the Plt, which upon hearing &c., was adjourned &c., and upon hearing counsel for the Plt and for C. D., the late next friend of the Plt, and for E. F., his solr ; Let the said E. F. deliver to M. N., the present solr of the Plt, a list of all the deeds, papers, and writings relating to this action which are in the custody or power of the said E. F. ; And Let such list be verified on oath by the said E. F. if required ; And Let the said E. F. deliver to the said M. N. such of the said deeds, papers, and writings in his possession, custody, or power as may from time to time be required by the said M. N. for the carrying on of the proceedings in this action, the necessity for such delivery to be determined by the Judge in Chambers in case the parties differ, such deeds &c., to be retained by the said M. N., subject to the lien (if any) of the said E. F. for costs.—*Re Hutchinson*, H. v. *Norwood*, North, J., 4 June, 1886, A. 868 ; S. C., 34 W. R. 637 ; 54 L. T. 842.

7. *Order to produce, with Liberty to apply in case of Difficulty by reason of (former) Solrs' Lien.*

THIS Court being of opinion that such affidavits (of the Plt) are insufficient, Let the Plt J. L., on or before —, file a full and sufficient affidavit pursuant to the said order dated —, and accounting particularly for the documents set forth and referred to in the second schedule of his said affidavit filed —, more particularly describing such as are not fully set forth and described, and stating which of them are now in the possession of Messrs. R. C. & Co., his former solrs ; And Let the Plt J. L., at all seasonable times upon reasonable notice, produce at the office of Messrs. H. W. & N., his solrs, the several documents set forth and referred to in such second schedule which by such further

affidavit shall appear to be in his possession or power, or in the possession or power of the said Messrs. R. C. & Co.; And Let the Deft, his solr and agent, be at liberty to inspect and peruse the documents so produced, and to take copies of and extracts therefrom as the Deft shall be advised at his expense; And Let the Plt J. L. produce the said documents upon any examination of witnesses in this action and at the trial thereof as the Deft shall require; And Let the Deft be at liberty to make such further application as to all or any of the documents mentioned in the said affidavit as he may be advised.—The costs of the application to be borne by the Plt in any event.—Liberty for the Plt to apply.—See *Lewis v. Powell*, Stirling, J. (transferred from Q. B. D.), 20 March, 1897, B. 1405; (1897) 1 Ch. 678.

NATURE AND EXTENT OF LIEN.

A solr has a right to hold papers of his client which have come to him in the course of business in his professional capacity until his bill is paid.

As to the nature and extent of this lien, which cannot be actively enforced, and is subject to the same rights and equities to which the papers were in the hands of the client, see *Stedman v. Webb*, 4 My. & Cr. 346; *Bozon v. Bolland*, 1b. 354; *Clutton v. Pardon*, T. & R. 304; *Molesworth v. Robbins*, 2 J. & Lat. 358; *Pelly v. Wathen*, 1 D. M. & G. 16; 7 Ha. 351; *Blunden v. Desart*, 2 Dr. & War. 405; *Re Capital Fire Insurance Co.*, 24 Ch. D. 408, C. A.; *Re Galland*, 31 Ch. D. 296, C. A.; *Re Llewellyn*, (1891) 3 Ch. 145; *Re Hawkes, Ackerman v. Lockhart*, (1898) 2 Ch. 1, C. A., *post*, p. 1086.

And that the lien may be asserted though the debt is statute-barred, see *Re Carter, C. v. C.*, 55 L. J. Ch. 230; 34 W. R. 57; 53 L. T. 630; *Re Bromhead*, 5 D. & L. 52; *Re Murray*, W. N. (67) 190.

It extends only to taxable costs, charges, and expenses, including all disbursements which can be moderated by the taxing master, and are not necessarily allowed in full on being vouched, but it does not include ordinary advances: *Re Taylor, Stileman and Underwood*, (1891) 1 Ch. D. 590; thus, it includes the costs of a reference to tax the solr's bill: *Re Hanbury*, W. N. (96) 241; 75 L. T. 449; 65 L. J. Ch. 678; or of an action to recover the amount: *Lambert v. Buckmaster*, 2 B. & C. 616; but not charges by him as land agent or otherwise extra professionally: *Re Walker, Meredith v. W.*, 68 L. T. 517; *Cordery*, 357.

If by the decree the client has been ordered to deliver up deeds, &c., the solr with whom they have been deposited for the purposes of the suit cannot, on the ground of his lien, withhold delivery: *Bell v. Taylor*, 8 Sim. 216; *Baker v. Henderson*, 4 Sim. 27; *secus*, if the deeds have been deposited with the solr for general purposes as well as the purposes of the suit: *Warburton v. Edge*, 9 Sim. 508; and see *Young v. English*, 7 Beav. 10.

And similarly, upon payment of a mortgage debt and mortgagee's costs, the mortgagee's solr cannot retain the mortgagor's title deeds on the ground of his general lien for independent business done by him as solr for the mortgagor: *Re Moseley*, 15 W. R. 975; *Re Long, Exp. Fuller*, 16 Ch. D. 617; or for costs due for work done relating to the mortgaged property during the continuance of the mortgage: *Re Llewellyn*, (1891) 3 Ch. 145.

A solr acting for both parties in a mortgage transaction cannot, after execution of the mortgage, retain the title deeds in respect of his lien for costs due from the mortgagor: *Re Snell*, 6 Ch. D. 105; *Pratt v. Vizard*, 5 B. & Ad. 511; *Re Taylor, Mason v. T.*, 10 Ch. D. 729; *Macfarlane v. Lister*, 37 Ch. D. 86; *Exp. Quinn, Re Nicholson*, 53 L. J. Ch. 302; 49 L. T. 811; 32 W. R. 296; but as against the mortgagor his lien continues subject to the mortgage: *Re Walker, Meredith v. W.*, *sup.*; and, having acted for an admor, he can, until paid, retain the papers as against the admor *de bonis non*: *Re Watson*, 53 L. J. Ch. 305; 38 W. R. 477; 50 L. T. 205.

As to the lien of the solrs of a deceased exor and trustee who has a claim upon the estate, see *Turner v. Letts*, 7 D. M. & G. 243; 20 Beav. 185;

Christian v. Field, 2 Ha. 177; and see *Horne v. Shepherd*, 3 Jur. N. S. 806; 26 L. J. Ch. 817.

The lien, unless limited by special agreement, is general, and not confined to the particular occasion on which the papers were delivered: *Re Messenger*, 3 Ch. D. 317; *Colmer v. Ede*, 19 W. R. 318; 40 L. J. Ch. 185; 23 L. T. 884; *Exp. Sterling*, 16 Ves. 257; but it is limited to what is due to the solr *qua* solr, and does not include all sums of money due from the client: *Re Galland*, 31 Ch. D. 296, C. A.; *Worrall v. Johnson*, 2 J. & W. 214, 218; *Re Walker, Meredith v. W.*, 68 L. T. 517.

And see *Champney v. Burland*, 19 W. R. 913 (L. J.), where a charge for general costs was negatived by the terms of the memorandum.

The lien applies not only to papers, but to other articles, *e.g.*, books delivered to the solr for the purposes of the action: *Frinwell v. King*, 15 Sim. 191; but not to personal chattels not under the control of the Court, nor in the possession of the solr: see *Savage v. James*, 1 R. 9 Eq. 357; nor to deeds in possession of the solr as mortgagee from his client: *Sheffield v. Eden*, 10 Ch. D. 291; nor to documents never held by the solr on contract, or in any other way as solr: *Re Long, Exp. Fuller*, 16 Ch. D. 617; and a solr who prepares a marriage settlement has no lien upon it for his costs against the trustees: *Re Lorraine, Bowker v. Austin*, (1894) 1 Ch. 556.

It may be assigned with the debt in respect of which it is claimed: *Bull v. Faulkner*, 2 D. & S. 772.

A solr, clerk to a local board, is not deprived of his lien against them as their solr because he is also their servant: *Newington Local Board v. Eldridge*, 12 Ch. D. 349, C. A.

A transfer of the "goodwill" of a solr's business does not, *per se*, carry the right to possession of the client's papers: *James v. James and Bendall*, 37 W. R. 495; *Cordery*, 242.

The lien does not arise unless the documents have been received by the solr as such: *Vaughan v. Vanderstegen*, 2 Drew. 409; *Gibson v. May*, 4 D. M. & G. 512; and see *Fish. Mort. s. 632*.

The lien attaches to a policy of assurance without the necessity of giving notice to the assurance office: *W. of England Bank v. Batchelor*, 51 L. J. Ch. 199; 46 L. T. 132; 30 W. R. 364.

Solr of Co.—The lien on papers of a limited co. is subject to the Companies Acts and the co.'s articles of association: and the directors have no power to create any lien on the share register and minute books; and the solr cannot assert his lien against documents which come to his hands pending the winding up of the co. in such a way as to interfere with the prosecution of the winding-up; but the winding-up order does not, *ipso facto*, defeat any valid pre-existing lien: *Re Capital Fire Ins. Assoc.*, 24 Ch. D. 408, C. A.

His lien on title deeds of the co. in his hands for costs incurred while debentures remain floating securities is good as against the debenture holders: *Brunton v. Electric Engineering Corpn.*, (1892) 1 Ch. 434; and see *Biggerstaff v. Rowatt's Wharf*, (1896) 2 Ch. 93, 99, C. A.

Solrs of a co. have no lien on the papers of the co. for costs incurred in business which was *ultra vires*: *Howard and Dollman's Case*, 1 H. & M. 433.

The solr to an official liquidator has no lien for his costs on the file of the proceedings in the winding-up and the documents relating thereto: *Pullbrook's Case*, 4 Ch. 627; nor on books of the co. which ought to be kept at the registered office: *Re Anglo-Maltese Hydraulic Dock Co.*, 54 L. J. Ch. 730; 52 L. T. 841; 33 W. R. 652.

The solrs of a co. may be compelled, under the Companies Act, 1862, s. 115, on summons by the official liquidator, to produce documents belonging to the co. without prejudice to their lien: *South Essex Estuary Co.*, 4 Ch. 215; *Union Cement Co.*, *Id.* 627; *Re Capital Fire Ins. Assoc.*, 24 Ch. D. 408, C. A.

Bankruptcy.—A bankrupt cannot give a lien after the commencement of the bankruptcy: *Exp. Lee*, 1 Ves. 285 (see Bankruptcy Act, 1883, s. 43); but a lien created before the receiving order is protected if the solr had no notice of an available act of bankruptcy (sect. 49). Money paid by the debtor to his solr for costs of opposing a bankruptcy petition cannot be claimed by the trustee in bankruptcy: *Re Sinclair, Exp. Payne*, 15 Q. B. D. 616, C. A.; but this rule only applies to costs which are expended on what is strictly a necessity, not, *e.g.*, costs incurred in arranging with creditors with a view

to prevent proceedings; and solrs who have money in their hands on which the debtor has given them a charge for general costs, cannot retain such money to meet costs incurred for the debtor after knowledge of the act of bankruptcy: *Re Spackman*, *Exp. May*, 24 Q. B. D. 728; and see *Cordery*, 362.

Town Agent.—The lien of the town agent on papers in his possession is limited to the extent of the amount due from the client to his country solr: see *Lawrence v. Fletcher*, 12 Ch. D. 858; and if the latter has been paid—it matters not how—without notice of anything being due to the agent, the papers cannot be retained: *Waller v. Holmes*, 1 J. & H. 239; *Peatfield v. Barlow*, 8 Eq. 61; *Vyse v. Foster*, 10 Ch. 236; and see *Morg. & Wurtz*, 560.

As to what the usual agency terms are, and that if the London agent agrees to suspend his right to payment, he cannot claim interest, unless expressly stipulated for, see *Ward v. Lawson*, 43 Ch. D. 353, C. A.

And that the relation of town agent and country solr is that of solr and client, see *Reid v. Burrows*, (1892) 2 Ch. 413.

INSPECTION, PRODUCTION, AND DELIVERY.

Although the documents cannot, as a general rule, be taken out of the solr's hands until the lien is satisfied, they cannot be withheld from inspection: *Lockett v. Cary*, 10 Jur. N. S. 144; 3 N. R. 405; and the right to inspect includes the right to take copies: *Pratt v. P.*, 47 L. T. 249.

And upon payment into Court of, or security given for, enough to answer the solr's claim, delivery will be ordered pending taxation: *Mills v. Finlay*, 1 Beav. 560; *Re Jewitt*, 34 Beav. 22, *sup.*, Form 5, p. 1081; *Newington Local Board v. Eldridge*, 12 Ch. D. 349, C. A.; *Re Galland*, 31 Ch. D. 296, C. A.; and *qu.*, whether the jurisdiction is not extended by O. L. r. 8, *Ibid.*

And delivery of the papers before taxation will be ordered where their retention would embarrass the client in the prosecution and defence of pending actions: *Re Galland*, 31 Ch. D. 296, C. A.; and see *Re Hanbury*, W. N. (96) 241; 75 L. T. 449; 65 L. J. Ch. 678.

In an action by a local board against their clerk to compel production of papers, the Court refused to make an interlocutory order without payment into Court of a sum sufficient to answer the lien on the papers claimed by the Deft, the sum paid in being made subject to his lien: *Newington Local Board v. Eldridge*, 12 Ch. D. 349, C. A.; see Form 4, *sup.* p. 1081.

The lien on them claimed by the solr will not relieve him from producing documents to be used in evidence at the instigation of third parties: *Hope v. Liddell*, 7 D. M. & G. 331; 20 Beav. 438; *Fowler v. F.*, 29 W. R. 800; 50 L. J. Ch. 686; 44 L. T. 799;

—nor from producing an original order of the Court for the purpose of correction: *Bird v. Heath*, 6 Ha. 236.

A solr called to produce a settlement under a *subpoena duces tecum* in an action by the wife to enforce the trusts could not refuse to do so by reason of his lien against the husband for the unpaid costs of preparing it: *Fowler v. F.*, 50 L. J. Ch. 686; nor can he refuse to produce documents subject to his lien for examination by the trustee in bankruptcy of his client: *Re Toleman*, *Exp. Bramble*, 13 Ch. D. 885.

And the client cannot defeat the right of parties to the action to production by setting up the lien claimed by his former solr: *Vale v. Oppert*, 23 W. R. 780; 10 Ch. 340; *Rodick v. Gandell*, 10 Beav. 270; but if he cannot produce the document without paying the solr, he must do so, even though he alleges negligence disentitling the solr to costs, but the order for production will contain liberty to apply in case he really cannot obtain the document: *Lewis v. Powell*, (1897) 1 Ch. 678; see Form 7, *ante*, p. 1082.

Discharge of Solr.—When the relation of solr and client is at an end, the question as to production and delivery of papers upon which a lien is claimed turns upon whether the solr has been discharged by the client, or has, directly or indirectly, discharged himself.

(a) If he has been discharged, he is not bound to produce the papers until his bill is paid: *Re Faithfull*, 6 Eq. 325; *Lord v. Wormleighton*, Jac. 580; *Bozon v. Bolland*, 4 M. & Cr. 354.

And the order in *Re Beavan and Whitting*, 33 Beav. 439 (affirmed L. C., see 6 Eq. 328), on a solr who had been discharged, is explained by the circumstance that production was ordered in order to proceed with taxation, while the cash account showed a balance due from the solr to the client.

But even when he has been discharged he will not be allowed, by withholding papers come to his hands after action brought, and on which he claims a lien, to impede the course of the Court in the prosecution of an administration or partition action, but must produce the papers, subject to his lien, when required for carrying on the proceedings: *Boughton v. B.*, 23 Ch. D. 169; *Re Hutchinson*, 34 W. R. 637; 54 L. T. 842; *Boden v. Hensby*, (1892) 1 Ch. 101; *Gerty v. Mann*, 29 L. R. Ir. 7; or the drawing up or entry of an order: *Simmonds v. G. E. Ry. Co.*, 3 Ch. 397; *Clifford v. Turrill*, 2 D. & S. 1;

—or the prosecution of an appeal by the new solr: *Webster v. Le Hunt*, 9 W. R. 804;

—or the management by the receiver of estates under administration by the Court: *Belaney v. French*, 8 Ch. 918; and see *Re Leah*, 6 Jur. N. S. 387; 2 L. T. 72;

—or the prosecution of the winding-up of a co. of which he is solr, when he takes the documents, knowing that winding-up proceedings are pending, and that the order, if made, will relate back: *Re Capital Fire Ins. Assoc.*, 24 Ch. D. 408, C. A.;

—even though the documents came into his possession before the commencement of the action: *Re Hawkes*, (1898) 2 Ch. 1, C. A.;

—and whether the exors or trustees are Plts or Defts or the conduct of the action is given to a creditor: *Re Hawkes*, *sup.*;

—nor can the solr, when subpoenaed as a witness, refuse to produce the Plt's deeds: *Fowler v. F.*, 60 L. J. Ch. 686.

And generally, where there is a "pressing necessity" for papers, delivery will be ordered on deposit of a sum sufficient to cover what is due on the bill, and also the costs of taxation: *Clutton v. Pardon*, T. & R. 301, 304; *Re Galland*, 31 Ch. D. 296, C. A.

After a solr has been discharged and the business transferred to other solrs, he is entitled to retain as his own property letters addressed to him by his client, and copies of letters by him to his client: *Re Wheatcroft*, 6 Ch. D. 97.

In bankruptcy, when the trustee and solr have been changed, the former solr does not lose his lien for costs upon the documents, and the old trustee is not bound to discharge such lien by paying the costs himself: *Re Austin*, 4 Ch. D. 129.

(b) Where the solr has discharged himself, he may be ordered to deliver up papers to the new solrs, on their undertaking to hold them without prejudice to his lien, and to return them undefaced, and to allow the solr access to them for the purpose of his action for costs: *Robins v. Goldingham*, 13 Eq. 440; *Bluck v. Lovering*, 35 W. R. 232; see Form 2, *sup.* p. 1080; and see *Heslop v. Metcalfe*, 8 Sim. 622; 3 My. & Cr. 183; *Colegrave v. Manley*, T. & R. 400; *Re Smith*, 4 Beav. 309; *Clover v. Adams*, 6 Q. B. D. 622.

The notice of motion or summons is intitled in the action but need not be intitled "In re the solr": *In re Marie Rose Gold Co.*, W. N. (96) 243; 40 S. J. 637; 31 L. J. N. C. 429; 101 L. T. 254.

The like order was made where the solr in a pauper suit was discharged by the Court for delay in prosecuting the suit: *Hannaford v. H.*, 19 W. R. 429.

The order was made without costs, where the client refused to pay the bill of the solr who had discharged himself: *Walker v. Beanlands*, 15 W. R. 168.

Primâ facie, an order to change solrs was a discharge by the client: *Webster v. Le Hunt*, 9 W. R. 804.

In the following cases the solr is considered to have discharged himself:—

Bankruptcy of himself or firm: *Re Moss*, 2 Eq. 345.

Arrest and detention in custody: *Re Williams*, 3 D. F. & J. 104; 28 Beav. 465; *Chick v. Nicholas*, 26 W. R. 231 (though not so in the case merely of embarrassed circumstances: *Re Smith*, 9 W. R. 396; 4 L. T. 43).

Dissolution of partnership: *Rawlinson v. Moss*, 7 Jur. N. S. 1053; 30 L. J. Ch. 797; 4 L. T. 619; 9 W. R. 733; *Griffiths v. G.*, 2 Ha. 586.
 Misconduct and irregularity: *Re Smith*, 4 Beav. 309; *Bennett v. Baxter*, 10 Sim. 417.

DETERMINATION OF LIEN.

The lien is superseded by taking security (*Robarts v. Jeffreys*, 8 L. J. Ch. (O. S.) 137) inconsistent with the retention of the lien: *Angus v. MacLachlan*, 23 Ch. D. 330; and see *Exp. Willoughby, Re Westlake*, 16 Ch. D. 604; *Cowell v. Simpson*, 16 Ves. 275; but only to the extent covered by the security: *Watson v. Lyon*, 7 D. M. & G. 288; and *prima facie*, where a solr takes from his client a security for costs without explaining that he intends to reserve his lien, the lien is abandoned: *Re Taylor, Stileman and Underwood*, (1891) 1 Ch. D. 590; *In re Douglas Norman & Co.*, (1898) 1 Ch. 199.

It is not destroyed by the involuntary loss of possession of the documents: *Re Carter, C. v. C.*, 55 L. J. Ch. 230; 34 W. R. 57; 53 L. T. 636.

It ceases on payment of the solr's costs, and he cannot retain the papers on the ground that third persons claim an interest in them: *Re Emma Mine, Exp. Turner*, 24 W. R. 54.

(II.)—LIEN FOR COSTS ON FUND IN COURT OR PROPERTY RECOVERED OR PRESERVED.

1. *Charging Fund in Court with Solr's Costs—Payment—Solicitors Act, 1860 (23 & 24 V. c. 127), s. 28.*

UPON the application of A., B., and C., solrs of &c., and upon hearing the applicants in person, and the solrs for the Plt and the Defts; Declare that the applicants, as the solrs employed by the Plt, are entitled to a charge upon the £— in Court, as being property recovered by or preserved for the Plt, for the amount of their taxed costs, charges, and expenses as such solrs of and in reference to this action. Refer to taxing master to tax such costs as between solr and client, including therein the costs of the applicants of and incident to this application, and in such taxation the applicants are to give credit for all sums of money (if any) by them received of or on account of the Plt in respect of the said costs, and the balance of such costs after such deduction (if any) is to be certified; And Let the funds in Court be dealt with, as directed in schedule hereto.—[Add Payment Schedule, Form 32.]—*Plumbly v. The Tivoli, Ltd., Chitty, J.*, at Chambers, 3 Feb. 1890, B. 393.

For form of application, see D. C. F. 1035.

2. *Solr declared entitled to a Charge on his Client's Life Interest in Fund in Court—Payment of Income restrained—23 & 24 V. c. 127, s. 28.*

DECLARE that Petr, as the solr employed by Deft M. in the defence of this cause, is entitled to a charge on the life interest of the said Deft in the residue of the £— Consols in Court to the credit of &c., after the sale for costs by the order dated &c. directed, for the amount of his costs when taxed as between solr and client, and for the sum of £— for his costs out of pocket of this application; And Let no part of the

interest during the life of M. to accrue on the said £— be paid or otherwise dealt with without notice to the Petr.—*Smith v. Winter*, V.-C. J., 31 Jan. 1870, B. 196; *S. C.*, 18 W. R. 447.

3. *Fund in Court charged with Solr's Costs, as against Assignee of Original Client.*

UPON the application of A. B. (the assignee of C. D.), and upon hearing the solrs for A. B., C. D., and E. F. (solr); By consent Let E. F. deliver up to A. B., or to his solr or agent, all deeds, books, papers, &c., in his custody or power in relation to the conduct of this action; And, by consent, Let the interest of A. B. in the funds in Court in respect of the debt formerly due to the said C. D., and since assigned to A. B., and any sums which may be payable out of the said funds in Court under any order to be made in the said action for the costs of C. D. of this action, stand charged in favour of the said E. F. with the amount of the costs of the said E. F. as solr in this action, and in the action of X. v. Y. &c., for the said C. D., and also for his costs of this application.—Tax before-mentioned costs as between the said E. F. and his client the said C. D.—*Re Ormerod, Atkinson v. O.*, North, J., 15 May, 1891, B. 612.

In the absence of consent, the direction for delivery of deeds should be to the party and not to his solr.

4. *Lien for Costs declared on Fund in Court in Partnership Action—Stop Order.*

THE application of A. B., a solr, which, upon hearing the solrs &c., in Chambers &c., was adjourned &c., and upon hearing counsel for the applicant, and for the Plt and the Deft, and for C. D., the assignee of E. F., a creditor of the firm of J. & S. in the judgment mentioned; Let the said C. D. be appointed to represent all creditors of the said firm for the purpose of this application; Declare that the applicant, as the solr lately employed by the Plt in the prosecution of this action, is entitled to a charge upon the shares and interest of the Plt and the Deft, and the said creditors, and of each of them respectively, of and in £— in Court &c., and of and in the balance in the hands of the receiver, for the taxed costs, charges and expenses of the applicant properly incurred of and in reference to this action as solr of the Plt, including the costs of this application. Reference to tax the said costs, with liberty to apply for payment.—Stop order on funds in Court in favour of the applicant.—*Jackson v. Smith, Exp. Digby, Kay, J.*, 10 July, 1884, A. 2183; *S. C.*, 53 L. J. Ch. 972; 51 L. T. 72.

5. *Stop Order on Taxed Costs of Solr.*

UPON the application of A. B., solr for the Plt, and upon hearing the applicant in person; Let the amount of the Plt's costs, when taxed by

the order dated &c., directed to be paid to C. D., his solr, out of funds in Court in the said order mentioned to the credit of &c., be not paid out to the said C. D. until further order, and such further order is not to be made without notice to the said A. B.—*Beswick v. B.*, V.-C. B., 16 Feb. 1876, A. 222.

For order on solr's petition, declaring him entitled to lien on fund in Court for costs, as between solr and client, and he having been paid as between party and party, for the difference, and direction to ascertain the amount due, and fund not to be dealt with without notice to the solr, see *Lloyd v. Mason*, 4 Ha. 138.

For order, where Plt had changed his solr, on the petition of his former solr, that no order be made by way of compromise, or otherwise, to pay any money to Plt, without notice to Petr; Plt to bear his own costs; Petr to pay the costs of the other parties appearing, see *Verity v. Wylde*, 4 Drew. 430.

For order declaring costs of suit a charge on funds in the Plt's hands in favour of the Deft's solrs, together with costs of the application, see *Imperial Royal Azienda, &c. of Trieste v. Funder*, V.-C. M., 7 Nov. 1872.

For order *ex parte* restraining delivery to client of a cheque drawn (by Acct. Gen.) for payment of a dividend in the suit, until a petition by the solr to establish his lien on the fund (client's claim to which had been established in the suit) could be served and heard, on the usual undertaking by Petr, see *Gerrard v. Dawes*, 18 W. R. 32; 21 L. T. 322.

6. *Charging Property recovered or preserved with Solr's Costs—Sale* —23 & 24 V. c. 127, s. 28.

UPON the petition of W. &c., solrs &c.—“Declare that the Petrs are entitled to a charge upon the shares and interests of each of them the Plt and the Deft T. respectively of and in the hereditaments and premises at W., in the petition mentioned, or any other property recovered by or preserved for them respectively in the said suit, for the taxed costs, charges, and expenses of the Petrs of and in reference to such suit as the solrs of the Plt and the same Deft respectively; And refer it to the taxing master to tax such costs as between solr and client, including therein the costs, charges, and expenses of the Petrs of and in reference to such suit, including the costs of the Petrs of and in relation to this application.” Direction that the amount of such taxed costs found due to the Petrs as the solrs of the Plt be raised by a sale, with the approbation of the Judge, of his shares and interest in the said hereditaments and premises or other such property as aforesaid, and be paid to the Petrs, and that the amount of such taxed costs found due to the Petrs as solrs of the Deft T. be raised by a sale, with the approbation of the Judge, of his shares and interest in the said hereditaments and premises, or other such property as aforesaid, and be paid to the Petrs.—*Twynam v. Porter*, V.-C. J., 24 Nov. 1870, B. 2946; 11 Eq. 181.

For forms of application, see D. C. F. 1033 *et seq.*

7. *Charging Sum recovered with Solr's Costs—Balance not ascertained* —Sect. 28.

UPON the application of P. of &c., one &c., and on affidavit of service on the Plt and Defts—“Declare that if the balance certified to be due

on taking the accounts directed by the order dated &c., shall be in favour of the Plt, the Plt's solr P. is entitled to a charge upon the amount which shall be so certified to be due for the taxed costs, charges, and expenses of the said P. of or in reference to this suit; And Let such costs, charges, and expenses be taxed by the taxing master, and be paid, within &c., after the date of the certificate of taxation, by the Defts S. &c., to the said P. out of the balance which shall be certified to be due from them to the Plt, so far as the same will extend; And Let the Defts S. &c. pay the residue, if any, of such balance within the time aforesaid to the Plt, pursuant to the said order."—*Perks v. Stothert*, V.-C. K. in Chambers, 6 Dec. 1861, B. 2335.

8. *Charging Property recovered by Defts with the Costs of their Solr, and Direction for Payment by Plt to him of Costs previously ordered to be paid to Defts.*

THE application of A. B. of &c., solr, adjourned &c., and upon hearing counsel for the applicant and for the Plt and the Defts; Declare A. B., the solr employed by the Defts in the defence of this action, is entitled to a charge upon the real and personal estate of the above-named R. D., and upon and of and in any other property recovered by or preserved for the Defts in this action for the taxed costs, charges, and expenses of the applicant in reference to this action as the solr of the Deft; And Let it be referred to the taxing master to tax such costs as between solr and client, including therein the costs, charges, and expenses of the applicant of and in reference to this action, and also including the costs of the applicant of and relating to this application; And notwithstanding an order dated &c., dismissing the Plt's motion for a receiver, Let the Defts' costs of the said motion, when taxed, be paid by the Plt to the applicant instead of to the Defts, and be taken into account on the taxation hereinbefore directed.—Liberty to applicant to apply in Chambers as to raising and paying the said costs.—*Re Dickinson; Buts (Marquis of) v. Walker*, Chitty, J., 18 April, 1888, A. 650.

9. *Charge on Property recovered—Fund in Court paid to Solr on Account.*

UPON the petition of A. B., a solicitor &c., and upon hearing counsel for the petitioner, and for the Plts and the Defts; Declare petitioner entitled to a charge on £— in Court &c., also on the moneys due from E. F. in the petition named amounting to £—, pursuant to the taxing master's certificate filed &c., also on the balance which will remain of £— the purchase-money of the collieries in the petition mentioned after payment thereof of the moneys due and payable to W. Z., and which balance will amount to £— or thereabouts, for his costs, charges,

and expenses properly incurred of and in reference to this action and this application. Reference to tax the said costs, charges, and expenses as between solr and client; And Let the fund in Court be dealt with as directed in the Schedule hereto.—[Add Payment Schedule directing payment of fund in Court on account of said costs.]—*Charlton v. C., Pearson, J.*, 16 July, 1883, A. 3302.

10. *Declaration of Charge without prejudice to Right of Solrs subsequently employed.*

DECLARE that the applicant W. (*the solr*) is entitled to a charge upon the real estate of which the testator died intestate, and to which P. (*the client*) is by the said order, dated &c., declared to be entitled by descent, and also upon the surplus income of the testator's real estate from the — day of &c. (*date when the applicant was first employed as solr*), and the accumulations thereof to which the said P. is also by the said order declared to be entitled for his taxed costs, charges, and expenses of and in reference to the proceedings in this action as the solr of the said P.; but this declaration is without prejudice to the question whether Messrs. B. & Co. (*subsequent solrs*) are entitled to a prior charge for their costs, charges, and expenses as solrs for the said P.—Reference to tax such costs, charges, and expenses as between solr and client, and the costs of the applicant of and in relation to this application.—*Re Knight, K. v. Gardner*, Kay, J., at Chambers, 4 Nov. 1887, A. 1914; see (1892) 2 Ch. 368, 371.

11. *The like, subject to prior Charging Order of Solr previously employed, and to Right of Solr subsequently employed.*

LET the real estate &c. [*as in last form*], stand charged with the payments to the applicants B. & Co. (*solrs*) of their taxed costs, charges, and expenses of and in reference to the proceedings in this action, and also the costs (if any) of and incident to the appeal of the Plt from the said order &c., as the solrs of the said P., incurred up to the — day of &c., and of their costs of and incident to this application, subject nevertheless to the said order dated &c. (*the charging order previously obtained*), and subject also to the right of S., the solr for the late Deft P., and for J. E. H., his exor, to be paid their costs, charges, and expenses of and relating to the said appeal in priority to the applicants.—Costs of applicants and S. to be taxed; And the Judge doth not think fit to make any order on the rest of the said application nor as to the costs thereof, except that the applicants' costs of the said application be taxed by the taxing master and be included in their charge aforesaid.—*Re Knight, K. v. Gardner*, Kay, J., at Chambers, 19 July, 1888, A. 1028; see (1892) 2 Ch. 368.

NOTES.

SOLICITOR'S LIEN ON FUND IN COURT.

This lien, as distinguished from that on papers, may be actively enforced; it is not general, but extends only to the costs of the particular action in which the fund was recovered, and is only available against the balance ultimately payable to the client: *Bozon v. Bolland*, 4 My. & Cr. 354; *Hall v. Laver*, 1 Ha. 571; *Lucas v. Peacock*, 9 Beav. 177; *Verity v. Wyld*, 4 Drew. 427; *Westacott v. Bevan*, (1891) 1 Q. B. 774; *Mackenzie v. Mackintosh*, 64 L. T. 318, 706; 7 Asp. M. C. 53.

It exists both by common law and under the Solicitors Act, 1860 (23 & 24 V. c. 127), s. 28: *Haymes v. Cooper*, 33 Beav. 431; 33 L. J. Ch. 488; *Re Born, Curnock v. Born*, (1900) 2 Ch. 433; but the common law lien (unlike the statutory), being in the nature of a retaining lien, does not attach to real estate: *Shaw v. Neale*, 6 H. L. Ca. 581; nor extend beyond the client's interest: *Verity v. Wyld*, *sup.*; *Greer v. Young*, 24 Ch. D. 545, C. A.; *Cordery*, 374 *et seq.*; *Briscoe v. B.*, 61 L. J. Ch. 665; 67 L. T. 116; 40 W. R. 621.

It may be protected by a stop order: *Smith v. Winter*, 18 W. R. 447; *Form 2, sup.* p. 1087; *Hobson v. Shearwood*, 8 Beav. 487; *Lucas v. Peacock, sup.*

Or, on the *ex parte* application of the solr, by injunction, restraining payment of dividends to the client until the petition of the solr to establish his lien can be served and heard: *Gerrard v. Dawes*, 18 W. R. 32; 21 L. T. 322; *sup.* p. 1089.

And it could have been established by a suit in equity: *Sympson v. Prothero*, 5 W. R. 814; 26 L. J. Ch. 671; 3 Jur. N. S. 711.

And now, by an action for fees for work done (and money expended) as a solr: R. S. C. App. (A.), Part III. Section II.

It is not affected by the death of the client: *Lloyd v. Mason*, 4 Ha. 132; nor by a compromise of the interests of infant clients sanctioned by a judgment containing no reservation of the lien: *Re Wright, Wright v. Sanderson*, (1901) 1 Ch. 317, C. A.

Nor discharged by attaching the client for the costs: *Davies v. Bush*, You. 358; *Lloyd v. Mason, sup.*; nor by taking him in execution under a *ca. sa.*: *O'Brien v. Lewis*, 3 D. J. & S. 606.

STATUTORY LIEN ON PROPERTY RECOVERED OR PRESERVED.

By the Solrs Act, 1860 (23 & 24 V. c. 127), s. 28 (passed to meet the decision in *Shaw v. Neale*, 6 H. L. C. 581, denying the right of a solr to a lien for his costs on real estate recovered by him for his client), "in every case in which a solr shall be employed to prosecute or defend any suit, matter, or proceeding in any Court of Justice, it shall be lawful for the Court or Judge before whom any such suit, matter, or proceeding shall have been heard, or shall be depending, to declare such solr entitled to a charge upon the property recovered or preserved, and, upon such declaration being made, such solr shall have a charge upon and against, and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such solr, for the taxed costs, charges, or expenses of or in reference to such suit, matter or proceeding, and it shall be lawful for such Court or Judge to make such order or orders for taxation of, and for raising and payment of such costs, charges, and expenses out of the said property as to such Court or Judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void, and of no effect as against such charge or right: provided always, that no such order shall be made by any such Court or Judge in any case in which the right to recover payment of such costs, charges, and expenses is barred by any Statute of Limitations."

The expression "*bonâ fide* purchaser for value without notice" refers to notice of the right to the charging order, not of the existence of it, and accordingly knowledge that money was recovered in an action is sufficient to fix the assignee of the money with notice: *Cole v. Eley*, (1894) 2 Q. B. 350, C. A.

The statutory lien extends only to the costs of proceedings before a Court of justice, and therefore not to the costs of an arbitration under the Lands Clauses Act: *Macfarlane v. Lister*, 37 Ch. D. 88, C. A. It is available by the reprieve or other assignee of the solr: *Baile v. B.*, 13 Eq. 497; *Briscoe v. B.*, 61 L. J. Ch. 685; 67 L. T. 611; 40 W. R. 621; and it extends to the costs of the application for the order, and of a successful appeal to the Court of Appeal: *Waterland v. Serle*, W. N. (97) 267; 42 S. J. 68; 32 L. J. N. C. 582.

NATURE AND EXTENT OF CHARGE.

The Act does not give an absolute right to a charge, but the granting of the charge is in the discretion of the Court: *Greer v. Young*, 24 Ch. D. 545, C. A.; *Pinkerton v. Easton*, 16 Eq. 450; *Emden v. Curte*, 19 Ch. D. 311, C. A.; *Croghan v. Maffett*, 28 L. R. Ir. 97; *Re Born*; *Curnock v. Born*, (1900) 2 Ch. 433.

And the charge is independent of contract and in the nature of salvage; and in a proper case a charge may be made on the interests of persons who did not employ the solr, and who were not parties to the action, if they adopt the benefit of it: *Greer v. Young*, 24 Ch. D. 545, C. A. (overruling *Berrie v. Howitt*, 9 Eq. 1); *Re White, Fitzsimon v. White*, 17 L. R. Ir. 223; *Charlton v. C.*, 52 L. J. Ch. 971; *Shelvin v. McGrane*, 17 L. R. Ir. 271; *Harrison v. H.*, 13 P. D. 180, C. A.; and see *Exp. Tweed*, (1899) 2 Q. B. 167, C. A.

Thus, in an admon action, the solr was entitled to a charge on the whole estate, though his client was a debtor to the estate: *Bailey v. Birchall*, 2 H. & M. 371; and in a partnership action the Plt's solr was entitled to a charge on the fund recovered in priority to the creditors (who, however, were represented and argued the case): *Jackson v. Smith, Exp. Digby*, 53 L. J. Ch. 972; Form 4, *sup.* p. 1088; and where an action by a person claiming a trust estate was successfully defended by the solr of the trustee, who was one of the beneficiaries, the solr was entitled to a charge upon the whole estate: *Bulley v. B.*, 8 Ch. D. 479, C. A.

But the client is the person primarily liable to pay, and the order charging the entirety is only made by way of collateral security, to prevent the solr losing his costs, and not unless it is shown that the client is unable to pay, nor when the application for the charge is practically that of the client: *Jackson v. Smith, Exp. Digby*, 53 L. J. Ch. 972, 976; 51 L. T. 72; *Harrison v. Cornwall Minerals Ry. Co.*, 53 L. J. Ch. 596; 32 W. R. 748; 50 L. T. 452; nor if a person with a very small interest were to bring an action to enable a particular solr to obtain a charge: *Greer v. Young*, 24 Ch. D. 545, C. A.

In aid of the common law lien (*v. sup.* p. 1092) on a fund recovered by the solr's exertions, the Court will make a charging order notwithstanding delay (three years) in making the application, if no intervening rights are thereby prejudiced: *Re Born*; *Curnock v. Born, sup.*

Where there is a counterclaim arising out of the contract on which the clause is grounded, claim and counterclaim must be treated as one action for the purpose of determining the right to a charging order under the section: *Westcott v. Bevan*, (1891) 1 Q. B. 774.

A charge under the section cannot be given in favour of London agents, as they are not the solrs "employed" by the client: *Macfarlane v. Lister*, 37 Ch. D. 88, C. A.

The word "property," as used in the section, comprises a chose in action: *Birchall v. Pugin*, L. R. 10 C. P. 397; costs payable under a judgment in favour of the client: *Dallow v. Garrold*, 14 Q. B. D. 543, C. A.; but not an easement incident to property (*e.g.*, the right to ancient lights): *Foxon v. Gascoigne*, 9 Ch. 654; *Cross v. C.*, 43 L. T. 533; nor, *semble*, an allowance out of a lunatic's estate: *Re Robinson*, 27 Ch. D. 160, C. A.; nor alimony granted in divorce proceedings: *Leete v. L.*, 48 L. J. P. D. 61; 40 L. T. 788; 27 W. R. 921; *secus*, an annual sum which the guilty husband was ordered to pay to the wife (the petitioner) for life: *Harrison v. H.*, 13 P. D. 180, C. A.

Under the description of "property recovered or preserved" are included —a debt for which judgment has been recovered: *Birchall v. Pugin*, L. R. 10 C. P. 397;

—money paid into Court under O, XIV, as a condition of leave to defend:

Moxon v. Sheppard, 14 Q. B. D. 627; and see *Clover v. Adams*, 6 Q. B. D. 622;

—money received by way of compromise, being in substance the fruit of the action: *Ross v. Buxton*, 42 Ch. D. 190; and see *Moxon v. Sheppard*, *sup.*;

—money paid under order of Court, and ordered by the Court of Appeal to be refunded to the successful appellant: *Guy v. Churchill*, 35 Ch. D. 489, O. A.;

—money paid into Court in satisfaction of the Plt's claim, although, the Plt being a bankrupt, the money was that of the trustee, who was afterwards substituted as Plt: *Emden v. Carte*, 19 Ch. D. 311, O. A.;

—the interest in the mortgaged property of Plt to a foreclosure suit: *Wilson v. Round*, 4 Giff. 416;

—and even the interest of a Deft to such suit, whose right to a subsequent charge has therein been established: *Scholesfield v. Lockwood*, 7 Eq. 83;

—property the subject of an action against an incumbrancer in which a cloud was removed from the Plt's title, though the incumbrance was valueless: *Re Fiddley*, *Jones v. Frost*, 7 Ch. 773;

—property devolving under a will on persons who have opposed the will in an action brought by the executor to establish the will, and carried through to a successful issue by his solr: *Exp. Tweed*, (1899) 2 Q. B. 167, C. A.;

—funds securing an annuity to a married woman for her separate use without anticipation, assigned by a post-nuptial settlement, which was attacked by her husband in a suit to set the same aside, and was successfully defended by her: *Re Keane*, *Lumley v. Desborough*, 12 Eq. 115;

—property protected by the appointment of a receiver: *Twynam v. Porter*, 11 Eq. 181; *Keenan v. Armstrong*, 27 L. R. Ir. 371; and see *Baile v. B.*, 13 Eq. 507; *Bailey v. Birchall*, 2 H. & M. 371;

—property the subject of a partition action, and as to which an infant's title was declared on petition under the Declaration of Titles Act: *Pritchard v. Roberts*, 17 Eq. 222.

But the description does not include

—money which is imperilled rather than preserved, *e.g.*, money paid into Court as security for costs, and which becomes repayable by reason of the success of the party paying it: *Re Wadsworth*, *Rhodes v. Sugden*, 29 Ch. D. 517;

—money paid into Court by the Deft with denial of liability and counter-claim for damages: *Westacott v. Bevan*, (1891) 1 Q. B. 774;

—money paid into the Bankruptcy Court to abide the result of the counter-claim in an action, so that the right to it depended on a discretion which might be affected by extraneous matters: *Pierson v. Knutsford Estate Co.*, 13 Q. B. D. 666, C. A.;

—property not actually recovered or permanently preserved; *e.g.*, where proceedings adapted to the preservation of property are subsequently stayed or compromised: *Pinkerton v. Easton*, 16 Eq. 490; *Rowlands v. Williams*, 53 L. T. 135; *W. N.* (85) 169; and *v. inf.* p. 1096;

—the Deft's shares in a hostile partition action, though the Plt obtained judgment for sale: *Flower v. Lloyd*, 27 W. R. 655; 40 L. T. 514.

PRIORITY OF LIEN—ASSIGNMENT—GARNISHEE ORDER.

Where there is a fund in Court the lien is not affected by any assignment by the client, nor by a stop order obtained by his assignee: *Haynes v. Cooper*, 33 Beav. 431; and see *The Jeff Davis*, L. R. 2 A. & E. 1; *The Heinrich*, L. R. 3 A. & E. 505; *Re Wadsworth*, *Rhodes v. Sugden*, 29 Ch. D. 517, 520; *Pierson v. Knutsford Estate Co.*, 13 Q. B. D. 666, C. A. per Grove, J.

The solr is not bound to give notice to an intending assignee: *Faithfull v. Ewen*, 7 Ch. D. 495; and see *Cole v. Eley*, (1894) 2 Q. B. 350, C. A., *sup.* p. 1092; but notice by Plt's solr is effectual to prevent the Deft from paying money under a compromise to the Plt to the prejudice of the solr: *Ross v. Buxton*, 42 Ch. D. 190; *Welsh v. Hole*, 1 Doug. 237; *Read v. Duppa*, 6 T. R. 361; *Ormerod v. Tate*, 1 East, 464; and Deft's solrs, having got money out of Court and handed it to Plt, after express notice of his solr's lien, were held personally liable to satisfy such lien: *Ross v. Buxton*, *sup.*

A charging order under the Act has priority over a garnishee order pre-

viciously obtained, but not served: *Hamer v. Giles*, 11 Ch. D. 942; and see *Davis v. Freethy*, 24 Q. B. D. 519, C. A.; and where proceeds of a *fi. fa.* were actually attached in the hands of the sheriff, the lien of the Plt's solr, who, with notice of the garnishee summons, subsequently obtained a charging order, was held entitled to priority: *Dallow v. Garrold*, 14 Q. B. D. 543, C. A.; and cf. *Shippey v. Grey*, 49 L. J. C. P. 524; 42 L. T. 673; 28 W. R. 877, C. A.; but see *North v. Stewart*, 15 App. Ca. 452, 463, where *Hough v. Edwards*, 1 H. & M. 171, and *Mercer v. Graves*, L. R. 7 Q. B. 499 (which do not go so far as *Dallow v. Garrold*), were cited, and it was intimated by Lord Watson that the solr's lien, until converted into a charge by virtue of the statute, will not prevent attachment of costs by persons having claims against the judgment creditor: see, however, *Re Knight, K. v. Gardner*, (1892) 2 Ch. 368, 373.

Costs of mortgagor's solrs in an action successfully maintaining the mortgagor's title, mortgagees taking no part, were charged in priority to the interest of the mortgagee: *Scholey v. Peck*, (1893) 1 Ch. 709.

Where the landlord of a bankrupt's premises gave notice of his claim for rent to a receiver appointed by the Court, but did not attempt to distrain, he had no lien on funds in the hands of the receiver in priority to the solr: *Re Suffield, Exp. Brown*, 20 Q. B. D. 693, C. A.

The charge on a ship or its proceeds as property recovered or preserved has priority over liens for necessities supplied after (but not before) the institution of the suit, and for wages of the master, himself part owner, by whom the solr was instructed: *The Heinrich*, L. R. 3 A. & E. 505; and see *The Soblomsten*, L. R. 1 A. & E. 293; but not over the claim of seamen for wages: *The Gustaf*, 31 L. J. Adm. 207; 6 L. T. 660; *Lush*, 606; or other prior liens: *The Livietta*, 8 P. D. 209.

As between successive solrs, the one who conducts the action to an end has the prior lien: *Cormack v. Beisley*, 3 De G. & J. 157; *Re Wadsworth, Rhodes v. Sugden*, 29 Ch. D. 517; 34 Ch. D. 155; *Re Knight, K. v. Gardner*, (1892) 2 Ch. 368; but see *Batten v. Wedgwood Coal Co.*, 28 Ch. D. 317, 320.

SET-OFF.

By O. LXV, 14, "a set-off for damages or costs between parties may be allowed, notwithstanding the solr's lien for costs in the particular cause or matter in which the set-off is sought."

It has now been decided that this rule (following the old rule, 63 H. T. 1853) applies only to costs in the particular cause, and not to costs in independent proceedings; and costs incurred in the High Court cannot be set off against costs obtained in the County Court, although the proceedings are between the same parties: *Hassell v. Stanley*, (1896) 1 Ch. 607 (setting at rest the doubt raised in *Edwards v. Hope*, 14 Q. B. D. 922, C. A.; *Cordery*, 375); and see *Blakey v. Latham*, 41 Ch. D. 518; *Goodfellow v. Gray*, (1899) 2 Q. B. 498, C. A.

But the set-off for damages mentioned in the rule means damages in different actions: *Goodfellow v. Gray*, (1899) 2 Q. B. 498, C. A.; *Blakey v. Latham*, 41 Ch. D. 518; and accordingly, notwithstanding that a charging order has been obtained *ex parte* by a solr on damages recovered by his client, an order may be made allowing a set-off against such damages in respect of damages recovered against the client in another action: *Goodfellow v. Gray, sup.*

A set-off of interlocutory costs, or of the costs of separate questions or issues in the same proceedings, has in general been allowed without regard to any lien of solrs: *Re Harrauld, Wilde v. Walford*, 52 L. J. Ch. 436; *Cordery*, 376 (and cases there cited); although there has been a change of solrs: *Roberts v. Buée*, 8 Ch. D. 198.

Costs which the Plt is ordered to pay to the Deft may be set off against money which the Deft is ordered to pay to the Plt: *Pringle v. Gloag*, 10 Ch. D. 676; *Bawtree v. Wilson*, 2 Kee. 713; and see *Heiron v. Hobson*, 47 L. J. Ch. 574.

But a set-off of costs incurred in independent proceedings will not be allowed to the prejudice of the solr's lien: *Re Cleland*, 2 Ch. 808; *Re Harrauld, Wilde v. Walford*, 52 L. J. Ch. 436; 53 L. J. Ch. 505; 51 L. T. 441; 31

W. R. 318; *Exp. Griffin, Re Adams*, 14 Ch. D. 37; *Barker v. Hemming*, 5 Q. B. D. 609, C. A.; *Smith's Case, Re Bank of Hindustan*, 3 Ch. 125; *Re General Exchange Bank*, 4 Eq. 138.

And where an appeal of the wife in divorce proceedings was dismissed with costs, the husband's costs of the appeal were not allowed to be paid, to the prejudice of the wife's solr's lien, out of money which had been paid into Court by the husband as security for the costs of the wife: *Hall v. H.*, (1891) P. 302, C. A.

Where, however, the client is a debtor to a trust estate, as he can receive no costs until the debt is paid, and his solr can be in no better position, the trustees may set off the debt against the costs without regard to the lien: *Re Harrald, Wilde v. Walford*, 53 L. J. Ch. 505; 51 L. T. 441; reversing *S. C.*, 52 L. J. Ch. 436; unless the Court, on the principle of salvage, should think fit to give a more extended charge: see *Re White, Fitzsimon v. W.*, 17 L. R. Ir. 223; *Bailey v. Birchall*, 2 H. & M. 371; *Jackson v. Smith*, 53 L. J. Ch. 972; 51 L. T. 72.

As to the practice at common law under the repealed r. 63, Hil. T. 1853, see Cordery, 377.

COMPROMISE—LIEN, HOW AFFECTED BY.

The lien may be defeated by a settlement or compromise of the action, provided such settlement is *bonâ fide*: *Brunsdon v. Allard*, 2 E. & E. 19; *Slater v. Mayor of Sunderland*, 33 L. J. Q. B. 37; 9 L. T. 422; *Re Hope*, 8 P. D. 144, C. A.; *Rowland v. Williams*, 53 L. T. 135; W. N. (85) 169;

—*secus* if the compromise is merely collusive, and made with the express object of defeating the lien: *Re Hope, sup.*; *Exp. Games*, 3 H. & C. 294; *Exp. Morrison*, L. R. 4 Q. B. 153; and see *Moxon v. Sheppard*, 14 Q. B. D. 627; *Price v. Couch*, 60 L. J. Q. B. 767; *Re Margetson and Jones*, (1897) 2 Ch. 314, where the solr was held to be entitled to an order against the former solr for taxation and payment of the costs incurred by the client to him up to the time when the taxation against the former solr had been dropped with the view of defeating the lien; and see Cordery, 380.

And in order to make out that a compromise is collusive, the solr must show that both parties entered into it with the intention of depriving him of his lien: *Re Hope, sup.*; and see *Exp. Morrison, sup.*; *Dunthorne v. Bunbury*, 24 L. R. Ir. 6.

But the solr's lien will attach to money received under a compromise, where such money is in substance the fruit of the action: *Ross v. Buxton*, 42 Ch. D. 190; *White v. Pearce*, 7 Ha. 276; *Heiron v. Hobson*, 47 L. J. Ch. 574; *Slater v. Mayor of Sunderland, sup.*

A solr does not lose his lien on a fund placed in his hands to abide the result of a suit, although the suit has been *bonâ fide* compromised: *Hanson v. Reece*, 3 Jur. N. S. 1204; 6 W. R. 46; 27 L. J. Ch. 118.

WAIVER OF LIEN.

A solr who takes from his client a mortgage or other security for his costs on the property which he hopes to recover in a pending action is thereby precluded from afterwards obtaining a charging order: *Groom v. Cheesevright*, (1895) 1 Ch. 730; and see further, as to waiver of solr's lien by taking security, *Balch v. Symes*, 1 T. & E. 87, 92; *Enniskillen Ry. Co. v. Collum*, 29 L. R. Ir. 421; Cordery, 372; Dan. 1691, 1697.

PROCEDURE TO OBTAIN CHARGING ORDER.

The application for a declaration of charge under the statute may be made by summons, intituled in the action, but not necessarily in the matter of the Act or of the solr: *Hamer v. Giles*, 11 Ch. D. 942; *Clover v. Adams*, 6 Q. B. D. 622; but it seems that it may still be properly made by petition: see *Brown v. Trotman*, 12 Ch. D. 880.

Any Judge of the High Court in the Division in which the suit, matter, or proceeding has been heard can make the order, and in Q. B. D. the applica-

tion need not necessarily be made to the particular Judge who made the original judgment or order: *Dallow v. Garrold*, 14 Q. B. D. 543, 546, C. A.; *Re Deakin, Exp. Daniell*, (1900) 2 Q. B. 489, C. A. (and see *S. C.* as to the jurisdiction of the Judge in Bankruptcy).

Where the charge asked for is confined to the interest of the client the other parties to the action should not be served: *Brown v. Trotman*, 12 Ch. D. 880; *secus* where the charge extends to the whole property: *Jackson v. Smith, Exp. Digby*, 53 L. J. Ch. 972; 51 L. T. 72; Form 4, *sup.* p. 1088, where one creditor in a partnership action was allowed to represent all.

Where an order has been made for payment of costs out of a trust estate to the solr, he is not entitled afterwards to obtain a charging order: *Re Viney's Trusts*, 18 L. T. 514; but if he is discharged before payment an order will be made giving him liberty to apply to enforce it by sale or otherwise: *Pilcher v. Arden*, 7 Ch. D. 318, C. A.

The order may be made though the property belongs to an infant: *Greer v. Young*, 24 Ch. D. 545, C. A.; and see *Baile v. B.*, 13 Eq. 497; or is settled on a married woman restrained from anticipation: *Re Keane, Lumley v. Desborough*, 12 Eq. 115; but the infant, married woman, trustees, next friend, or guardian should have an opportunity of being heard: *Greer v. Young, sup.*; *Bonser v. Bradshaw*, 10 W. R. 481; 9 L. T. 195; 9 Jur. N. S. 1048; 4 Giff. 260. There is, therefore, no need to bring an action, as was done in *Pritchard v. Roberts*, 17 Eq. 222.

Upon the construction of the words "Court or Judge," it was held that the order should be made in the branch of the Court to which the suit was attached: *Re Fidley, Heinrich v. Sutton*, 6 Ch. 865; and see *Higgs v. Schrader*, 3 C. P. D. 252; and the application should be made to the Judge before whom the action has been tried, and who has dealt with the substantial question in it: *Owen v. Henshaw*, 7 Ch. D. 385; and, if made after trial, is a "further proceeding" within O. XLIX, 2, so that the order may be made by the Judge from whom, or the Judge to whom, an action has been transferred for trial.

The order should be limited to the costs properly incurred, with the usual direction as to taxation: *Emden v. Carte*, 19 Ch. D. 311, 318, C. A.; and in a foreclosure action the Court refused to extend the charge to the costs of an action of ejectment in aid of the foreclosure: *Wilson v. Round*, 4 Giff. 416; but the costs of proving the retainer, which was disputed by the client, were included: *Re Hill*, 33 Ch. D. 266, C. A.

So long as a fund in Court upon which a charging order has been made has not been paid away, the order is effectual against every one except a *bond fide* purchaser for value without notice: *Re Suffield, Exp. Brown*, 20 Q. B. D. 693, C. A.

Though the solr has discharged himself, yet if he has not done so wrongfully or improperly, the charging order may be upheld: *Clover v. Adams*, 6 Q. B. D. 622.

The solr's lien for costs on the fund in Court or property recovered is for taxed costs, and unless the client's right to tax has expired when the fund recovered is paid into Court, such right is unaffected by subsequent lapse of time: *De Bay v. Griffin*, 10 Ch. 291.

A town agent has been held entitled under this section to a charge for an unascertained balance due to him by the country solr: *Tardrew v. Howell*, 3 Giff. 381.

A solr having ceased to act for his client, and having obtained a charging order on funds in Court for his costs, was not entitled to enforce payment until the general costs of the action were taxed: *Re Green, G. v. G.*, 26 Ch. D. 16, C. A.

The Court in Bankruptcy has no jurisdiction to give effect to the lien of a solr who has been instrumental in recovering judgment in an action by ordering payment to the solr of a dividend in the bankruptcy representing the amount recovered: *Re Cook, Exp. Cripps*, (1899) 1 Q. B. 863.

An application to set aside a charging order must be promptly made; a delay of two months from service of order was held fatal: *Re Deakin, Exp. Daniell*, (1900) 2 Q. B. 489, C. A.

SECTION III.—SETTING ASIDE SECURITIES &c., OBTAINED FROM CLIENT.

1. *Deed to be Security only for what due on taking Accounts—Dealings and Transactions—Costs.*

“**DECLARE** that the instrument dated &c., is (ought) to stand as a security only for what, if anything, shall be found to be justly due from Plt to Deft at the date thereof: And Let the following &c., 1. An account of all dealings and transactions between the Plt and the Deft, and of all sums of money paid or advanced by the Deft to or for the use or on account of the Plt, and of all sums of money received by or come to the hands of the Deft, for the use or on account of the Plt, including in such accounts all bills of costs claimed by the Deft to be due from the Plt, such costs to be taxed &c.; 2. An inquiry whether any and (if any) what sum or sums of money was or were due from the Plt to the Deft on the — day of —, and the — day of —, being the respective dates of the two promissory notes in the Plt’s (bill) mentioned.”—Deft to pay to the Plt costs of suit up to decree.—Adjourn &c.—See *Davies v. Parry*, V.-C. S., 30 May, 1859, A. 1899; 1 Giff. 182.

For like declaration and account of what was due in respect of bills of costs, with an account of receipts and payments, see *Morgan v. Higgins*, 1 Giff. 284, following *Lawless v. Mansfield*, 1 Dr. & War. 557, where the decree is given.

For order on petition to tax several bills, and give credit for all sums paid, and declaring a bond and mortgage are to stand as a security only for what (if anything) shall appear to be due on such taxation, restraining proceedings on the bond or mortgage, or otherwise, see *Aubrey v. Popkin*, L. C., 22 Jan. 1768, A. 78; 1 Dick. 403.

For order to examine stated account and bill of costs, secured by mortgage, and the part consideration for a purchase by the solr from his client, with reference to taxation, and with leave to either party to claim further credits, see *Edwards v. Meyrick*, 2 Ha. 79.

For decree, that mortgage, executed by Plt to his solr, he representing it was a deed for another purpose, be delivered up to be cancelled, in suit against the solr and his assignee for value without notice, see *Vorley v. Cooke*, 1 Giff. 230, 237.

For decree setting aside deed of gift to the donor’s attorneys, given while acting for him in the management of the property, without proof of fraud, and for accounts, reconveyance, and repayment, see *Welles v. Middleton*, 1 Cox, 126; and see *Strange v. Brennan*, 10 Jur. 649; 15 Jur. 346; 15 L. J. Ch. 389; 2 Coop. Ch. C. 1.

For decree setting aside an agreement to give the solr certain shares, and allowing a mortgage to stand as a security for so much only as should appear to be due to the solr upon taxation, see *Gardener v. Ennor*, 35 Beav. 649.

2. *Mortgage to Solr for Costs to stand as Security only for what actually due—Taxation of Costs—Account of Rents.*

DECLARE that the indenture of mortgage, dated &c., ought to stand as a security only for such amount of principal and interest (if any) as may be certified to be due on taking the accounts hereinafter directed;

And Let the Deft H., on or before &c., make out and deliver to Plts proper bills of costs in respect of the legal and equitable suits and proceedings in the said indenture of mortgage referred to, and also in respect of the other professional business done and transacted by Deft H. for the testator X. in his lifetime; And Let all such bills of costs, when delivered, be referred to the taxing master to tax and settle the same.—Deft H. to produce upon oath all documents &c. relating to the said bills, and to be examined &c., and give credit for all sums of money by him received on account; And Let the following &c.: 1. An account of the receipts of the Defts and each of them in respect of the matters in the pleadings mentioned, and particularly an account of what has been received by the Deft H., or by any person &c., in respect of the rents, profits, and proceeds of the estates in the pleadings mentioned, or otherwise out of the property of or on account of the testator in his lifetime, and of the application thereof. 2. An account of the receipts of the Defts, and each of them, or by any person &c., for or on account of the testator, or his estate, subsequent to his death, and of the application thereof &c.—Defts to pay to Plts their costs of this suit up to this hearing, to be taxed &c.—Adjourn &c.—Liberty to apply.—*Morgan v. Higgins*, V.-C. S., 20 Jan. 1859, B. 976.

3. *The like.*

An account of what is due to the Deft L., as exor of W., deceased, in the pleadings named, under and by virtue of the mortgage made to the said W. in the pleadings mentioned, and for his costs of this action, to be taxed; “And Let, in case any part of the Deft’s demand consists of bills of costs, the same be taxed &c.; And Declare that (as to that part of the Deft’s demand) the mortgage is to stand as a security only for what, if anything, shall appear to be due to the Deft on such taxation.”—See *Morgan v. Lewis*, M. R., 29 Nov. 1811, B. 310.

For inquiry what was the bill of costs and account, which made up a large sum secured by mortgage, and alleged to consist of money advanced and costs, and whether any, and which, of the items of such bill and account were improper, and ought not to be allowed on taxation, see *Edwards v. Merrick*, 2 Ha. 79.

For decree setting aside a mortgage by father, tenant for life, and son, tenant in tail in remainder, to their solr, immediately after the son attained majority, and subsequent sale; with accounts, and direction for reconveyance on payment of balance due, if any, with special directions, see *King v. Savery*, 1 S. & G. 316; affirmed, with a slight variation, *nom. Savery v. King*, 5 H. L. C. 627.

For form of account in a foreclosure suit by solr-mortgagee directing taxation of costs included in security, and disallowance of certain stipulated charges for commission, see *Eyre v. Hughes*, 2 Ch. D. 148, *inf.* Chap. XLVII., “MORTGAGES.”

NOTES.

DEALINGS BETWEEN SOLICITOR AND CLIENT—SECURITY TO SOLICITOR FOR COSTS.

Before the Attorneys and Solrs Act, 1870 (33 & 34 V. c. 28), a solr could

not take a security from his client, nor apply one taken for future costs: *Re Foster*, 2 D. F. & J. 105; *Pilcher v. Rigby*, 9 Price, 83; *Jones v. Tripp*, Jac. 323; nor enter into an agreement to receive a gross sum for future services: *Philby v. Hazle*, 8 C. B. N. S. 647; nor accept a promise from his client of a gift for professional services beyond his legal remuneration: *O'Brien v. Lewis*, 11 W. R. 318; *Pince v. Beattie*, *Ib.* 979.

By that Act (sect. 4), *sup.*, Vol. I., p. 277, a solr may make an agreement in writing with his client respecting the amount and manner of payment for the whole, or any part, of any past or future services, fees, charges, or disbursements in respect of business done, or to be done, by such solr &c., subject to examination by the taxing master. But, by sect. 11, nothing in the Act contained is to give validity to any purchase by a solr of the interest, or any part of the interest, of his client in any suit, action, or other contentious proceeding, or to any agreement for payment only in the event of success in such suit, &c.: see upon these sections, Vol. I., Chap. XVII., pp. 277 *et seq.*

As to agreements under the Solrs' Remuneration Act (44 & 45 V. c. 44), s. 8, *v. sup.*, Vol. I., p. 279; and that an agreement under the Act must be fair and reasonable, and such as would be enforced by the Court, see *Mearns v. Knapp*, 37 W. R. 585; *Cordery*, 271.

And generally pending suit a solr is disqualified from accepting benefits from a client beyond his costs: *Walker v. Smith*, 29 Beav. 394; *Re Holmes' Estate*, 3 Giff. 337; *Welles v. Middleton*, 1 Cox, 112; 4 Bro. P. C. 245.

But a mortgage might be taken for costs already due: *Williams v. Piggott*, Jac. 600; and 6 & 7 V. c. 73, s. 37, is no bar to a suit by the solr to foreclose the equity of redemption: *Thomas v. Cross*, 13 W. R. 166; 5 N. R. 148; 10 Jur. N. S. 1163; 11 L. T. 430.

Effect will not be given to any stipulation which is unusual or disadvantageous to the client: *e.g.*, a clause postponing the right to redeem for twenty years: *Cowdry v. Day*, 1 Giff. 316 (see also on this question *Eyre v. Hughes*, 2 Ch. D. 148); or an absolute power of sale even in a second mortgage, unless its unusual nature is fully explained to the client: *Cockburn v. Edwards*, 18 Ch. D. 449, C. A.; and see *Craddock v. Rogers*, 53 L. J. Ch. 968; W. N. (88) 134; *Stokes v. Prance*, (1898) 1 Ch. 212; but the doctrine does not apply where the transaction is not an ordinary mortgage, but an arrangement for giving the client time to pay a debt presently payable, and the mortgage property is of a peculiar character, *e.g.*, an interest in a railway in Jersey saddled with a large debenture debt: *Pooley's Trustee v. Whetham*, 33 Ch. D. 111, C. A.

And the ordinary rule that the Court will not grant an interlocutory injunction restraining a mortgagee from exercising his power of sale, does not apply where the mortgagee was solr of the mortgagor: *Macleod v. Jones*, 24 Ch. D. 289, C. A.

Stated accounts of the amount due should be produced to the client on taking the security, and the mortgage deed will stand only for what shall be found due at the date of the security on taking the account: *Davies v. Parry*, 1 Giff. 182, *sup.* Form 1, p. 1098; *Morgan v. Higgins*, 1 Giff. 270, Form 2, p. 1098; *Macleod v. Jones*, *sup.*; and in the case of a mortgage given to secure costs, for so much as shall appear to be due to the solr upon taxation: *Eyre v. Hughes*, *sup.*; *Kenney v. Browne*, 3 Ridgw. P. C. 522; *Newman v. Payne*, 4 Bro. C. C. 350; *Gardener v. Ennor*, 35 Beav. 549.

As to the allowance of interest upon a mortgage to secure payment of untaxed costs, see *Re O'Connor*, 17 W. R. 1143; *Lyddon v. Moss*, 4 D. & J. 104; *Moss v. Bainbrigge*, 6 D. M. & G. 292; and as to the allowance of interest on costs generally, *v. sup.* Vol. I. pp. 307 *et seq.*

And a mortgage to a third party, who was in fact a trustee only, was decreed to stand as a security only for what should be found to be properly due, with interest at 4 p. c.: *Thomas v. Lloyd*, 3 Jur. N. S. 288.

A security which has been originally obtained by the solrs of the alleged mortgagor in their own favour by fraud, cannot be enforced by an assignee from the solrs for value without notice of their fraud: *Vorley v. Cooke*, 1 Giff. 230.

In order to open settled accounts between solr and client, in the absence of unfairness or undue influence, specific items of mistake must be alleged and proved: *Blaygrave v. Routh*, 2 K. & J. 509; *Hiles v. Moore*, 17 L. J. Ch. 385;

Re Webb; Lambert v. Still, (1894) 1 Ch. 73, C. A.; *Cordery*, 199; *secus*, if fraud or undue influence are shown: *Watson v. Rodwell*, 11 Ch. D. 150, C.A.; *Coleman v. Mellersh*, 2 M. & G. 309; *Morgan v. Higgins*, 1 Giff. 270, 288 (explaining discrepancy between *Blagrove v. Routh* and *Lawless v. Mansfield*, 1 Dr. & W. 605); *Ward v. Sharp*, 53 L. J. Ch. 313; 50 L. T. 557 (where a third person was put forward as mortgagee); and neglect by solr-trustees to inform residuary legatees that they were entitled to have a bill of costs, and to have it taxed or moderated is not *per se* a ground for opening a settled account of nine years standing, no error, excessive charge, or other injustice being shown: *Re Webb; Lambert v. Still*, (1894) 1 Ch. 73, C. A.

And upon sufficient cause shown by the Deft. and evidence of pressure, and non-delivery of bills of costs by solr-mortgagee, the security in which they have been included may be opened in a foreclosure suit without cross-bill, or counter-claim under the new procedure: *Eyre v. Hughes*, 2 Ch. D. 148.

A purchase having been ordered to stand as a security only, the Court would not import a power of sale: *Pearson v. Benson*, 28 Beav. 598.

Independent proof of payment by the solr, in the case of dealings between himself and the client, is required. As to securities given by the client, the solr must prove the advance of the money by some other evidence than the instrument creating the security; in this respect a purchase and security stand upon the same footing: *Gresley v. Mousley*, 3 D. J. & F. 433; and see *Morgan v. Lewis*, 3 Anstr. 769; 4 Dow, 29; 5 Price, 42; 3 Y. & J. 230, 394; 3 Cl. & F. 159; *Lawless v. Mansfield*, 1 Dr. & War. 557; *Consett v. Bell*, 1 Y. & C. C. 578; *Cheslyn v. Dalby*, 2 Y. & C. 170; 4 *Ib.* 238; but the receipt clause in the deed will protect a subsequent purchaser without notice: *Conveyancing Act*, 1881 (44 & 45 V. c. 41), s. 55.

SALARIED SOLICITOR.

As to the rights of a solr, employed at a salary (exclusive of expenses out of pocket) to prosecute and defend legal proceedings for a public body, on a taxation, as between solr and client, see *Henderson v. Merthyr Tydfil District Council*, (1900) 1 Q. B. 434, and as to remuneration of solr by salary, see *Cordery*, 262, 263.

GIFTS, SALES, AND PURCHASES.

Gifts conferred by a client on a solr while the relation (*Morgan v. Minett*, 6 Ch. D. 638), or the influence arising from it (*per Turner, L. J.*, in *Holman v. Loynes*, 4 D. M. & G. 270, 283), subsists, are invalid: see *Re Holmes' Estate*, 3 Giff. 337; *Wood v. Downes*, 18 Ves. 127; *Lady Ormonde v. Hutchinson*, 13 Ves. 47, 52; *Willes v. Middleton*, 1 Cox, 112; so also a gift made to the solr's son: *Barron v. Willis*, (1900) 2 Ch. 121, C. A.; or his wife who is the niece of the client: *Liles v. Terry*, (1895) 2 Q. B. 679.

The relation must be wholly at an end before any gift can be made: *Morgan v. Minett*, *sup.*; *Montesquieu v. Sandys*, 18 Ves. 302, 312; *Oldham v. Hands*, 2 Vez. 259.

The distinction taken in cases where the solr was not solr *hac re* applies to transactions of purchase, not of gift: *Montesquieu v. Sandys*, 18 Ves. 313.

Where the solr of the Plt in a creditor's action bought up debts, the estate being insolvent, the question whether he was trustee of any profit, being one between him and the other creditors, could not be raised by the chief clerk's certificate: *Re Tillett, Field v. Lydall*, 32 Ch. D. 639.

A distinction has been taken between gifts *inter vivos* from client to solr, and gifts to a solr under the client's will, even though drawn by the solr himself: *Hindson v. Weatherill*, 5 D. M. & G. 301; *Walker v. Smith*, 29 Beav. 394; *Raworth v. Marriott*, 1 My. & K. 643; *Paine v. Hall*, 18 Ves. 475.

See also, as to setting aside benefits from client to solr pending the relation, *Tomson v. Judge*, 3 Drew. 306 (where the gift being of realty was in terms a purchase); *Gardener v. Ennor*, 35 Beav. 549; *Woodward v. Humpage*, 3 Giff. 337; *Rhodes v. Bate*, 1 Ch. 252; *Morgan v. Minett*, 6 Ch. D. 638 (where the client released a mortgage debt due from him to the solr).

In transactions between them of sale and purchase, the *onus* is, in like manner, though not with the same strictness, thrown upon the solr of prov-

ing that the transaction was fair, and that he has given the client all that reasonable advice against himself that he would have given against a third person: see *Gibson v. Jeyes*, 6 Ves. 286, and cases collected; *Fox v. Mackreth*, 1 L. C. Eq. 141; *Huguenin v. Baseley*, 2 L. C. Eq. 597; *Cockburn v. Edwards*, 18 Ch. D. 499, C. A.; *Barron v. Willis*, (1900) 2 Ch. 121, C. A.

A solr cannot take advantage of his position (as, e.g., by using knowledge which he has acquired as to his client's property or the value of it) to obtain a benefit at the expense of his client: *Tyrrell v. Bk. of London*, 10 H. L. C. 26; *McPherson v. Watt*, 3 App. Ca. 254, 271; or by registering a mortgage to himself with a view to gaining priority over an unregistered mortgage to his client: *Battison v. Hobson*, (1896) 2 Ch. 403; and this rule extends to his clerk: *Hobday v. Peters*, 28 Beav. 349; and applies although the solr is acting gratuitously: *McPherson v. Watt*, *sup.*; and although the solr acting for husband and wife is retained by the husband only: *Barron v. Willis*, *sup.*; and as between the solr and the trustee in the subsequent bankruptcy of the client: *Luddy's Trustee v. Peard*, 33 Ch. D. 500.

Where money is advanced by solrs and by trustees (who are the solr's clients) on a contributory mortgage, the mere fact that the solrs were negligent in advising the investment is not a ground for postponing their security to that of the trustees: *Stokes v. France*, (1898) 1 Ch. 212.

Where an Aberdeen advocate purchased nominally for his brother, but really for himself, house property belonging to two ladies for whom he was acting as agent, and concealed from them that he was buying for himself, the purchase, though otherwise *bonâ fide*, could not be enforced: *McPherson v. Watt*, 3 App. Ca. 254.

For the exercise of the jurisdiction of the Court, in ordering to be given up assignments obtained from the client as leases, see *Ogilvie v. Jeaffreson*, 6 Jur. N. S. 970; 29 L. J. Ch. 905; 8 W. R. 745; or in setting aside a purchase of the client's equity of redemption: *Gibbs v. Daniel*, 10 W. R. 688; 9 Jur. N. S. 636; 7 L. T. 27; 4 Giff. 1; or in setting aside a bill of sale: *Sykes v. Bond*, 4 L. T. 869; 7 Jur. N. S. 1024.

And as to a sale to a solr by the client, see *Edwards v. Meyrick*, 2 Ha. 60; *Champion v. Rigby*, 1 Russ. & M. 539; *Trevelyan v. Charter*, 9 Beav. 140.

The solr, having re-sold, must account for any profit. In taking the accounts, he will be credited with purchase-money, or advances paid, sums expended in substantial improvements and repairs, with interest at 4 or 5 p. c., according to circumstances, and debited with the amount he has received for rents and profits, and with the estimated deteriorations in value of the property, annual rests being directed: see *Sidney v. Ranger*, 12 Sim. 118; *Re Lacey*, 6 Ves. 615; *Re Hughes*, 6 Ves. 617; *Re Bennett*, 10 Ves. 401; *Charter v. Trevelyan*, 11 Cl. & F. 714; 4 L. J. Ch. 209, 214; and as to rate of interest, see *Re Unsworth*, 2 Dr. & Sm. 337; *Macleod v. Jones*, 53 L. J. Ch. 534. As to the rule against charging interest on profits in the case of a trustee, *v. inf.*, p. 1164.

And, on the grounds of public policy, a voluntary conveyance by client to counsel, in consideration of professional services, was set aside: *Broun v. Kennedy*, 4 D. J. & S. 217; 33 Beav. 133.

It being the duty of a solr having the conduct of a sale to get the highest possible price, he cannot, when so employed, purchase for himself, as his duty would conflict with his interest: *Sidney v. Ranger*, 12 Sim. 118; *Grover v. Hugell*, 3 Russ. 428; *Bloye's Trust*, 1 Mac. & G. 488; and see *Atkins v. Delmege*, 12 Ir. Eq. 1; *Popham v. Exham*, 10 Ir. Ch. 440, 455.

But where not actually employed to conduct a sale under a decree, or otherwise than as the solr of creditors, who might themselves have purchased, the mere appearance of a solr's name in the particulars of sale will not disqualify him from purchasing for himself: *Guest v. Smythe*, 5 Ch. 551.

Where the solr obtains leave to bid, he is not bound to disclose facts affecting the value, but if he professes to give information on any particular subject, with a view to guide the Court and obtain its approval, he must give all the material information he can: *Coake v. Boswell*, 11 App. Ca. 232, 240, 244.

And a solr conducting an action is precluded from purchasing the subject-matter of the action: *Simpson v. Lamb*, 7 E. & B. 84; 26 L. J. Q. B. 121; *Wood v. Downes*, 18 Ves. 120; but this rule will not invalidate an assignment

effected previously to the employment of the solr: *Davis v. Freethy*, 24 Q. B. D. 519, C. A.

A solr who, by the will of his client, is allowed to charge profit costs is thereby given a beneficial interest which he loses by attesting the will: *Re Pooley*, 40 Ch. D. 1, C. A.; but not by merely attesting a subsequent codicil: *Re Trotter*, (1899) 1 Ch. 764; and he cannot retain the benefit as against creditors where the estate is insolvent: *Re White, Pennell v. Franklin*, (1898) 2 Ch. 217, C. A.; (1898) 1 Ch. 297.

A solr who is a member of a committee of inspection cannot charge profit costs without obtaining the previous sanction of the Court to the allowance under the Bankruptcy Rules, 1886, r. 317: *Re Gallard*, (1896) 1 Q. B. 68, C. A.

An agreement by an attorney with a certificated conveyancer to allow him commission on business introduced, has been held not within 6 & 7 V. c. 73, s. 32, nor such as will render the parties liable to the penalties for barratry or maintenance: *Scott v. Miller*, Joh. 220.

DELAY—LACHES—STATUTE OF LIMITATIONS.

The ordinary relation between solr and client being that of agent and principal, a solr receiving moneys of his client in the course of business, can, in general, plead the Statute of Limitations (21 Jac. I. c. 16, s. 3): *Watson v. Woodman*, L. R. 20 Eq. 721, 731; *Re Hindmarsh*, 1 Dr. & Sm. 129; 8 W. R. 203; *Dooby v. Watson*, 39 Ch. D. 178; and see *Re Sharpe, Masonic Ass. Co. v. S.*, (1892) 1 Ch. 154, 166, C. A.; but not so where the moneys so received are bound by a particular trust, of which the solr is cognisant: see *Burdick v. Garrick*, 5 Ch. 240; *Re Bell, Lake v. B.*, 34 Ch. D. 462; *Power v. P.*, 13 L. R. Ir. 281; nor where the solr is guilty of misconduct, rendering him liable to the general summary jurisdiction as an officer of the Court: *Re Sharpe*, 5 Dowl. 717; *Re Fairthorne*, 3 D. & J. 548; 15 L. J. Q. B. 131.

When, under the doctrine of *Lockhart v. Reilly* (1 De G. & J. 464, see *Lewin on Trusts*, 10th ed. pp. 1118, 1119) or otherwise, a solr who is a trustee becomes liable to indemnify his co-trustee, the Statute of Limitations will not begin to run in his favour until judgment has been given against the co-trustee: *Robinson v. Harkin*, (1896) 2 Ch. 415.

During the continuance of the relation of solr and client, delay in impeaching the transaction is not so material as in other cases: *Gresley v. Mousley*, 4 D. & J. 78; 1 Giff. 450.

But after the relation has ceased a transaction which might have been impeached may be made valid by the election of the client to abide by it: *Mitchell v. Homfray*, 8 Q. B. D. 587, C. A.; but see *Tyars v. Alsop*, 69 L. T. 367; 36 W. R. 919; 61 L. T. 8; 37 W. R. 339.

And the solr "cannot disengage himself from the relation of solr by cutting a clean line between himself and the client at the exact moment at which he ceases to be solr. He must wind up properly the relationship of solr and client": *Macloed v. Jones*, 24 Ch. D. 289, C. A., per Bowen, L. J.

See, however, on the question of laches as a bar to relief against the solr, *M. Clanricarde v. Henning*, 30 Beav. 175; *Lyddon v. Moss*, 4 D. & J. 104; *Pearson v. Benson*, 28 Beav. 598; *Salmon v. Cutts*, 4 D. & S. 125; *Oldham v. Hand*, 2 Ves. 259.

SECTION IV.—COURT'S CONTROL OVER SOLICITORS.

1. Attachment against Solr for non-payment of Balance found due from him on Taxation.

WHEREAS by an order dated &c., it was ordered that A. B., the above-named solr, should, within a fortnight after service of the said order,

deliver to C. D. a bill of fees and disbursements in all suits, causes, actions, and other matters of business in which he had been employed as the solr for the said C. D., and that it be referred to the taxing master to tax and settle the said bill with all usual and consequential directions; And whereas the taxing master, by his certificate dated &c., certified that there was due from the said solr, A. B., to C. D. £—. Now, upon motion &c., by counsel for the said C. D., and upon hearing counsel for the said solr, A. B., and it appearing to the satisfaction of the Court that the said solr, A. B., has made default in payment of the said £—, and that such default is a default by a solr, in payment of a sum of money when ordered to pay the same in his character of an officer of the Court, within the meaning of the Debtors Act, 1869, Let the said C. D. be at liberty to issue a writ of attachment against the said A. B. for his contempt in not having paid the said £— to the said C. D., pursuant to the said order and taxing master's certificate.—Costs.—*Re Peters*, Kay, J., 6 May, 1887, B. 650.

See also *Re Rush*, 9 Eq. 147; and in a case of improperly dealing with money of client, see *Re Dudley*, 12 Q. B. D. 44, and *Bone v. King*, Chitty, J., 10 Feb. 1888, A. 141.

2. *Sale by Court set aside—Solr to pay all the Costs.*

(*Directions to set aside attachment against alleged purchaser and discharge him from custody, and rescind and cancel his conditional contract, and discharge the orders against him.*) Refer to taxing master to tax the costs of the purchaser, and all parties appearing on the application, and all the costs of the purchaser incident to the alleged contract, and any proceedings relating thereto, or consequent thereon, including the charges and expenses necessary to secure his immediate discharge from custody.—Such costs, and costs, charges and expenses, when taxed, to be paid by Plt's solr.—Liberty to apply.—*Bromage v. Davies*, V.-C. S., 30 June, 1858, A. 1360; *S. C.*, 4 Jur. N. S. 683.

3. *Solr to pay Costs occasioned by Fund having been improperly paid out through his Neglect.*

UPON the petition of A. B. &c., and upon hearing counsel for the Petr, and for the Respondents (*names*), Declare that the estate of C. D., deceased, is primarily liable to refund to the Petr the amount of dividends on the funds in Court to the credit of &c., improperly received by her under the said order dated &c.; And declare that the Respondent E. F. is primarily liable to pay to the Petr and the Respondents their costs, hereinafter directed to be taxed, except so much thereof as would have been incurred by the Petr in obtaining payment out of the legacy if the said order dated &c. had not been made; And declare that the Respondent E. F. is also liable to make good to the Petr the deficiency between the amount to be received by

the Petr under the schedule hereto, and the amount which, but for the said order dated &c., would have been standing in Court, representing the legacy of £500, and accumulation of interest thereon, less the amount, if any, which shall be received from the estate of C. D., deceased.—Usual account of personal estate of C. D. come to the hands of G. H., the admor &c.—Refer to the taxing master to tax, as between solr and client, the costs of the Petr and Respondents, other than E. F., of this application, and in such taxation the taxing master is to distinguish so much of the costs as would have been incurred by the Petr in obtaining payment of the said legacy and interest if the said order dated &c. had not been made; Direct payment by the Respondent E. F. of the said costs, other than distinguished costs; Let the funds in Court be dealt with &c.—[Add Payment Schedule, with direction to sell New Consols, pay proceeds and part of cash to Petr, and invest and accumulate residue of cash.]—*Re Dangar's Trusts*, Stirling, J., 8th April, 1889, A. 762; *S. C.*, 41 Ch. D. 178.

4. *Liability of Solr to make Reparation for Improper Proceedings on behalf of Lunatic.*

“DECLARE that all the proceedings in this suit after the appointment of a receiver were unauthorized and improper, and that all the proceedings after the finding of the inquisition in lunacy, dated &c., were irregular and void.”—Direction to carry over funds in Court in the cause to the credit of “In the matter of B., a person of unsound mind”; “And Let M. & P. (solrs), on or before &c., lodge in Court, as directed in the schedule hereto, the sums paid for costs to themselves and to the Deft's solr, and to the accountant, after deducting the costs of this suit up to the appointment of the receiver, such costs to be taxed, and the amount to be paid by the said M. and P. after such deduction, to be certified by the taxing master; And the Petr R., the committee of &c., is to be at liberty to take such proceedings as he may be advised for obtaining any better or other account against the Deft.”—Solrs to pay Petr's costs of the appeal and of the application in Court below, as between solr and client.—[Add Lodgment Schedule, Form No. 1.]—See *Beall v. Smith*, L. J., 6 Dec, 1873, A. 3105; *S. C.*, 9 Ch. 85.

For order for repayment, with interest, of money paid out of Court to parties not entitled, and making the solr by whom the petition was presented primarily liable for the costs and expenses, see *Re Spencer*, 18 W. R. 240; 39 L. J. Ch. 841; 21 L. T. 808.

5. *Solr ordered at his own expense to Stamp Deeds with Stamps for which he had charged his Client.*

LET the said J., on or before &c., or subsequently within four days after service of this order, procure the indenture of mortgage, dated &c., and made between &c., and also a transfer of such mortgage indorsed thereon and dated &c., whereby &c., to be duly stamped with

proper stamps at his own expense, and within the time aforesaid deliver over such deeds so stamped to the said B.; Let the said J. pay to the said B. his costs of and incident to this application, to be taxed by the taxing master.—*Re Jones*, M. R., 17 Feb, 1876, A. 351.

6. *Four-day Order on Solr to produce Deeds duly stamped to Registrar, in pursuance of undertaking given at Bar by Counsel on instructions of Solrs.*

UPON motion &c., by counsel for R. T. F. and E. M. H., and upon hearing counsel for the C. G. F., Ltd., G. S. B. the official receiver and liquidator of C. G. F., Ltd., and the above-named solrs (*names*) and the Board of Commrs for Inland Revenue, and upon reading &c., and the Board of Commrs for Inland Revenue by their counsel waiving the penalty for stamping after date the documents hereinafter mentioned, This Court doth order that the said solrs (*names*) do, within four days after service of this order, produce to Mr. Registrar K., duly stamped with a proper *ad valorem* stamp duty, the documents A, B, C, D, E. M. H.² and E. M. H.³ referred to in the affidavit of W. J. B., filed &c.; And the said Board of Commrs for Inland Revenue are to be at liberty to apply to enforce this order as they may be advised; And the official receiver and the said Board of Commrs by their said counsel not asking for costs, It is ordered that the solrs (*names*) do pay to the said R. T. F. and E. M. H. their costs of this motion, to be taxed by the taxing master.—*Re Coolgardie Gold Fields, Ltd.*; *Re C. S. & M., Solrs*, (1900) 1 Ch. 475.

N.B.—In this case, on motions which were acceded to by the Court, an undertaking was given at the Bar by counsel for the co., C. G. F., Ltd., on the instructions of their solrs, to produce to the registrar duly stamped certain unstamped documents tendered in evidence on behalf of the said co. This undertaking was not fulfilled, and the Court directed the order made on the motions to be completed without entering the unstamped documents, and made the above order on the solrs. The last-mentioned order was not completed, however, as the Inland Revenue Commrs intimated to Mr. Beal, registrar, for the information of the Judge, that the Treasury did not intend to take any steps to enforce the stamping of the documents, the solrs having paid a sum of 50*l.* fixed by the Treasury. The practice of the Chancery registrars in taking the solrs' personal undertaking to stamp the deeds and to produce the deeds when stamped to the registrar, in lieu of receiving the amount of the duty and penalties as provided by sect. 14 of the Stamp Act, 1891 (*supra*, Vol. I. p. 157), was approved by the Court: *S. C.*

NOTES.

JURISDICTION OVER SOLICITORS.

The summary jurisdiction over solrs as officers of the Supreme Court extends only to relief as to personal misconduct and neglect of duty, and in respect of acts done in the character of a solr: *Re Hollington*, 22 W. R. 106; 43 L. J. Ch. 99; 29 L. T. 502; *Re Blanchard*, 3 D. F. & J. 131; *Chapman v. C.*, 9 Eq. 276. It is a disciplinary power to prevent breaches of duty, quite independently of the legal right of the client: *Re H. A. Grey*, (1892) 2 Q. B. 440, 444, C. A.; *Re Freston*, 11 Q. B. D. 545, C. A.; *Re Dudley*, 12 Q. B. D. 44, C. A.

This jurisdiction is usually exercised by motion on notice: see *Re Jones, sup.*, Form 5; *Cordery on Solrs*, 144; but has been also exercised upon petition: *Re Justice*, 16 W. R. 821; *Re Forsyth*, 34 Beav. 140; 2 D. J. & S. 509; *Re Woodard*, 17 W. R. 1006; or at the hearing: see *Beall v. Smith, sup.*, Form 4.

The client can apply against the London agent of the country solr: *Exp. Edwards*, 7 Q. B. D. 155, C. A.; but against the solr's trustee in bankruptcy or pers. represve, the application should be under sect. 37 of the Solrs Act, 1843 (6 & 7 V. c. 73): see *Re Roy*, 4 Dowl. 573; *Exp. Nicholls*, 2 Dowl. N. S. 423.

The exercise of a jurisdiction is discretionary: see *Re H. A. Grey*, (1892) 2 Q. B. 440, 445; and, except under special circumstances, the Court will not make an order where the client has elected to bring an action and failed: *Sittingbourne & Sheerness Ry. Co. v. Lawson*, W. N. (86) 76, 87; but the fact that the client has recovered judgment against the solr does not take away the jurisdiction: *Re H. A. Grey, sup.*

And an order will not be made if the relation of solr and client does not exist between the parties in reference to the transaction which is the subject of the application: *Exp. Cobeldick*, 12 Q. B. D. 149, C. A.; e.g., where money is received by the solr by way of loan, or non-professionally: *Re Harvey*, 27 Beav. 320; *Re Bryant*, 50 L. T. 450; *Re Schwahlaerber*, 1 Dowl. 182; *Exp. Deane*, 2 Dowl. 533; or deeds are held by him as trustee or by way of security: *Pearson v. Sutton*, 5 Taunt. 364; *Re Chitty*, 2 Dowl. 455; *Re Cardross*, 5 M. & W. 545; 7 Dowl. 861; *Exp. Cobeldick, sup.*

For instances of the exercise of the jurisdiction:—

- (a) By directing solrs to pay over money received by or on behalf of a client, see *Tylee v. Webb*, 14 Beav. 14; *Re Lawrence*, 2 S. & G. 367; *Exp. Wortham*, 4 D. & S. 415; *Re Becke*, 18 Beav. 462; *Re Cullen*, 27 Beav. 51; *Re Justice, sup.*; though judgment has been recovered by the client: *Re H. A. Grey, sup.*
- (b) To give up, and pay the costs of, an improper deed prepared by them: *Potts v. Dutton*, 8 Beav. 493.
- (c) To make good loss occasioned to the Consolidated Fund under the Court of Chancery (Funds) Act, 1872, s. 5, where, by reason of the solr's negligence, a fund has been paid out of Court to the wrong person: *Marsh v. Joseph*, (1897) 1 Ch. 213, C. A.
- (d) To indemnify the client against the costs of an appeal prosecuted for the solr's purposes, and not in the interests of the client (the official solr being directed to inquire into the matter): *Harbin v. Masterman* (No. 2), (1896) 1 Ch. 351, 366, C. A.
- (e) By making solrs liable for taking an insufficient security in a case of confidential agency and trust: *Craig v. Watson*, 8 Beav. 427; *Hamilton v. Lane*, 25 L. R. Ir. 188.
- (f) For proceedings by which funds are wrongfully got out of Court: *Ezart v. Lister*, 5 Beav. 587.
- (g) By committal, and ordering payment of the costs of scandal, in answer, and improper use of counsel's name: *Bishop v. Willis*, 5 Beav. 83, n.

And as to the jurisdiction in respect of misfeasance or neglect, see *Dixon v. Wilkinson*, 4 D. & J. 508; *Re Ward*, 31 Beav. 1; *Exp. Fairchild*, 23 W. R. 213; *Re Wright*, 12 C. B. N. S. 705; *Re Dangar's Trusts*, 41 Ch. D. 178.

As to the jurisdiction to order a solr to pay costs personally, see Vol. I., p. 262; O. LXV, 5, 11; O. LRV, 7; and that from such an order an appeal lies without leave, see *Re Bradford*, 15 Q. B. D. 635, C. A.

An agreement to compromise a suit by Plt's and Dett's solrs, and pay Plt's costs, may be summarily enforced: *Gilbert v. Cooper*, 15 Sim. 343; S. C., 11 L. T. 169.

As to the liability of solrs for proceedings taken for their own benefit improperly, or not *bonâ fide*, see *Re Williams*, 12 Beav. 510, 516, n.; *Beall v. Smith*, 9 Ch. 85, *sup.*, Form 4; *Simmons v. Rose*, *Re Ward*, 31 Beav. 1; *Fielden v. Buenos Ayres Ry. Co.*, 18 W. R. 729; 19 W. R. 361; 40 L. J. Ch. 113.

As to the personal liability of a solr who enters into an undertaking before the Court, e.g., that documents shall be stamped, see *Re Coolgardie Goldfields*, (1900) 1 Ch. 475, *sup.* p. 1106, and see *The Crimdon*, (1900) P. 171.

The jurisdiction of the Court to restrain a solr who has acted in one proceeding from acting in a subsequent proceeding for the party opposed to his former client is not confined to the case where the solr has discharged himself, but extends to the case where he has been discharged by the client; and, *semble*, the true test to be applied is whether the second proceeding so flows out of, or is connected with, the first, that the solr must be in possession of information the communication of which would prejudice his client: *Little v. Kingswood Collieries Co.*, 20 Ch. D. 733, C. A., approving *Hutchins v. H.* (1 Hogan, 313), *Bigges v. Head* (Sausse & Scully, 335), and explaining *Cholmondeley v. Clinton*, 19 Ves. 261. If a solr, after judgment, acts for another party so as to prejudice his client he is liable in damages: *Barber v. Stone*, 50 L. J. Q. B. 297; *Lawrence v. Harrison*, Sty. 426.

Placing himself in a position calling for investigation may deprive a solr of his costs: *Fyler v. F.*, 3 Beav. 550; *Harvey v. Mount*, 8 Beav. 439; and see *Nanney v. Williams*, 2 Beav. 452; *Powell v. P.*, (1900) 1 Ch. 243.

He may be made to pay the costs occasioned by his enforcing by attachment a contract obtained from a purchaser by misrepresentation: *Bromage v. Davies*, 4 Jur. N. S. 683, *sup.*, Form 2, p. 1104; and see *Re Gregg*, 9 Eq. 137; or (it seems) the costs of the day thrown away by his neglect to give notice that the Deft, who was a material witness, was ill, and unable to attend: *Shorter v. Tod-Heatty*, W. N. (94) 21; or of obtaining an *ex parte* injunction without disclosing facts showing that the usual undertaking in damages is valueless: *Schmitt v. Faulks*, W. N. (93) 64; but not the costs of obtaining an *ex parte* order without disclosing a pending lunacy petition, where he believed his client to be of sound mind: *Re Armstrong & Sons*, (1896) 1 Ch. 536.

But a solr ought not to be made a party to an action merely for the purpose of costs or discovery: *Burstall v. Beyfus*, 26 Ch. D. 35, C. A.

The solr of a co. is not an officer within the summary jurisdiction of the Companies Act, 1862, s. 165: *Re G. W. Forest of Dean Coal Co., Carter's Case*, 31 Ch. D. 496.

As to practising in the name of another solr as his agent, see *Hockley v. Bantock*, 2 M. & K. 437; *Turner v. Ford*, 1 M. & Cr. 1; *Exp. Foley*, 11 Beav. 456.

And as to the right to complain by petition of irregular conduct of business in the offices, see *Re Masters' Clerks*, 1 Ph. 650.

DEBTORS ACT.

Under the Debtors Act, 1869 (32 & 33 V. c. 62), s. 4 (4), a solr is liable to attachment when he makes default in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of officer of the Court making the order.

For cases under this section and the Amending Act of 1878, *v. sup.*, Vol. I. pp. 441—443; and see *Re H. A. Grey*, (1892) 2 Q. B. 450.

The section does not apply where a solr is ordered to pay costs as an unsuccessful litigant: *Re Hope*, L. R. 7 Ch. 523; but where a solr as such is ordered to pay money and costs he may be attached for non-payment of the costs as well as of the money: *In re a Solr*, (1895) 2 Ch. 66.

An order for payment of a sum of money into Court as security for costs is not within the section: *Bates v. B.*, 14 P. D. 17, C. A.

LIABILITY OF SOLICITOR FOR NEGLIGENCE.

Courts of Equity have declined to hold a solr responsible for loss in respect of conduct founded on competent advice which has been submitted to the judgment of the client: *Chapman v. C.*, 9 Eq. 276; or for mere negligence: *Frankland v. Lucas*, 14 Sim. 586; though he may not be allowed to recover any part of his bill in respect of a suit lost by *crassa negligentia*: *Stokes v. Trumper*, 2 K. & J. 232.

And where by mistake and negligence of the solr money was paid out of Court to persons not entitled, they were held liable to repay it with interest, and their solr, who presented the petition on which the order was made, was held primarily liable for the costs and expenses, to be paid within one month from the taxing master's certificate: *Re Spencer*, 18 W. R. 240; and see *Re*

Dangar's Trusts, 41 Ch. D. 178, Form 3, *sup.* p. 1105; *Slater v. S.*, 58 L. T. 149; (1897) 1 Ch. 222, n.; but a solr will not be held personally liable merely because he has innocently ratified the use of his name by another solr who had used it without his knowledge: *Marsh v. Joseph*, (1897) 1 Ch. 213, C. A.

In the more recent cases the jurisdiction in Equity to charge a solr with loss occasioned by negligence was distinctly repudiated: *British Mutual Invest. Soc. v. Cobbold*, 19 Eq. 627; *Mare v. Lewis*, L. R. 4 Eq. 219; though in *Chapman v. C.*, 9 Eq. 276, it was stated in reference to negligence by a solr, that in a proper case the Court will take cognizance of all well-grounded complaints against the conduct of its officers in the management of their clients' business, and that relief will be given without leaving the client to his remedy in damages.

And see *Dixon v. Wilkinson*, 4 D. & J. 508; 4 Drew. 622, for a strong inclination of opinion in favour of the jurisdiction even in cases of mere neglect.

Under the new procedure it is contemplated that a client may claim damages for injury through his solr's negligence: see R. S. C., App. A., Part II., Section IV., par. 10.

Solrs cannot be made liable for neglect or breach of duty in relying on the provisions of the Conveyancing Act, 1881 (44 & 45 V. c. 41), s. 66, nor for error in an official certificate of searches under the Conveyancing Act, 1882 (45 & 46 V. c. 39), s. 2, sub-ss. 8, 9, 10, or the Yorkshire Registry Act (47 & 48 V. c. 54), s. 23.

The solr of a mortgagee by not inquiring for title deeds renders himself liable to his client for any sum which the client on selling has to pay by reason of an equitable incumbrance: *Whiteman v. Hawkins*, 4 C. P. D. 13; and a solr who advises an exor to pay a statute-barred debt, though he knows that an admon summons by the alleged creditor has been dismissed by the Court, will be liable to the estate: *Midgley v. M.*, (1893) 3 Ch. 282, C. A.; and as to the duty of a solr, advising trustees as to investment, to see that the security is adequate as well as in proper form, see *Stokes v. France*, (1898) 1 Ch. 212.

And the Plt's solr in a debenture-holder's action, neglecting to procure the investment of moneys in Court, was held liable, on summons at the instance of the receiver in the action, for the loss of interest, but entitled to set off a gain resulting from a fall in the price of Consols: *Batten v. Wedgwood Coal Co.*, 31 Ch. D. 346; but see *McDougal v. Knight*, W. N. (87) 68.

In an action for negligence, the Statute of Limitations (21 Jac. I. c. 16), s. 3, runs (in the absence of fraud) in the solr's favour from the date of the negligence, and not from the discovery of it: *Hughes v. Twisden*, 55 L. J. Ch. 481; 34 W. R. 498; 54 L. T. 470; and cases cited Cordery, 133; but see *Wood v. Jones*, 61 L. T. 551.

7. Inquiry as to Charge of Profit Costs by Solr-Mortgagee.

THE application of the Plt by summons, dated —, that an account might be taken of all sums of money advanced or paid by the Plt to or on account of, or which have become owing to him in respect of, certain bills of costs or otherwise by the Deft and C. A. W. M., deceased, which upon hearing the solrs &c., was adjourned to be heard in Court coming &c.; And upon hearing counsel &c.; And upon reading &c., Declare (*inter alia*):—(1) That the Plt acted as the agent of C. A. W. M. and not as the mortgagee in possession in the receipt and application of her income under the will of T. W., deceased. (2) That the agreement alleged by the Plt to the effect that he was entitled as the solr of the said C. A. W. M. to charge profit costs for any work done by him in connection with the securities hereinafter mentioned and for the receipt and application of her income, and for work done as such agent as aforesaid, has not been established.

(3) That the Plt was not and is not entitled to charge the Deft, or the said C. A. W. M., or her estate with any profit costs of the Plt for the preparation or execution of the indenture dated &c., or the other indentures respectively dated &c. in the writ respectively mentioned, or the mortgages of the lands in T., in the U. S. of A., or for any work done in connection with the securities thereby created, or the moneys thereby secured respectively, or for the receipt and application of the said income, or for work done as such agent as aforesaid; And Let the following inquiry be made at the risk as to costs of the Plt, viz.: An inquiry whether any and what sum has been paid or allowed by the Plt to his partner J. M. A. for the period from the — day of — to the — day of —, or to his partners the said J. M. A. and C. L. E., or either of them, for the period from the — day of — to the — day of —, or to his partner the said J. M. A. for the period from the — day of — to the — day of — as their proper proportions respectively in the partnership profits during the periods aforesaid in respect of the profit costs for the preparation and execution of the said indenture dated the — day of —, and the said other indentures in the writ mentioned and the said mortgages of the said lands at T., or for work done in connection with the securities thereby created or the moneys thereby secured respectively, or for the receipt and application of the said income, and work done as such agent as aforesaid.—*Eyre v. Wynn-Mackenzie*, Kekewich, J., 28 Nov. 1893, A. 1896; (1894) 1 Ch. 218; *S. C.*, C. A., 18 Dec. 1895, A. 4972; (1896) 1 Ch. 135, C. A.

In this case leave to extend time for appeal was refused by the C. A. on the ground that the Mortgagees' Legal Costs Act, 1895, s. 3, was not intended to affect judgments given before it was passed; and see *Day v. Kelland*, *inf.* p. 1111.

LIABILITY OF SOLICITOR AS TRUSTEE OR MORTGAGEE.

Solrs will not readily be affected with liability as constructive trustees in respect of transactions professionally conducted by them which amount to a breach of trust by their client: *Barnes v. Addy*, 9 Ch. 244; *Re Blundell*, *B. v. B.*, 40 Ch. D. 370; or in respect of money which passes through their hands as solrs: *Williams v. W.*, 17 Ch. D. 437; *q.v.* as showing that the notice required to convert a solr into a trustee is of a different degree from that required to affect the conscience of a person who is already in the position of a trustee.

A solr receiving money for purposes of investment is not thereby *ipso facto* affected with the liabilities of a trustee: *Mare v. Lewis*, 1 R. 4 Eq. 219; *Mara v. Browne*, (1896) 1 Ch. 199, C. A.; *Brinsden v. Williams*, (1894) 3 Ch. 185; and see Lewin on Trusts, 10th ed.; and clearly not where he is employed to invest in particular securities to be approved by the client: *Dooby v. Watson*, 39 Ch. D. 178; but it may be otherwise if he undertakes to find a good mortgage: *S. C.*; and see *Hamilton v. Lane*, 25 L. R. Ir. 189; or has been constituted a general agent for purposes of investment: *Smith v. Pococke*, 1 Drew. 197; *Dooby v. Watson*, *sup.*; and see *Re Sharpe*, (1892) 1 Ch. 154, 166, C. A.

But if the solr, receiving his client's money for investment, takes the security in his own name, he becomes a trustee for his client to the extent of the money: *Harpham v. Shacklock*, 19 Ch. D. 207, C. A.; *Re Vernon, Evans & Co.*, 33 Ch. D. 402, C. A.; and the client's equitable title will prevail over a subsequent equitable mortgage by the solr: *Harpham v. Shacklock*, *sup.*; and the client cannot be postponed on the ground of negligence, because, in the absence of ground for suspicion, he has accepted the assurance of the solr

as to the mode in which the investment has been effected: *Re Vernon, Ewens & Co., sup.*; and see *Shropshire Union, &c. Co. v. Reg.*, L. R. 7 H. L. 496; *Taylor v. London and County Bank*, (1901) 2 Ch. 231, C. A.

If a client selling to the solr signs a receipt for purchase-money which is not in fact paid, a purchaser from the solr will be entitled to rely on the receipt as giving him an equity prevailing over the *cs. q. t.* of the client: *Lloyd's Bank v. Bullock*, (1896) 2 Ch. 192, 197.

The general rule has been that a solr-mortgagee, who acts as solr in proceedings relating to the mortgage, or for himself in a redemption action, cannot, as against the mortgagor, include in his costs, charges and expenses as mortgagee, remuneration for his professional services, but only disbursements out of pocket: *Stone v. Lickorish*, (1891) 2 Ch. 303; *Re Wallis, Exp. Lickorish*, 25 Q. B. D. 176, C. A.; *Re Roberts*, 43 Ch. D. 52; *Sclater v. Cottam*, 5 W. R. 744; 3 Jur. N. S. 630; and the objection to allowance of his profit costs need not be taken at the hearing of a redemption action, but may be taken before the taxing master: *Stone v. Lickorish, sup.*; and though the mortgage contained a clause empowering a solr and an auctioneer who were mortgagees to make the same charges as if they had not been mortgagees, costs incurred by one of the mortgagors to the solr in matters unconnected with the mortgage, and a fee paid to the auctioneer-mortgagee for his valuation, were disallowed: *Field v. Hopkins*, 44 Ch. D. 524, C. A.; and see *Re Gray*, (1901) 1 Ch. 239; and *semble*, on the principle that a mortgagee cannot clog the equity of redemption, it was not competent for the solr to contract with the mortgagor for such payments: *S. C.*, per Kay, J.; but *semble*, there is nothing to prevent the partner of a solr-mortgagee from receiving his share of the profit costs: *Re Doody, Fisher v. D.*, (1893) 1 Ch. 129. As to the incapacity of a solr-trustee to charge profits, *v. inf.* Chap. XLII., "TRUSTEES," pp. 1176, 1177.

Now by the Mortgagees' Legal Costs Act, 1895 (58 & 59 V. c. 25), s. 2, where the mortgage is made on or after July 1, 1895, a solr-mortgagee may charge usual professional remuneration for the investigation of title and preparation and completion of the mortgage, and by s. 3 (whether the mortgage is made or the business done before or on or after July 1, 1895) may recover and charge against the security usual professional remuneration for business done in relation to the mortgage or security.

Sect. 3 does not apply retrospectively where the costs have been disallowed and the time for appealing has expired: *Eyre v. Wynn-Mackenzie*, (1896) 1 Ch. 135, C. A., *v. sup.* p. 1110. And the Act does not apply where there has been a previous order ascertaining the rights of the parties in reference to costs: *Day v. Kelland*, (1900) 2 Ch. 745, C. A.

It is conceived (see Cordery, p. 212) that the Act will apply where the solr-mortgagee has subsequently acquired the character of a trustee for those entitled to redeem.

There is no jurisdiction on a summons in an admon action to make a solr-trustee account for profit costs received by him: *Re Thorpe, Vipont v. Radcliffe*, (1891) 2 Ch. 360.

Where one of two defaulting trustees is a solr, he cannot, merely because he is a solr, be required to indemnify a co-trustee who has himself been an active participator in the breach of trust and not merely in consequence of the advice and control of the solr: *Head v. Gould*, (1898) 2 Ch. 250.

LIABILITY OF FIRM OF SOLRS.

The liability of a firm for misapplication of money entrusted to them in the course of their regular business as solrs, is joint and several, and all or any of the members are liable by action to make good loss occasioned by their partner's act: *E. Dundonald v. Masterman*, 7 Eq. 504; *Plumer v. Gregory*, 18 Eq. 629; *St. Aubyn v. Smart*, 3 Ch. 646; and see *Atkinson v. Mackreth*, 2 Eq. 570; *Missing's Case*, *Sawyer v. Goodwin*, 16 L. T. 514; *Eager v. Barnes*, 7 L. T. 408; *Blyth v. Fladgate*, (1891) 1 Ch. 337, 352; and see the Partnership Act, 1890 (53 & 54 V. c. 39), ss. 5, 13.

And if one of the firm, thus acting for trustees, makes an improper investment of the trust fund, his co-partners are fixed with notice of the impropriety: *Blyth v. Fladgate, sup.*

But as it is not within the scope of the business of solrs to keep securities for their clients, it will require clear evidence of authority to render a solr's

partners liable for securities deposited with and misappropriated by him: *Cleather v. Twiaden*, 28 Ch. D. 340, 350, C. A.; but where a firm are in the habit of receiving moneys and securities for safe custody, or where one partner receives securities in connection with business done by the firm, as e.g. on a mortgage transaction, the firm will be liable: *Rhodes v. Moules*, (1895) 1 Ch. 236, C. A.

A firm of solrs is not liable for loss caused by one of the partners allowing a stranger to use the name of the firm in order to obtain payment of money out of Court: *Marsh v. Joseph*, (1897) 1 Ch. 213, C. A.; nor can one partner generally make the firm liable as constructive trustees: *Mara v. Browne*, (1896) 1 Ch. 199, C. A.

As to the application of the Statute of Limitations, *v. sup.* pp. 1103, 1109; and that an innocent partner may be deprived of the benefit of the statute by reason of representations made by his co-partner, and binding on him, see *Moore v. Knight*, (1891) 1 Ch. 547; following and applying *Blair v. Bromley*, 5 Ha. 542; 2 Ph. 254; and, *semble*, if solrs receive money for investment, but do not invest it, and pay interest on the money as though invested, and credit themselves therewith in their books, such money is "converted to the use" of the firm within the Trustee Act, 1888 (51 & 52 V. c. 59), s. 8, so that they cannot avail themselves of the benefit of that section: *Moore v. Knight*, (1891) 1 Ch. at p. 547.

But the solr who has improperly invested, but afterwards replaced, his client's money is entitled to the benefit of such investments: *Sawyer v. Goodwin*, 1 Ch. D. 351, C. A.

As to the liability of a retired partner, who allowed his name to remain on the record, for the conduct of the suit, see *Re Manby*, 3 Jur. N. S. 259; 26 L. J. Ch. 313; or for the receipt of money misapplied by the continuing partner: *Chater v. Maclean*, 1 Jur. N. S. 75; 3 W. R. 261; 3 Eq. R. 375; *Black v. Parker*, 54 L. T. 212; *Blyth v. Fladgate*, (1891) 1 Ch. 337.

As to the liability of a solr who acts under the orders of a person nominated but not actually trustee, see *Mara v. Browne*, (1896) 1 Ch. 199, C. A.

PRIVILEGE.

A solr is privileged from arrest under an attachment in, and on his way to or from, Court or Judges' Chambers on business of his client: *A. G. v. Leather Sellers' Co.*, 7 Beav. 157; *Eyre v. Barrow*, 6 W. R. 767; 27 L. J. Ch. 784; 7 Jur. N. S. 692; *Re Jewitt*, 33 Beav. 559; *Dodd v. Holbrook*, 11 Jur. N. S. 969; 12 Jur. N. S. 19; 35 L. J. Ch. 175; 13 L. T. 426; 14 W. R. 125.

But this privilege will not protect him from the consequences of disobedience to a punitive order under the general summary jurisdiction of the Court: *Re Freston*, 11 Q. B. D. 545, C. A.; *Re Dudley, Exp. Monet*, 12 Q. B. D. 44, C. A.; even though a receiving order has been made against him under the Bankruptcy Act, 1883 (see s. 9, sub-s. 1): *Re Wray*, 56 L. J. Ch. 737, 1106; 36 Ch. D. 138; 57 L. T. 605; 36 W. R. 67; *sup.* Vol. I., p. 434.

SECTION V.—STRIKING OFF THE ROLL, OR SUSPENDING.

1. Order to strike Solr off the Roll at his own Request.

UPON the petition of E. this day preferred unto this Court, it was alleged that, in Michaelmas Term, 18—, the Petr was admitted a solr of the Supreme Court of Judicature; That the Petr is now desirous of having his name struck off the roll of solrs; It was therefore prayed, and upon reading the affidavit of the Petr filed &c. [*Affidavit should*

state that there is no proceeding or application against the solr in the Court as such, and that he does not apprehend that any will be made], it is accordingly ordered, that the Petr E. be struck off from the roll of solrs of the Supreme Court of Judicature.

2. Order to suspend Solr, and for Payment of Costs of Complainant and of Incorporated Law Society.

UPON reading the report of the committee of the Incorporated Law Society appointed herein, filed the — day of —, an affidavit of S. D., filed the — day of —, and the exhibits therein referred to; And upon hearing counsel for the Incorporated Law Society and for the said A. B., a solr of the Supreme Court, on the said Incorporated Law Society's notice of motion, dated the — day of —, to strike off the roll or suspend from practice the above-named solr on the ground of professional misconduct, or for such order as the Court may think fit, It is ordered that the said A. B., a solr of the Supreme Court of Judicature, be suspended from practice as such solr for the period of (two) years from this date, and that he do pay to S. D. (Complainant) her costs of the inquiry before the Incorporated Law Society and of this application (if any), and to the said Incorporated Law Society their costs of this application, all such costs to be taxed.—See *Re B. (a solr)*, Q. B. D., 3 July, 1900, Book II., T. 51.

3. Order to strike off Rolls, and for Payment of Costs of Complainant and of the Incorporated Law Society.

UPON reading the report of the committee appointed under the above-mentioned Act, dated the — day of —, the affidavits of —; And upon hearing counsel for the Incorporated Law Society and the above-named solr in person, on the said Society's notice of motion, dated the — day of —, for such order as to this Court may seem fit, upon consideration of the said report in reference to an application of the said I. G. M. to strike off the roll or suspend from practice the above-named solr on the ground of professional misconduct, It is ordered that the name of A. B., a solr of the Supreme Court of Judicature, be struck off the roll of solrs of the Supreme Court; And it is further ordered that the said A. B. do pay to the said I. G. M. his costs of the inquiry before the above-mentioned committee and of this application (if any), and to the said Society their costs of this application, all such costs to be taxed.—See *Re B. (a solr)*, Q. B. D., 21 May, 1900, Book III., T. 29.

4. Order to strike Solr off the Roll on Conviction.

UPON reading the two affidavits of — [of service of notice of the motion on the solr and verifying the certificate of conviction], And upon

hearing Mr. H. of —, counsel for the Incorporated Law Society, and no one appearing on behalf of the above-named solr on the Incorporated Law Society's notice of motion, herein dated the — day of —, "that your name be struck off the Roll of Solrs on the ground of your having been convicted and sentenced to [eighteen] months' imprisonment as an offender of the [second] division," It is ordered that the name of —, a solr of the Supreme Court of Judicature, be struck off the Roll of Solrs of the said Supreme Court.—*Re T. (a solr)*, Q. B. D., 22 May, 1900, Book I., E. 40.

NOTES.

PROCEDURE.

An application to strike a solr off the roll is usually made to a Divisional Court: see Archbold's Practice, vol. 1, p. 180; *Re Martin*, 24 W. R. 111; W. N. (75) 198. A solr may be struck off the roll on his own application and a proper affidavit stating that there is no complaint against him as solr, nor does he anticipate any: see Cordery, 172; *Exp. Gray*, 9 Dowl. 336; *Re Sturdy*, 2 Jur. N. S. 452.

By the Solrs Act, 1860 (23 & 24 V. c. 127), s. 24, any order to strike off a solr, on his own application, or on the application of any other person, must, before the same is acted upon, be produced to the registrar of solrs, and the registrar is to enter a minute of such order in connection with the name of the solr on the roll, and is to strike such name off and mark the order as having been entered.

And as to the necessity, formerly, of admission or restoration as an attorney previous to admission, restoration, or renewal of certificate as a solr, see *Re Barber*, 19 Beav. 378.

Judicature Acts.—Under the Jud. Act, 1873 (36 & 37 V. c. 66), s. 87, the distinction between solrs, attorneys, and proctors is abolished, and there is to be one appellation, "Solrs of the Supreme Court"; one admission by the Master of the Rolls, with the same privileges and subject to the same obligations as if the Act had not passed; and the same jurisdiction may be exercised by the Supreme Court (of which solrs are to be deemed officers), and the High Court of Justice and the Court of Appeal, or any Division or Judge thereof, as any one of the Superior Courts of Law or Equity might, previously to the passing of the Act, have exercised in respect of any solr or attorney admitted to practise therein.

By the Jud. Act, 1875 (38 & 39 V. c. 77), s. 14, provision was made for the making of regulations adapting any enactments relating to attorneys, and any direction, certificate, or form required under those enactments, to the solrs of the Supreme Court, under sect. 87 of the Act of 1873; and under this clause, rules and regulations as to the examination and admission of persons intending to become solrs of the Supreme Court, the taking out and renewal of their certificates, the re-admission of solrs, and custody of documents, were issued in November, 1875: see W. N. (75) Part II., p. 476.

Solicitors Act, 1888.—Now by the Solrs Act, 1888 (51 & 52 V. c. 65), s. 12, provision is made for the appointment of a committee of members of the Council of the Incorporated Law Society, for the purpose of hearing any application to strike a solr off the roll of solrs, or an application to require a solr to answer allegations contained in an affidavit; and by sect. 13, an application to strike the name of a solr off the roll (whether at the instance of the solr himself or of any other person), or an application to require a solr to answer allegations contained in an affidavit, is to be made to and heard by the committee in accordance with the rules made under the Act. After hearing the case the committee are to embody their finding in the form of a report to the High Court of Justice, or (where the application is at the instance of the

solr himself) to the Master of the Rolls. If the committee are of opinion that there is no *prima facie* case of misconduct against the solr, the society need not take any further proceedings, but if the committee are of opinion that there is a *prima facie* case, it becomes the duty of the society to bring the report before the Court; the report is to have the same effect as that of a Master, and any order may be made thereon. It is provided that any person who, but for the Act, would have been entitled to apply to the Court to strike a solr off the roll, or to require him to answer allegations in an affidavit, shall be entitled so to apply, although the committee is of opinion that there is no *prima facie* case, and shall be entitled to be heard if the society brings the report before the Court. In a case in which the report is in favour of the solr, the Court has jurisdiction to order the person making the charges of professional misconduct to pay the solr's costs, although the report is only filed, and not otherwise brought before the Court: *Re Lilley*, (1892) 1 Q. B. 759, C. A.

By sect. 14, the committee may administer and take oaths and affirmations for the purpose of an inquiry on any application made to them under the Act.

By sect. 19, the Master of the Rolls or any Judge of the High Court of Justice may, notwithstanding anything in the Act, exercise any jurisdiction over solrs which he might have exercised if this Act had not been passed.

The former jurisdiction of the Court is saved by this section, and where, before the Act, the Court would make an order forthwith (as, *e.g.*, on evidence of a conviction), or *semble*, in other cases where an inquiry before the Master would have been dispensed with, a motion may now be made in accordance with the old practice by the Incorporated Law Society (or *qu.* by other persons) to the Court forthwith without any application to the committee: *Cordery*, 168, citing *Re Weare*, (1893) 2 Q. B. 439.

Rules under this Act were made on the 31st January, 1889: see W. N. (89) Part II., p. 87. They prescribe the mode of applying to the committee and make regulations as to the hearing, and as to the documents to be furnished. Either party may appear in person or by his counsel or solr, and the report of the committee is to be filed in the Central Office, and the registrar, if the report is set down for consideration by the High Court, is to give notice of the day of hearing to both parties: rr. 5, 8, 10; *Cordery*, 170, 171.

If the application is by a solr to strike himself off the roll, he may be required by the committee to advertise or otherwise to give public notice of the day of hearing of the application; and in such a case the report is to be made to the Master of the Rolls, and to be filed as he shall direct: rr. 6, 8; *Cordery*, 170, 171.

On the application of the solr himself to have his name struck off the roll, the solr makes an affidavit stating grounds, and that there is no application against him on the ground of misconduct. The Law Society committee hear the application and forward it with their report to the Master of the Rolls who endorses his fiat on the application. It is not done in Court.

Provision is also made for making an entry on the roll of any adverse order of the Court on the committee's report: r. 8; *Cordery*, 171.

Under this Act and rules the right to apply to the committee in respect of a solr's misconduct is not confined to clients or persons injured; and when the solr has been adjudicated bankrupt, the notes of his public examination, in bankruptcy, signed by him, may be used in evidence against him under the Bankruptcy Act, 1883, s. 17 (8): *Re A Solicitor*, 25 Q. B. D. 17, C. A.

Where the committee are of opinion that no *prima facie* case is made out, it is competent for them to refuse to proceed to a further hearing or report. The applicant can renew his application on further evidence, or, if dissatisfied with the committee's report, can bring the matter before the Court under s. 13, but he cannot obtain a mandamus to compel the committee to hear the application: *Reg. v. Incorporated Law Soc.*, (1895) 2 Q. B. 456; *S. C.* (No. 2), (1896) 1 Q. B. 327, C. A.; *Cordery*, 172 (*q. v.* as to the report and results thereof).

The order of a colonial Court striking a solr off the colonial roll for misconduct is not a ground for the action of the Court in this country: *Re A Solicitor, Exp. Incorporated Law Soc.*, (1898) 1 Q. B. 331; *Cordery*, 169.

JURISDICTION, WHEN AND HOW EXERCISED.

Solrs will be struck off the roll in cases of gross misconduct, e.g. :—

Fraudulently abusing the confidence of the client : *Re Martin*, 6 Beav. 337;

Re J. C. M. and J. M., 24 W. R. 111;

— obtaining the client's money for the alleged purpose of discharging legal liabilities which did not exist : *Re H.*, 31 L. T. 730;

— breach of trust and misrepresentation : *Thorndike v. Hunt*, 5 Jur. N. S. 879;

— getting a false affidavit sworn, and, without authority, instructing counsel to consent to payment of money out of Court : *Wheatley v. Bastow*, 7 D. M. & G. 261, 558;

— selling out and misapplying trust funds : *Re Chandler*, 22 Beav. 253;

— having been convicted : *Re Taylor*, Q. B. D., 22 May, 1900, Form 4, *sup.* p. 1113;

— allowing houses belonging to him to be used by the tenants as brothels : *Re Weare*, (1893) 2 Q. B. 439.

The Court will take cognizance of a report showing that the solr has improperly kept back counsel's fees : *In re A Solicitor, Exp. Incorporated Law Soc.*, 63 L. J. Q. B. 397; and see *Cordery*, 142;

— or accepted as a loan large sums of money from a client who had just attained his majority : *Re A Solicitor, Exp. Incorporated Law Soc.*, (1894) 1 Q. B. 254;

— or shared profit-costs with other solrs introduced by him to act for parties having interests conflicting with that of his client : *Re Four Solicitors*, (1901) 1 Q. B. 187.

See also *Re Gregg*, 9 Eq. 137; *Meux v. Lloyd*, 2 C. B. N. S. 409; *Re Stewart*, L. R. 2 P. C. 88; and cases in 18 Sol. Jour. 65, 66, 244, 492.

Repayment, pending a rule to strike off the roll, of money fraudulently obtained is no purgation of the offence : *Re H.*, *sup.*

Notwithstanding that an order for payment of money due to a client contains also a direction to strike the solr off the roll, the order speaks from the time it is made, and it is no answer to an application for an attachment for non-payment that he is no longer a solr : *Re Strong*, 32 Ch. D. 342, C. A.

And when struck off, it is a condition precedent to being restored that the solr shall have made full restitution, or made the best efforts in his power thereto; and satisfied the Court of his unimpeachable conduct in the meantime : *Re Poole*, L. R. 4 C. P. 350; *Exp. Pyke*, 6 B. & Sm. 703.

The Court has power to restore to the roll a solr who has been struck off as the consequence of his conviction on a criminal charge, though the conviction stands, but the power will only be exercised under very special circumstances : *Re Brandreth*, 39 W. R. 687; 60 L. J. Q. B. 501; 64 L. T. 739; W. N. (91) 86.

For the terms upon which, under palliating circumstances, an order to strike off the rolls was not enforced, see *Goodwin v. Gosnell*, 2 Coll. 457.

As to the jurisdiction of the Court of Appeal to entertain an application to strike a solr off the roll, though not brought before them by way of appeal, see *Re Whitehead*, 28 Ch. D. 614, C. A.

Where a solr had not taken out his certificate for several years, and did not take any notice of an application to strike him off the roll for misconduct in reference to a mortgage transaction, the Court, under special circumstances, did not strike him off or suspend him, but made an order restraining him from applying to renew his certificate without the leave of the Court : *S. C.*

In some instances the solr has been suspended from practice for a longer or shorter period, and not actually struck off : see *Erskine v. Adeane*, *sup.*, Form 6 (for six months); *Re Hill*, L. R. 3 Q. B. 543 (for one year); *Re Blake*, 3 Ell. & E. 34 (for two years); *Re A Solicitor*, 63 L. T. 350.

Where the solr has been exonerated from the charges, application by him for the costs of the inquiry had to be made to the Divisional Court and not to a Judge in Chambers : *Re Davidson*, (1899) 2 Q. B. 103; but now by O. LII, 24, if upon an application under sect. 13 of the Act of 1888 to strike a solr off the roll, or to require him to answer the allegations contained in an affidavit, the committee find and report that the solr has not been guilty of professional misconduct, the solr may, at any time within three calendar months after the date of the report, apply by summons to a Judge in

Chambers for an order for payment to him by the applicant of the cost of and occasioned by the application to the committee and of the summons, and the Judge shall make such order thereon as he shall think just; and such order is to be final and without appeal.

Where a solr had been struck off the rolls, but the commission to administer oaths granted to him by the Court of Exchequer had never been superseded, the Court had no power to order an affidavit sworn before him to be taken off the file: *Ward v. Gamgee*, 65 L. T. 610; 40 W. R. 39; W. N. (91) 165.

Unqualified Person.—By the Solrs Act, 1843, s. 32, a solr who permits his name to be used in any action upon the account or for the profit of an unqualified person "shall and may," upon complaint made, be struck off the roll, and "for ever after disabled from practising" as a solr, and the unqualified person may be committed to prison for any term not exceeding one year. Under this section, if an order is made striking the solr off the roll, the Court has no power afterwards to reinstate him: *Re Lamb*, 23 Q. B. D. 477, C. A.; but such an order is not made in a "criminal cause or matter" within sect. 47 of the Jud. Act, 1873, and the Court of Appeal can entertain an appeal from it (*Re Eede*, 25 Q. B. D. 228, C. A.), as from any other order striking a solr off the roll, or suspending him: *Re Hardwick*, 12 Q. B. D. 148, C. A. But on such appeals the Court of Appeal is slow to interfere with the discretion of the Court below: *S. C.*

And as to the penalties incurred by unqualified persons acting as solrs, see Cordery, 33 *et seq.*; *Re A Solicitor*, 63 L. T. 350.

The generality of sect. 2 of the Act (prohibiting persons from acting as solrs unless admitted and enrolled) is not controlled by sect. 32, and an unqualified person who acts as solr commits an offence under sect. 2, although he acts in the name and with the consent of a duly qualified solr: *Abercrombie v. Jordan*, *In re Hunt*, 8 Q. B. D. 187; and see *Re Simmons*, 15 Q. B. D. 348.

It has been held that by the terms of sect. 32 (the words "shall and may" being construed as imperative) the Court is bound to strike the solr off the roll, and cannot mitigate the punishment (*Re Kelly*, (1895) 1 Q. B. 180); but now, by the Solrs Act, 1899 (62 & 63 V. c. 4), s. 1, the Master of the Rolls has power to order that the name of any solr who has been, either before or after the commencement of that Act, struck off the roll under the provisions of sect. 32 of the Act of 1843, shall be replaced upon the roll, and any such order is to be deemed to be an admission within and for the purposes of sect. 11 of the Solrs Act, 1888.

A person employed by a solr as a process-server, who settles affidavits of persons in his employment relating to service of process, does not by so doing act as a solr within 6 & 7 V. c. 73, s. 2, so as to be liable to attachment for contempt of Court under 23 & 24 V. c. 127, s. 26: *Re Louis, Exp. Incorporated Law Soc.*, (1891) 1 Q. B. 649.

In taxing a solr's bill of costs, items relating to business done while the solr had not a certificate must be disallowed: *Re Sweeting*, (1898) 1 Ch. 268, treating *Re Jones*, 9 Eq. 63, as superseded.

An unqualified person who pretends to be a solr, and so obtains possession of money and documents, may be ordered to deliver up the same, and punished by attachment if he disobeys: *Re Hulm and Lewis*, (1892) 2 Q. B. 261.

A County Court Judge has no power to commit for contempt an unqualified person who has acted as solr in an action in the County Court: *Reg. v. Judge of Brompton County Court*, (1893) 2 Q. B. 195.

Renewal of Certificate.—By 23 & 24 V. c. 127, s. 23, in case of neglect for a year to renew a certificate, a Judge's order was necessary; and now, by the Solrs Act, 1888, s. 16, if a solr who has obtained the registrar's certificate neglects for twelve months to renew his certificate, and subsequently applies for a fresh one, it shall be in the discretion of the registrar to grant or refuse the application, subject to an appeal to the Master of the Rolls, who may affirm the decision of the registrar or direct him to issue the certificate on such terms and conditions as he may think fit; and, by the Solrs Act, 1899 (62 & 63 V. c. 4), this enactment is made applicable to every solr who applies for a fresh certificate to practise after having been struck off the roll or sus-

pended from practice. Notice of the intention to make the application must be given to the registrar at least six weeks before the application is actually made, unless such notice is dispensed with by the registrar or the Master of the Rolls.

The certificate has been renewed without compelling the applicant to undergo examination: *Re Elton*, 16 W. R. 323 (after a retirement for eleven years from ill-health); *Re Sewell*, 32 Beav. 475 (after ceasing to take out a certificate for ten years, with the intention of being called to the bar).

But after ceasing to practise for eighteen years, examination was required: *Exp. Leith*, 7 W. R. 579.

Proceedings by a solr who has neglected to renew his certificate will not be set aside as irregular, but he cannot recover costs in respect of them: *Sparling v. Brereton*, 2 Eq. 64; and see *Re Jones*, 9 Eq. 63; *Re Hope*, 7 Ch. 766; *Brown v. Tolley*, 31 L. T. 485.

CHAPTER XLI.

TRUSTEES.

SECTION I.—BREACH OF TRUST GENERALLY.

1. *Inquiry as to Dealings with Trust Funds.*

AN inquiry what trust funds, under (funds subject to) the trusts of the said indenture of &c., were possessed by or transferred into the names of A. &c., and the Defts S. &c., and what hath become of such trust funds, and whether any, and, if any, what, transfer or transfers was or were at any time, and when, and by what means, made thereof, or of any and what part thereof, into the names of the Defts S. &c., or of any other and what persons, and under what circumstances, and whether any, and, if any, what, change of the securities wherein such trust funds, or any and what part thereof, were originally invested ever, and when and under what circumstances, took place, and what hath become of such trust funds.—*Lester v. Archdall*, V.-C. K. B., 3 June, 1847, B. 1738.

2. *Inquiries as to Deceased Trustee's Balance, and as to the Trust Estate, and Dealings therewith, and with the Income thereof, and as to the Purchase of Land.*

LET the following &c. : 1. An inquiry whether any and what balance was at the death of D. due from him to the estate of the testator H., or to the funds comprised in the indenture of settlement dated &c.; and whether any and what moneys have been received in respect of such balance (if any), and when and by whom, and under what circumstances; and how such moneys ought to be applied, and whether any and what further proceedings can or ought to be taken for the recovery of such balance (if any), or any part thereof.

2. An inquiry of what particulars the property comprised in the schedule to the said indenture of settlement consisted at the date of the said indenture, and whether any and what parts of such property, or any other property for the time being subject to the trusts of the said indenture, have since that date been sold, exchanged, disposed of, or parted with, and when, and by whom, and under what circumstances, and by whom the proceeds respectively were received, and whether

any and what other property has been from time to time purchased or acquired in substitution for, or in addition to, the property for the time being subject to the trusts of the said indenture, and when and by whom, and under what circumstances, and what are the particulars of the property now subject to the trusts of the said indenture of settlement.

3. An inquiry whether any and what parts of the property for the time being subject to the trusts of the said indenture have been lost or misappropriated, and when and by whom, and under what circumstances, and whether any and what parts of the property so lost or misappropriated have been recovered or made good, and when and by whom, and under what circumstances, and how the property so recovered ought to be applied.

4. An inquiry whether any and what moneys for the time being subject to the trusts of the said indenture of settlement have been invested in the purchase of land, and what were the particulars of such investments, and who has been in the receipt of the rents and profits of such land since the purchase thereof.

5. An account of the moneys received by the Deft B. &c., and D. deceased, or either of them, in respect of the interest, dividends, and income of the property for the time being comprised in or subject to the trusts of the said indenture of settlement, or in respect of the sale or disposal of any parts thereof which have been sold or disposed of, and in respect of the rents and profits of any lands which may have been purchased with the moneys subject to the trusts of the said indenture.—*Donaldson v. D.*, V.-O. B., 18 Feb. 1871, A. 553.

3. *Uninvested Trust Money—Account of Dividends not received, with Interest thereon—Half-Yearly Rests.*

DECLARE that the Deft is chargeable with the dividends, amounting together to £—, which became payable in respect of the railway stocks &c., in the statement of claim mentioned, and which might have been received by her during the period in the statement of claim mentioned, together with compound interest on the amount of such dividends at the rate of £3 p. c. per ann. from the respective dates when such dividends became payable, with half-yearly rests.—Account of amount due by Deft to Plt having regard to above declaration.—*Gilroy v. Stephen, Fry, J.*, 7 June, 1882, A. 1252; S. C., 51 L. J. Ch. 834.

4. *Inquiry as to Money received by Trustees of whom one was an Infant.*

UPON the appeal of the Plt from so much of the order dated &c., this day made unto this Court, and upon hearing counsel for the appellant and the Deft A. B.; Let the said order dated &c., be varied, and instead

of the account thereby directed, Let the following account and inquiry be taken and made: (1) An account &c.; (2) An inquiry whether all or what part or parts of the moneys mentioned in the indenture of settlement dated &c., represent property comprised in the articles of &c., have or has come to the hands or into the possession or under the disposition or control of the Deft A. B., and what have been his dealings and transactions in respect of the same, and of what the property subject to the trusts of the indenture of settlement now consists, and what were the dates of and circumstances attending such receipts, dealings and transactions; And Let the Deft C. D. be at liberty to attend the inquiry.—*Re Garnes, G. v. Applin, C. A.*, 25 Nov. 1885, A. 4030; 31 Ch. D. 148, C. A.

5. *Inquiries as to adoption of Accounts and Prosecution of Order on behalf of Infants—Account of Trust Funds—Inquiries.*

1. LET an inquiry be made whether it will be fit and proper and for the benefit of the Plts, the infants, that accounts should be taken of the funds and property subject to the trusts of the indenture of settlement in the Plts' (bill) mentioned, dated &c., and of the dealings of the trustees therewith, or whether the account thereof set forth in the answer of the Deft W. should be adopted; 2. And if it should appear to be for the benefit of the infant Plts that such accounts should be taken, then Let an account be taken of the funds and property subject to the trusts of the said indenture of settlement, and of the dealing of the trustees therewith; And Let the following &c., viz.: 3. An inquiry whether it will be fit and proper and for the benefit of the Plts that the order of the — day of —, whereby the Deft W. was ordered to transfer and pay into Court certain funds and moneys in his hands belonging to the trust estate, should be further, and to what extent, prosecuted as to so much of such funds and moneys as the said Deft has not yet transferred and paid into Court in pursuance of the said order; 4. An inquiry whether anything and what is due from the Deft W. in respect of the trust funds received by him, or by any other &c.; 5. An inquiry whether any and what parts of the trust funds are outstanding on any and what security, and whether any and what proceedings should be taken for getting in and realizing the same.—Directions to appoint new trustees and for paying costs.—*Winkworth v. W.*, M. R., 2 May, 1857, B. 1021.

6. *Accounts and Inquiries as to Trust Property, Rents, and Interest—Surrender of Copyholds—Customary Heir—Sale of Stock and Effects—Possession of Title Deeds—Duty payable.*

DECLARATION that Plts became entitled beneficially on the insolvency of their father to the trust property, and to receive the income; And

Let the following &c., "1. An account of the trust funds possessed and received by the Defts as trustees of the said indenture of settlement dated &c., or any of them, or by any other person &c.; 2. An account of the rents, dividends, interest, or annual profits received by the said Defts, or any of them, or by any other person &c. since the said — day of — in respect of the said trust estates and funds &c., comprised in the said indenture of settlement; 3. An inquiry what real and personal estates were comprised in the trusts of the said indenture of settlement; 4. An inquiry under what circumstances the £— Cons., part of the £— Cons. stated by the answer of the Defts S. and P. to have been sold out by them on &c., were so sold out, and how and in what manner or to what purpose the proceeds of such sale were applied, and whether, having regard to the trusts of the aforesaid indenture of settlement, such sale of stock and the application of the proceeds of such sale was fit and proper and for the benefit of the Plts; 5. An inquiry whether any and what surrender was ever made, and if so when, of the copyhold hereditaments holden of the manor of — &c., in conformity with the covenant for that purpose contained in the said indenture of settlement, and who at the decease of M., the wife of W. (*insolvent*), was her heir according to the custom of the said manor, and who is now such customary heir; 6. An inquiry of what the household goods &c. mentioned and comprised in the said indenture of settlement consisted, and what has become thereof, and if the same or any of them have been sold, by whom and when and under what circumstances, and for what sum or sums of money, and to or by whom such money was paid or received; 7. An inquiry who is or are in the possession of the title deeds of the trust estate, and in what right or alleged right, or under what circumstances the holder or holders of the title-deeds obtained possession of and now claim to hold the same, and whether any and what proceedings should be taken by and against any person or persons, and whom, for the purpose of recovering possession of such title-deeds on behalf of the Plt; 8. An inquiry whether any and which of the trust funds and premises comprised in the aforesaid indenture of settlement is or are subject to, or charged or chargeable with, the payment of any and what legacy or succession duty."—Direction to transfer stock into Court.—[*Add Lodgment and Payment Schedule directing lodgment of stock in Court and sale to pay duty, if any.*—See *Westall v. Sparrowell*, M. R., 11 June, 1860, B. 1308.

7. Account and Inquiry as to Funds under Two Settlements and state of Investment, in Action by Trustee for his Discharge.

LET the following &c.—1. An account of the trust funds and property come to the hands of the Plt as trustee under each of the indentures of settlement, dated respectively &c., in the pleadings mentioned, either solely or jointly with his co-trustee, or co-trustees, under the said indentures respectively; 2. An inquiry whether the said trust

funds and property are now in the possession of the trustees respectively, and whether in the same state of investment as at the time when such trust funds and property came into the hands of the said trustees, or in any other and what state of investment; but such account and inquiry respectively are not to extend to the income of the said trust funds and property.—See *Ricardo v. Cooper*, L. C., 29 June, 1861, B. 1474, on Deft's appeal.

And for the decree below discharging Plt from being trustee of both settlements, and, in case a new trustee should not be appointed by the donees within a limited time, for the appointment of a new trustee, see *S. C.*, M. R., 15 March, 1861, B. 841; the *cs. q. t.* under both settlements were the same; Plt's bill was for his discharge from the trusts, the *cs. q. t.* suing him for other matters.

8. *New Trustees appointed—Former Trustee to replace Stock and pay amount of Dividends.*

APPOINT new trustees of the settlement; And Let the Deft W. E. N. (*trustee*) (within &c.) purchase £— Cons. and transfer the same to such new trustees when so appointed; And Let the Deft W. E. N. (within &c.) pay to the Plt J. M. (*tenant for life*), the sum of £—, being the amount of dividends which would have accrued on the Cons. sold by the Deft, as in the statement of claim mentioned, if the same had not been sold out, to the time of the issue of the writ, and also all further dividends which would have accrued due thereon, until the said Cons. shall be so purchased and transferred as aforesaid, the amount of such further dividends to be ascertained and certified.—Plt's costs to be taxed and paid by Deft.—Liberty to apply.—See *Matthews v. Nicholls*, M. R., 15 Jan. 1853, 1852, B. 401; and see *inf.* p. 1143, Forms 7 *et seq.*

For decree that debentures fraudulently disposed of by trustee without the concurrence of co-trustee be deposited in a box in Court by alleged purchaser, with account of interest on the debentures received by Defts, in whose hands they had been, and they to pay to the Plt what should be certified to be due from them respectively; Defts, including the fraudulent trustee, to pay Plt's cost of suit; the purchaser only so far as they were increased by making him Deft, see *Giles v. Pressey*, M. R., 8 Nov. 1861, A. 2013.

For decree for purchaser of railway debentures for value, without notice of fraud, from a trustee who had been allowed by his co-trustees to have the debentures in his sole custody and to receive the income, and who forged their signatures to the transfer deed, to deliver them up to the co-trustees; and the railway company to cancel the transfer, without prejudice to any question at law between them and the co-trustees, see *Cottam v. East Co. Ry.*, 1 J. & H. 243; and see *Stackhouse v. Cs. Jersey*, *Ib.* 721; 7 Jur. N.S. 359; 9 W. R. 453; *Taylor v. Midland Ry.*, 28 Beav. 287; affirmed in D. P., 8 H. L. C. 753; 8 Jur. N.S. 419; and see 30 Beav. 219; *Taylor v. G. I. P. Ry.*, 4 D. & J. 559; and *v. inf.* Vol. III. pp. 2308 *et seq.*

9. *Fraudulent Trustee declared personally Liable—Account—Payment into Court—Appointment of New Trustees—Costs.*

UPON motion &c.; And the Plt and Defts, other than the Deft G., by their counsel consenting that this motion shall be treated as the trial

of this action; and the Deft G. by his counsel not objecting thereto; Declare that the Deft G. is personally liable to make good all sums received by him as trustee of the estate of the testator B., and not duly invested or accounted for, with interest thereon at the rate of 5 p. c. per ann. from the respective dates of receipt thereof until the same shall have been made good; And Declare that the trusts of the will of the said testator, so far as the same are now subsisting, ought to be carried into execution &c.; And Let the following &c.:—1. An inquiry of what particulars the trust estate consisted on the — day of —, the date of the death of J., deceased, and of what the same estate now consists; 2. An account of what is due from the Deft G. for moneys received by him as such trustee as aforesaid, and not duly invested or accounted for, and interest thereon at the rate aforesaid; And Let the Deft G., on or before the — day of —, or subsequently within four days after service of this judgment, lodge in Court, as directed by the lodgment schedule hereto, the sum of £— cash and the debentures in the schedule mentioned, being cash and debentures admitted by him to be in his hands as trustee of the testator's will; And Let the Deft G., on or before the said — day of —, or subsequently within four days after service of this judgment, deliver up upon oath to the Plt all deeds, accounts, vouchers, and other documents in his custody or power relating to the said trust estate.—Refer to Chambers to appoint new trustees of the said will in the place of the Deft G. and the said J., deceased.—Deft G. to pay to the Plt his costs of this action up to and including this judgment, to be taxed.—Adjourn &c.—[*Add Lodgment Schedules*, Forms Nos. 1 and 2.].—*Re Brown, B. v. Hastings*, Keke-wich, J., 30 Oct. 1891, A. 2200.

The copy for service is to be endorsed with the memorandum prescribed by O. XII, 5.

The direction to pay into Court does not make the Plt a judgment creditor under 1 & 2 V. c. 110, or under sect. 45 of the Bankruptcy Act, 1883, and therefore a sequestration under it is not valid (at least until actual sale) as against the trustee in bankruptcy of the Deft: *Exp Brown, Re Hastings*, 8 Times Rep. 683; 61 L. J. Q. B. 654; 67 L. T. 234; therefore, if bankruptcy of the Deft is apprehended, the judgment should be framed as in Form 10.

10. *Order for Payment by Trustees where intended to be Registered as a Judgment.*

LET the Deft W., on or before &c., pay to the Plt T. the sum of £980 in the Plt's claim mentioned, together with £94 for interest thereon, at the rate of £5 p. c. per ann. from the — day of — to the said — day of —, after deducting &c., the said two sums making together £1,074 (the Plt by his counsel undertaking to give the Deft all reasonable facilities for realizing the securities deposited with the Plt's solr).—Direction for Plt to lodge the amount in Court within (one) week after receiving it, as directed in the schedule hereto.—Deft to pay Plt's costs of action.—Liberty to apply.—[*Add Lodgment Schedule*, Form

No. 1.]—See *Thompson v. Walker*, V.-C. W., 11 May, 1859, B. 1592; *S. C.*, in note to *Wand v. Docker*, 5 Jur. N.S. 1287; 2 L. T. 82.

For order declaring, without prejudice to the right of the Plt and the other *co. q. t.* against T. (the other trustee), the Deft D. liable to make good the amount produced by sale of a sum of New £3 p. c. Anns, with interest at £5 p. c. per ann. from the date of the sale up to the time of payment, with directions for payment, and for delivering up of deeds and payment of costs of suit, see *Wand v. Docker*, V.-C. W., 9 Dec. 1859, B. 512; *S. C.*, 5 Jur. N. S. 1284; 2 L. T. 82.

11. *Liberty to Trustees to apply in Chambers as to Indemnity against Tenant for Life.*

DECLARATIONS as to breaches of trust and consequential directions; Liberty to apply in Chambers for the appointment of new trustees of the indentures of settlement dated &c., in the pleadings mentioned; And at the request of the Defts E. H., J. M. H., A. G. H., and E. R., Liberty for the said Defts to apply in Chambers with reference to enforcing such rights (if any), as they may have to impound the interest of the Deft H. E. H. in the said indentures of settlement dated &c. by way of indemnity to the estates of the said G. H. and S. F. R. —[*Lodgment Schedule directing lodgment to credit of action, "Settlement Moneys," and for investment and accumulation.*]—See *Re Holt, Re Rollason, Holt v. Holt*, Byrne, J., 9 July, 1897, A. 1073; (1897) 2 Ch. 525.

NOTES.

ACTION FOR ACCOUNT.

In all cases in which the Plt in the first instance desires to have the account taken, the writ of summons is to be indorsed with a claim that such account be taken: O. III, 8; then, if the Deft fails to appear (*v. sup.*, Vol. I. pp. 172, 173), or appears, but fails to satisfy the Court that there is some preliminary question to be tried, the Plt may obtain an immediate order for the account claimed, with all directions which were usual in the Court of Chancery in similar cases: O. xv, 1. The application is to be by summons in Chambers: r. 2. As to parties to actions in respect of breaches of trust, *v. inf.* p. 1139.

BREACHES OF TRUST GENERALLY.

Though mere deviation from the letter of the trust may not render trustees liable, they must be prepared to show this was necessary or beneficial: *Harrison v. Randall*, 9 Ha. 397, 407; and the ordinary indemnity clause does not exempt trustees from liability in respect of a breach by their co-trustees: *Brumridge v. B.*, 27 Beav. 5; though it may be so specially worded as to have that effect: *Wilkins v. Hogg*, 3 Giff. 116; *Pass v. Dundas*, 29 W. R. 332; 43 L. T. 665.

As to such clauses, see *Hale v. Adams*, 21 W. R. 400; *Rehden v. Wesley*, 29 Beav. 213.

Trustees directed to sell, mortgaging, were liable for loss in value of the estate: *Devaynes v. Robinson*, 24 Beav. 86; but a power to mortgage includes power to give a power of sale: *Re Chawner*, 8 Eq. 569. An admor *dur. min.* *et.* could sell under a power given to exors or admors: *Monsell v. Armstrong*, 14 Eq. 423; and trustees for sale may, without express power, fix a reserved price: *Re Peyton*, 30 Beav. 252.

In *Taylor v. Tabrum*, 6 Sim. 281, trustees refusing an offer, and afterwards selling for less, were liable for the difference; and so exors, and for delay: *Fry v. F.*, 27 Beav. 144; see, as to trusts created after 28th Aug. 1860, and previously to 1st Jan. 1882, 23 & 24 V. c. 145, ss. 1, 2; and as to subsequent trusts, 44 & 45 V. c. 41, s. 35 (replaced now by Trustee Act, 1893, s. 13); 45 & 46 V. c. 38, s. 64.

But a contract by a trustee to sell for 6,000*l.* to A. could not be set aside at the suit of the assignee of one c. q. t. who offered 7,000*l.*, unless there was misconduct of which A. had notice: *Harper v. Hayes*, 2 D. F. & J. 542; 9 W. R. 504; 2 Giff. 210, 216; but see *Goodwin v. Fielding*, 4 D. M. & G. 90; *Stevens v. Austen*, 7 Jur. N. S. 873; 30 L. J. Q. B. 212; 3 L. T. 810; 3 El. & El. 685.

Including parts of two trust estates in one lot for sale was a breach of trust: *Rede v. Oakes*, 4 D. J. & S. 505; *secus*, where the sale was by the Court, and selling them together was beneficial, and the purchase-money could be apportioned: *Cavendish v. C.*, 10 Ch. 319; and see *Morris v. Debenham*, 2 Ch. D. 540. Trustees may not sell under an open contract: *John v. Jones*, 34 L. T. 570; but may sell without excluding the Vend. and P. Act, 1874, s. 2: Trustee Act, 1893, s. 15.

Power to sell leaseholds did not authorize sale by way of sub-demise, trustees thus continuing liable: *Re Walker and Oakshott*, (1901) 1 Ch. 383.

And trustees, exors or admors cannot bind the trust estate by a proviso in a lease giving the lessee an option of purchase: *Oceanic Steam Navigation Co. v. Sutherland*, 16 Ch. D. 236, C. A.

And, generally, the powers of trustees must be exercised according to the circumstances as they exist, and not by way of anticipation: see *Chambers v. Smith*, 3 App. Ca. 795, 808; Lewin, 732.

Where property is sold so as to be a breach of trust, the trustees and the purchaser (though he contracted without notice of the breach) may be restrained from completing: *Dance v. Goldingham*, 8 Ch. 902.

In *Cooke v. Crawford*, 13 Sim. 91, V.-C. E. held that a power of sale in trustees, and the survivor, and his heirs, could not pass by his will, and that his devise of the estate was a breach of trust, and that the costs of getting in the estate must be paid by his exors; and see *Ockleston v. Heap*, 1 D. & S. 640; *Mortimer v. Ireland*, 6 Ha. 196; but see *Titley v. Wolstenholme*, 7 Beav. 425, 434; *Wilson v. Bennett*, 5 D. & S. 475, 478; *Salway v. Strawbridge*, 7 D. M. & G. 594; 1 K. & J. 371 (where the word "assigns" was added). The doctrine of *Cooke v. Crawford* will not be extended: *Ashton v. Wood*, 3 S. & G. 436, 445; *Hall v. May*, 3 K. & J. 585; and was expressly disregarded in *Osborne v. Roulett*, 13 Ch. D. 774; but see *Morton v. Hallett*, 15 Ch. D. 143, 149, C. A., where the Court, though holding that a trust for sale might be executed by the heir of the surviving trustee for sale, declined to treat *Cooke v. Crawford* as overruled; and that the Court will not force upon a purchaser a title which depends on *Cooke v. Crawford* (13 Sim. 91), not being good law, see *Re Rumney*, (1897) 2 Ch. 351; and see Lewin, 246 *et seq.* As to a devise by a constructive trustee, see *Purser v. Darby*, 4 K. & J. 41. Now, by the Law of Property Amendment Act, 1859 (22 & 23 V. c. 35), s. 14, any devisee in trust of estates charged with debts may raise money by sale, although there is no express power; and by sect. 15 the powers conferred by the last section are extended to all persons in whom the estate shall for the time being be vested by survivorship, descent, or devise, or by any subsequent appointment of new trustees. And see sect. 30 of the Conveyancing Act, 1881 (44 & 45 V. c. 41), as to reprieve of a sole surviving trustee: Lewin, 268; *Pixton v. Tong*, 46 W. R. 187; *inf.* p. 1220. As to what words in a will carry trust estates, see notes to Section X., *inf.* pp. 1219, 1220.

The heir or devisee in trust becomes liable by acting: *Rackham v. Siddall*, 1 Mac. & G. 607; and see *Legg v. Mackrell*, 1 Giff. 165; and so does an invalidly appointed trustee: *Pearce v. P.*, 22 Beav. 248.

As to the liability of retiring trustees for a subsequent breach of trust, see *Webster v. Le Hunt*, 9 W. R. 918; *Clark v. Hoskins*, 36 L. J. Ch. 689; reversed on appeal, 37 L. J. Ch. 561; *Palairt v. Carew*, 32 Beav. 567; *Head v. Gould*, (1898) 2 Ch. 250; Lewin, 790, 791.

The former or continuing trustees are not discharged from liability by an appointment of new trustees under the Trustee Act: see Trustee Act, 1893, s. 25, sub-s. 2; Lewin, 798; *inf.* p. 1222.

Trustees making a compromise as to a trust fund, and not showing it was for the benefit of the *cs. q. t.*, were liable for the difference: *Wiles v. Gresham*, 5 D. M. & G. 770.

Parties incurring no risk or expense by acting should not, by remaining passive, prevent owners obtaining their property, as bankrupt trustee's assignees neglecting to transfer the fund: *Re Primrose*, 23 Beav. 590; or deceased trustee's represve: *Legg v. Mackrell*, 1 Giff. 165; and see *Reade v. Sparkes*, 1 Moll. 8.

Trustees were not liable for the loss of property of the existence of which they were ignorant: *Youde v. Cloud*, 18 Eq. 634.

Where a trustee is also mortgagee of the trust property he cannot foreclose, nor can he bid at the sale; but after a failure to sell he may perhaps purchase under proposals to the Court: *Tennant v. Trenchard*, 4 Ch. 537.

Where the tenant for life, for a nominal consideration, assigned certain arrears and profits alleged to be due from him by reason of breaches of trust, a suit by the assignee against the trustees was dismissed with costs: *Hill v. Boyle*, 4 Eq. 260.

OUTSTANDING FUNDS.

In *Fenwick v. Greenwell*, 10 Beav. 412, trustees were held liable for not enforcing a covenant to pay in a marriage settlement; and in *Styles v. Guy*, 16 Sim. 230; 1 Mac. & G. 422; 1 H. & T. 523, executors not prosecuting an inquiry whether they could get in a debt to the estate from a co-exor, who afterwards became insolvent, were ordered to pay in the debt and interest; and exors directed by the Court to get rid of dammose leasehold, and to sell canal shares, and not doing so, were held liable: *Rowley v. Adams*, 4 My. & C. 534; *Davenport v. Stafford*, 14 Beav. 319; and for leaving out money on personal security, though so invested by the testator: *Bullock v. Wheatley*, 1 Col. 130; and for not converting long annuities: *Bate v. Hooper*, 5 D. M. & G. 338; and for leaving money in a house of business in India: *Munch v. Cockerell*, 5 My. & C. 178; 9 Sim. 339; or in the hands of solrs: *Dewar v. Brooke*, 52 L. T. 489; 54 L. J. Ch. 380; and for not getting in a fund: *M'Gachen v. Dew*, 15 Beav. 84; and it is their duty to press for payment of outstanding funds, and, in default of payment within a reasonable time, to sue: *Re Brogden*, *Billing v. Brogden*, 38 Ch. D. 546, C. A.; *et v. inf.*, pp. 1141, 1148.

And where trustees are empowered to invest a trust fund by depositing it with a particular firm, and do so, it is their duty to call in the money upon a change of partners in the firm: *Re Tucker*, (1894) 1 Ch. 724; (1894) 3 Ch. 429, C. A.; and see *Smith v. Patrick*, (1901) A. C. 282, H. L.

But exors and trustees are not liable for not proceeding, if it is shown that it would have been useless so to do; *Clack v. Holland*, 19 Beav. 262; and see *Re Roberts*, *Knight v. Roberts*, 76 L. T. 479, C. A.; though the burden lies on them to show that they had a well-founded belief that proceedings would be useless: *Re Brogden*, *sup.*; nor for not proceeding sooner against an auctioneer for deposit of sale money: *Edmonds v. Peake*, 7 Beav. 239; and see *Ogle and Pilling*, 8 Ch. 711; nor for not obtaining a fund which the settlers could not legally entitle them to possess, nor are they bound by an admission (induced by fraud) of having done so: *Derbishire v. Home*, 3 D. M. & G. 80; *Neale v. Davis*, 5 D. M. & G. 258; and see, as to such admission in a voluntary settlement, *Marler v. Thomas*, 17 Eq. 8 (but in *Story v. Gape*, 2 Jur. N. S. 706, the trustees were held bound by a recital of the transfer to them: and see *Hale v. Adams*, 21 W. R. 400; Lewin, 214); nor for not calling in from a co-trustee money which they had a discretion to lend to him: *Paddon v. Richardson*, 7 D. M. & G. 563; nor for not inquiring after funds being payable under a covenant to settle future property: *Exp. Greaves*, 8 D. M. & G. 291; nor for not renewing a fire insurance: *Fry v. F.*, 27 Beav. 146; nor, under the circumstances, for not keeping up a life policy: *Hobday v. Peters*, 28 Beav. 603; nor for loss of interest caused by excusable delay in taking out probate: *Re Stevens*, *Cooke v. S.*, (1898) 1 Ch. 162, C. A.

ASSIGNMENT—NOTICE.

Notice of assignment to trustees before the funds reached their hands had no effect: *Buller v. Plunkett*, 1 J. & H. 441; 7 Jur. N. S. 873; 9 W. R. 190;

Somerset v. Cox, 33 Beav. 634; and notice to their solr will not, *per se*, be sufficient: *Saffron Walden B. B. Soc. v. Rayner*, 14 Ch. D. 406, C. A.; *Arden v. A.*, 29 Ch. D. 702; *Rickards v. Gledstanes*, 3 Giff. 298. But notice to one of several is enough: *Willes v. Greenhill*, 4 D. F. & J. 147; *Lewin*, 864; and verbal notice of assignment of policy to one director: *N. British, &c. Co. v. Hallett*, 7 Jur. N. S. 1263; 9 W. R. 880. See now, as to life policies, 30 & 31 V. c. 144; and as to marine policies, 31 & 32 V. c. 86.

The notice, under 30 & 31 V. c. 144, is to enable the assignee to sue, and is not requisite to complete his title as against a subsequent assignee: *Newman v. N.*, 28 Ch. D. 674.

The notice must be given after the relation of trustee and *c. q. t.* is created: *Webster v. W.*, 31 Beav. 393; and new trustees are not bound to inquire of the old ones as to notices received by them, nor are they bound thereby, nor does the Court make such inquiry on appointing new trustees: *Phipps v. Lovegrove*, 16 Eq. 80; nor will they be fixed with constructive notice of incumbrances not disclosed to them by the retiring trustee, and not referred to in the trust documents: *Hallows v. Lloyd*, 39 Ch. D. 686; nor does a trustee lose priority by not mentioning a charge of his own on receiving notice of another's: *Re Lewer*, 4 Ch. D. 101; 5 Ch. D. 61, C. A.

As to the necessity of renewing the notice on the death of the trustee, see *Lewin*, 865, and that priority is not *ipso facto* lost by such death, see *Ward v. Duncombe*, (1893) A. C. 369, H. L.; affirming C. A., (1892) 1 Ch. 188, *nom. Re Wyatt, White v. Ellis*.

And a trustee who has the legal estate, and takes an assignment by way of mortgage from a *c. q. t.*, can avail himself of the legal estate as a protection against a prior incumbrance of which he has no notice: *Newman v. N.*, 28 Ch. D. 674.

And that notice through a solr cannot be imputed when the conduct of the solr is such as to raise a conclusive presumption that he would not communicate the matter to his client, see *Cave v. C.*, 15 Ch. D. 639; *Espin v. Pemberton*, 3 D. G. & J. 547; *Rolland v. Hart*, 6 Ch. 678.

Trustees accepting *bond fide* a transfer of stock from their co-trustee are not affected by his knowledge that such stock was in fact purchased with other trust funds misappropriated by him: *Taylor v. Blakelock*, 32 Ch. D. 560, C. A.; and see *Taylor v. London and County Bank*, (1901) 2 Ch. 231, C. A.

A vendor is not liable for conveying to the purchaser, upon payment of the purchase-money, after receiving notice of a charge on the agreement: *Shaw v. Foster*, L. R. 5 H. L. 321.

Notice to exor after admon decree and payment into Court of some of the funds, under the Trustee Relief Act, was good without a stop order: *Thompson v. Tomkins*, 2 Dr. & S. 8; but see *Mutual Life Ass. Soc. v. Langley*, 26 Ch. D. 686; 32 Ch. D. 460, 470, C. A., *et sup.* Vol. I. p. 498.

A trustee is not bound to answer inquiries of a stranger about to deal with his *c. q. t.*; and if he does answer them honestly, to the best of his actual knowledge and belief, he will incur no liability; *Low v. Bouverie*, (1891) 3 Ch. 82, C. A.; *Derry v. Peek*, 14 App. Ca. 337; but he may in answering bind himself by a statement amounting to a warranty, or which may be used against him by way of estoppel in a properly-constituted action: *Low v. Bouverie, sup.*, explaining *Burrowes v. Lock* (10 Ves. 470), and treating *Slim v. Croucher* (1 D. F. & J. 518) as overruled by *Derry v. Peek, sup.*

A trustee is bound to furnish particulars of investments of a fund on the request of a *c. q. t.* entitled to a share: *Re Dartnall, Sawyer v. Goddard*, (1895) 1 Ch. 474, C. A.; and a *c. q. t.* contingently entitled in reversion to consols may require from the trustees an authority to the Bank of England enabling him to ascertain whether there are any charging orders, stop orders, or distringases upon the trust fund: *Re Tillott, Lee v. Wilson*, (1892) 1 Ch. 86.

When the fund is in Court the equivalent of notice is a stop order, as to which *v. sup.* Chap. XXVIII., p. 491 *et seq.*

As to assignment of debts and choses in action and notice, see Jud. Act, 1873, s. 25 (6), *sup.* Vol. I., p. 503.

PAYMENT INTO COURT BY TRUSTEE.

Any admission by an accounting party of a sum being due is sufficient to

ground an order upon him to pay into Court: *London Syndicate v. Lord*, 8 Ch. D. 84, 90, C. A.

Any admission, direct or implied, is sufficient to enable the Court to act: *London Syndicate v. Lord*, *sup.*; *Freeman v. Cox*, 8 Ch. D. 148; *Hampden v. Wallis*, 27 Ch. D. 251; *Dunn v. Campbell*, 27 Ch. D. 254, n.; *Porret v. White*, 31 Ch. D. 52, C. A.; *Wanklyn v. Wilson*, 35 Ch. D. 180, 186; and a verbal admission is sufficient: *Re Beeny*, (1894) 1 Ch. 499.

Formerly the right to have the money paid into Court must have been properly raised by the pleadings: *Proudfoot v. Hume*, 4 Beav. 476; and see *Richardson v. Bank of England*, 4 My. & Cr. 165; and the order was more readily made at the hearing than on interlocutory motion: *Governesses' Institution v. Rusbridger*, 18 Beav. 467; or on admissions by answer: *Collis v. C.*, 2 Sim. 365; though an admission in Chambers was acted upon: *Hinde v. Blake*, 4 Beav. 597; but the order is now made at any time, either under O. XXXII, 6, or under the original jurisdiction of the Court.

In the case of trust funds, a reasonable ground for making the order, such as danger to the fund, must be shown: *Re Braithwaite, B. v. Wallis*, 21 Ch. D. 121; *Ross v. R.*, 12 Beav. 89; but see *Robertson v. Scott*, 14 L. T. 187.

Thus, trustees have been ordered to pay into Court trust-money misappropriated: *Re Brown, B. v. Hastings*, Form 9, *sup.* p. 1123; or unaccounted for: *Freeman v. Cox*, 8 Ch. D. 148; or not invested: *Wiglesworth v. W.*, 16 Beav. 269; or invested on improper security: *Score v. Ford*, 7 Beav. 333; *Bourne v. Mole*, 8 Beav. 177; *Re Learoyd*, 32 Ch. D. 206; 33 Ch. D. 347, C. A.; 12 App. Ca. 727; or paid away improperly: *Scott v. Beecher*, 4 Price, 346; *Meyer v. Montriou*, 4 Beav. 343; but see *Crompton and Evans Union Bank v. Burton*, (1895) 2 Ch. 711; but six weeks were allowed for getting in a mortgage: *Wyatt v. Sherratt*, 3 Beav. 498; *Collis v. C.*, 2 Sim. 365.

But the practice will not be extended: *Neville v. Matthewman*, (1894) 3 Ch. 345, C. A.; and money improperly paid away by a solr, out of proceeds of sale of a mortgaged property, to the exors of the mortgagees instead of to the second mortgagees, was not ordered into Court on interlocutory motion: *Crompton and Evans Union Bank v. Burton*, (1895) 2 Ch. 711; and notwithstanding admissions in correspondence the Court will have regard to an affidavit made by the trustee in answer to the motion: *Neville v. Matthewman*, *sup.*; but an affidavit by the trustee merely stating that the money received by him is not in his hands, and not showing that he has no control over the money or the investments of it, is not sufficient: *Re Benson, Elletson v. Fillers*, (1899) 1 Ch. 39.

Payment in on originating summons under O. LV, 3 (d), will not be ordered unless the money is actually in the hands of the exors, admors, or trustees: *Nutier v. Holland*, (1894) 3 Ch. 408, C. A.; disapproving *Re Chapman*, 54 L. T. 13.

And for a fuller discussion of the subject, see Lewin on Trusts, 10th ed., pp. 1190—1197.

LIABILITY OF TRUSTEES AND EXECUTORS FOR EACH OTHER'S ACTS.

For the rules as to trustees and exors being held liable for the acts and defaults of co-trustees and co-exors, see *Townley v. Sherborne, Brice v. Stokes*, 2 L. C. Eq. 960, 967, and notes, 996; *Styles v. Guy*, 1 Mac. & G. 422; 1 H. & T. 523, *et sup.* p. 1127; Lewin, 283 *et seq.*

The rules are the same as to trustees and exors: *Styles v. Guy*, 1 Mac. & G. 422.

Under a common decree for account an exor could only be charged with his own acts and actual or constructive receipts: *Terrell v. Matthews*, 1 Mac. & G. 433, n.

Trustees and exors are not in general chargeable with each other's defaults. Thus they are not liable for loss of property got from them by the fraud of the co-trustee: *Barnard v. Bagshaw*, 3 D. J. & S. 355; nor for leaving documents of title, as debentures, with a co-trustee, and allowing him to receive the income; and do not thereby give him any implied authority to deal with the property: *Cottam v. E. Co. Ry.*, 1 J. & H. 243; *Goldney v. Bower*, cited *ib.* 247; and see Form 4, *inf.* p. 1158.

All the trustees (or some one authorized by all: *Margetts v. Perks*, 12 W. R.

517) must join in a receipt or release, and they are not liable merely for signing receipts: *Fellows v. Mitchell*, 1 P. W. 81; *Re Fryer*, 3 K. & J. 317; *Jago v. J.*, 68 L. T. 654.

An acknowledgment by one co-trustee of mortgaged property, given to the mortgagee without the consent or knowledge of his co-trustee, will not (whatever may be the law as between co-exors) bind his co-trustee so as to prevent the operation of the statute: *Astbury v. A.*, (1898) 2 Ch. 111.

Secus, as to exors, *v. inf.* Chap. XLIV., "ADMINISTRATION"; but one of two who are both exors and trustees can give a good discharge: *Charlton v. E. of Durham*, 4 Ch. 433.

—And the purchaser from trustees could require all the trustees to attend personally to receive the purchase-money if it was to be paid to them directly: *Re Flower and Met. Board of Works*, 27 Ch. D. 592; but see now the Trustee Act, 1893, s. 17, *sup.* Chap. XL., p. 1077.

But they are liable for each other's defaults if they have been guilty of negligence. Thus in *Hanbury v. Kirkland*, 3 Sim. 265, a trustee, enabling his co-trustee to deal alone with the fund for the supposed purpose of an intended investment, was held liable for its loss; and so by signing a joint receipt for mortgage money: *Cowell v. Gatcombe*, 27 Beav. 568; a trustee who acts as an active trustee, and liable for handing over a trust cheque to the other: *Trutch v. Lamprell*, 20 Beav. 116; and see *Clough v. Bond*, 3 My. & C. 490, *et inf.*; and if the acting trustee commits a breach of trust which leads to loss he is not bound to indemnify his co-trustees, who, by doing nothing, neglected their duty: *Bahin v. Hughes*, 31 Ch. D. 390, C. A.; and see *Bacon v. Camphausen*, 58 L. T. 851; *Blyth v. Fladgate*, (1891) 1 Ch. 337, 365; and the usual indemnity clause makes no difference: *Hale v. Adams*, 21 W. R. 400.

An exor allowing his co-exor to receive the proceeds of stock sold was liable: *Williams v. Nixon*, 2 Beav. 472; but an exor who, doing that which was not unnecessary because in the ordinary course of business, allows his co-exor to obtain sole possession of assets of the testator, is not liable for misapplication by his co-exor: *In re Gasquoine, G. v. G.*, (1894) 1 Ch. 470; *Lewin*, 275; especially if the exor who receives the money was trusted by the testator in his lifetime in similar business matters: *S. C.*

Where a stock legacy was paid by cheque, and the money was lost by the forgery of one exor, the co-exor (who ought to have reconverted the money into stock) was liable: *Re Bennison, Cutler v. Boyd*, 60 L. T. 859.

And a trustee is liable if he has sanctioned and adopted the act of his co-trustee: *Horton v. Brocklehurst* (No. 2), 29 Beav. 504.

Where *ca. q. t. sui juris* select one trustee to make an investment, the others may not be liable: *Griffiths v. Porter*, 25 Beav. 236, 242; *Raby v. Ridehalgh*, 7 D. M. & G. 104; but will be if the fund is dealt with in a different way: *Griffiths v. Porter, sup.* And see *Paddon v. Richardson*, 7 D. M. & G. 563.

In *Lincoln v. Wright*, 4 Beav. 427, an exor was held liable for leaving an ascertained residue in the hands of his co-exor, who became bankrupt; on payment, Plt was to assign to him the benefit of proof against the bankrupt's estate: *Ib.* 433; and see *Thompson v. Finch*, 8 D. M. & G. 560; *Re Spencer, S. v. Hart*, 51 L. J. Ch. 271; 45 L. T. 645; 30 W. R. 296; *et inf.* Form 4, p. 1158.

An exor enabling a co-exor to receive money, and not enforcing a debt from him to the estate, was liable: *Candler v. Tillet*, 22 Beav. 257; and see *Matthews v. Terrell*, 1 Mac. & G. 433, n., *et sup.*

One of two exors, directed after certain annual payments to invest and accumulate, receiving and misapplying the dividends without the other's connivance, that other was not held liable: *Williams v. Nixon*, 2 Beav. 472.

An exor acting without proving is only liable for what he receives: *Lowry v. Fulton*, 9 Sim. 115; and an exor who has renounced may act as the agent only of his co-exor, so as not to be liable as exor: *Dove v. Everard*, 1 R. & M. 231; *Lowry v. Fulton*, 9 Sim. 115; and the rule precluding an exor from purchasing the testator's estate does not apply to an exor who never proves the will: *Clark v. C.*, 9 App. Ca. 733. Two of three exors and trustees, authorized to carry on a farm, concurring in the third's doing so, the accounts were taken against them, treating him as their agent: *Toplis v. Hurrell*, 19 Beav. 423. Where one trustee permits his co-trustee to purchase goods for the purpose of carrying on a business, the co-trustee may be held entitled to pledge their joint credit: *Brazier v. Camp*, 63 L. J. Q. B. 257.

As to the liability of a solr-trustee to indemnify his co-trustee in respect of loss arising by the negligence of the solr when acting for the trust, *v. inf.* pp. 1135, 1153.

LIABILITY FOR DEFAULT OF AGENTS, BANKERS, OR SOLICITORS.

A trustee may select solrs and agents, and so long as he selects persons properly qualified he cannot be made responsible for their intelligence or honesty: *Re Weall, Andrews v. W.*, 42 Ch. D. 674.

And acting according to the ordinary course of business, and employing agents as a prudent man of business, a trustee is not liable for the default of such agents: *Speight v. Gaunt*, 9 App. Ca. 1; and see *Re Gasquoine, G. v. G.*, (1894) 1 Ch. 470, C. A.; although the trustee is remunerated: *Jobson v. Palmer*, (1893) 1 Ch. 71; and where the propriety of employing the agent is established the onus of proof is on those who assert that the loss was attributable to the default of the trustee: *Re Brier, B. v. Evison*, 26 Ch. D. 238, C. A.; but the agent must not be employed out of the ordinary scope of his business: *Fry v. Tapson*, 28 Ch. D. 268; and the trustee must show that he acted not only in the ordinary mode of business but also as a prudent man of business would act in such a transaction: *Bullock v. B.*, 56 L. J. Ch. 221; 55 L. T. 703.

Trustees may appoint a collector of book debts on commission: *Re Brier, B. v. Evison*, 26 Ch. D. 238, C. A.

Trustees of bonds transferable by delivery with coupons attached are justified in leaving them with their bankers, upon the usual acknowledgment of receipt: *Re De Pothonier*, (1900) 2 Ch. 529, distinguishing *Field v. Field*, (1894) 1 Ch. 425.

Trustees were made liable for a deposit with bankers drawn out by their co-trustees: *Clough v. Bond*, 3 My. & C. 490; 8 Sim. 594; *Gibbins v. Taylor*, 22 Beav. 344; and though standing to the trust account: *Darke v. Martyn*, 1 Beav. 525; *Moyle v. M.*, 2 Russ. & M. 710; with direction to the bank to invest: *Challen v. Shippam*, 4 Ha. 555; and when kept at the bank after order of Court to pay over: *Lunham v. Blundell*, 4 Jur. N. S. 3; 6 W. R. 49; 27 L. J. Ch. 179; *Wilkinson v. Bewick*, 4 Jur. N. S. 1010; 6 W. R. 849; and on failure of the bank: *Macdonell v. Harding*, 7 Sim. 178; but see *Johnson v. Newton*, 11 Ha. 160, 169; *Wilks v. Groom*, 3 Drew. 584; *Guardians of Colchester Union v. Moy*, 68 L. T. 564, 566.

Bankers by whose negligence trust-money has been lost will not be relieved from liability by reason of subsequent negligence by the trustees, which may have further conduced to the loss: *Magnus v. Queensland National Bank*, 37 Ch. D. 466, C. A.

Bankers are liable if they knowingly accept payment from a trustee or exor out of trust funds: *Wilson v. Moore*, 1 My. & K. 337; but not if, acting *bonâ fide*, they place trust money to the general account of their customer because he has no trust account with them, and afterwards allow him to overdraw: *Coleman v. Bucks and Oxon Union Bank*, (1897) 2 Ch. 243; and see *Shields v. Bk. of Ireland* (1901), 1 I. R. 222; but they are justified in advancing money to an acting exor for executorial purposes: *Child & Co. v. Thorley*, 16 Ch. D. 151.

Solrs of a mortgagee-trustee are not liable for the insufficiency of the security because the mortgage-money is paid through them: *Brinsden v. Williams*, (1894) 3 Ch. 185.

Deferred legatees (money to meet whose legacies had been paid into a bank pending an investment) had to bear the loss from the bank's failure, and could not call on the other legatees to refund: *Fenwicke v. Clarke*, 4 D. F. & J. 240; 10 W. R. 636.

The trustees were liable where the money was put on deposit at a bank without authority under the will: *Rehden v. Wesley*, 29 Beav. 213; or allowed to remain on deposit for fourteen months pending re-investment: *Cann v. C.*, 33 W. R. 40; 51 L. T. 770; or entrusted for investment to an "outside" stockbroker: *Robinson v. Harkin*, (1896) 2 Ch. 415.

As to the amount of balance which may be kept at a bank, see *Swinfen v. S.*, 29 Beav. 211.

A solr-trustee receives trust money not as agent of the other trustees, but as co-trustee: *Re Fryer*, 3 K. & J. 317; and see *Whitney v. Smith*, 4 Ch. 513. *Secus*, where the receipt is by a firm of solrs, one of whom is a trustee: *Ingle v. Partridge*, 32 Beav. 661.

Trustees were liable where they left the conveyance executed, with the receipt indorsed, in the solr's hands: *Ghost v. Waller*, 9 Beav. 497; or allowed the money to remain in his hands: *Deuar v. Brooke*, 54 L. J. N. S. Ch. 380; 52 L. T. 489; uninvested for six months: *Wyman v. Paterson*, (1900) A. C. 271; or left exchequer bills with their broker: *Matthews v. Brise*, 6 Beav. 239.

And where they trusted the fund to a solr to invest, and relied on his statement that he had done so: *Rowland v. Witherden*, 3 Mac. & G. 568.

Trustees were held liable for their solr's negligence or fraud in investing on insufficient mortgage security: *Hopgood v. Parkin*, 11 Eq. 74 (which was appealed and compromised): *Sutton v. Wilders*, 12 Eq. 373.

In such case the solr &c., may be sued jointly with the trustees: *Rowland v. Witherden*, 3 Mac. & G. 568 (but see *Maw v. Pearson*, 28 Beav. 196; *Barnes v. Addy*, 9 Ch. 244, *et inf.*); but not alone: *Robertson v. Armstrong*, 28 Beav. 123.

And as to the liability of the members of the firm of solrs in such case in respect of each other's acts, *v. sup.* pp. 1110, 1111.

A mere agent of the trustees is in general accountable to them alone: *Lewin*, 204, 549, 759; and a solr employed by trustees in trust business has no direct claim on the estate for costs: *Stanier v. Evans*, 34 Ch. D. 470.

But see *Myler v. Fitzpatrick*, 6 Mad. 360; *Fyler v. F.*, 3 Beav. 558; *Archer v. Lavender*, Ir. Rep. 9 Eq. 220.

An agent can only be made liable on the ground of fraud, or receipt of trust funds, or knowledge of or assistance in the dishonesty of the trustee: *Barnes v. Addy*, 9 Ch. 244; *Re Barney, B. v. B.*, (1892) 2 Ch. 265; *Lewin*, 760; and a solr who only acts in the character of solr to the trustees cannot be held liable as a constructive trustee: *Mara v. Browne*, (1896) 1 Ch. 199, C. A. But a solr to trustees who receives and improperly retains trust money is liable as an express trustee, so that lapse of time will not avail him as a defence: *Soar v. Ashwell*, (1893) 2 Q. B. 390, C. A.; and a solr who advises an executor to pay a debt which has been disallowed by the judge in an admon action as being statute-barred thereby renders himself liable to repay the amount to the estate: *Midgley v. M.*, (1893) 3 Ch. 282, C. A.

The possession of trust chattels by *c. q. t.*, in accordance with the trust instrument, is in law the possession of the trustee, who can maintain an action against a wrongdoer for conversion of them: *Barber v. Furlong*, (1891) 2 Ch. 172.

As to *c. q. t.* in receipt of rents and profits being regarded as bailiff or agent of the trustee, see *Lewin*, 1074.

Semble, the liability of a trustee for loss of trust property is not increased by the fact of his being remunerated for his services: *Jobson v. Palmer*, (1893) 1 Ch. 71.

REMEDIES FOR BREACH OF TRUST.

By O. III, 6, a writ may be specially indorsed for the recovery of a debt, or liquidated demand payable on a trust.

Trust funds being lent to purchase an estate, the trustees had a lien on it: *Birds v. Askey*, 24 Beav. 618; and trustees wrongfully paying a fund to the Plt's father, his assets in the Plt's hands were primarily liable: *Orrett v. Corser*, 21 Beav. 52; and improperly transferring a fund, and two-thirds being lost, the *cs. q. t.* were entitled to share in the other third: *Browne v. Butter*, 24 Beav. 159; and paying (on an indemnity) a trust fund to a person having a general power to appoint by will, on her appointing, the fund became liable as assets to meet the indemnity: *Williams v. Lomas*, 16 Beav. 1; a corporation raising money, not authorized, and paying off mortgages on other property, the new were entitled to stand in the place of the old: *Trevillian v. Mayor of Exeter*, 5 D. M. & G. 828.

Trustees could sue bankers in Equity for the loss of a fund transferred by them to the account of the tenant for life, with notice of the trust, and the Statute of Limitations did not apply: *Bridgman v. Gill*, 24 Beav. 302.

An order on trustees personally to pay trust moneys into Court does not prevent *cs. q. t.* pursuing an unauthorized investment: *Francis v. F.*, 5 D. M. & G. 108; but trust assets settled on marriage could not be followed: *Cooper v. Wormald*, 27 Beav. 266; nor a trust fund paid into Court

to meet another breach of trust, without notice, and invested: *Thorndike v. Hunt*, 3 D. & J. 563—569; *Browne v. Butter*, 24 Beav. 159; *Taylor v. Blake-lock*, 32 Ch. D. 560, C. A.; nor where invested out of Court: *Case v. James*, 7 Jur. N. S. 616, 618, n., 860; 30 L. J. Ch. 749; 4 L. T. 664; 9 W. R. 771; and see *Taylor v. London and County Bank*, (1901) 2 Ch. 231, C. A.

A purchaser for value of an equitable interest in the trust property cannot hold it against the *ca. q. t.*, though he had no notice of the trust, and after notice got in the legal estate from the trustee: *Mumford v. Stohwasser*, 18 Eq. 556; *Maxfield v. Burton*, 17 Eq. 15, 17; *Manningford v. Toleman*, 1 Col. 670; *Shropshire Union, &c. v. The Queen*, L. R. 7 H. L. 496; *Taylor v. Russell*, (1891) 1 Ch. 8, 28; (1892) A. C. 244; and see *Heath v. Crealock*, 10 Ch. 22; but if the trustee has given a receipt for money which has not been paid, an innocent purchaser may be entitled to rely on the receipt as against the *ca. q. t.*: *Lloyds Bank Ltd. v. Bullock*, (1896) 2 Ch. 192. But a trustee having the legal estate, and taking from his *ca. q. t.* an assignment for value of his equitable interest, can avail himself of the legal estate as against a prior incumbrance of which he had no notice: *Newman v. N.*, 28 Ch. D. 674.

The rule whereby a trustee is disabled from purchasing the trust property (see *Lewin. 551 et seq.*) applies to an agent employed by the trustee for the purposes of sale as fully as to the trustee himself: *Martinson v. Clowes*, 21 Ch. D. 857; and to all persons invested with the like fiduciary character as that of trustees for sale, *e.g.*, exors and admors, an exor in his own wrong, trustees for creditors, an agent, &c.: *Lewin*, 558; *secus*, mortgagee purchasing from mortgagor; surviving partners from repressee of deceased; an execution creditor from the sheriff; or an exor who has not proved from the exor who has: *Ibid.*

Mortgagees from trustees who had power to sell only had a valid charge to the extent to which the mortgage-money had been properly applied: *Devaynes v. Robinson*, 24 Beav. 86.

A deposit of title-deeds for value against whom a prior charge is established must deliver up the deeds: *Newton v. N.*, 4 Ch. 143; *Burton v. Gray*, M. R., 3 March, 1873, A. 567; *et inf.* Chap. XLVII., "MORTGAGES."

FOLLOWING TRUST FUNDS.

The Court will not follow trust funds advanced to traders, or capitalize the increase of income: *Stroud v. Gwyer*, 28 Beav. 130; 6 Jur. N. S. 719.

And as to following trust money into land purchased by the trustee, see *Wilkins v. Stevens*, 1 Y. & C. C. 431; or by a third person with notice: *Birds v. Askey*, 24 Beav. 618; into mortgaged property: *Manningford v. Toleman*, 1 Col. 670; into debenture securities: *Mant v. Leith*, 15 Beav. 524; into stock: *Small v. Attwood*, Yo. 507; into *post obit* securities: *Harford v. Lloyd*, 20 Beav. 310; into exchequer bills: *Knott v. Cottee*, 16 Beav. 81; and through a cheque drawn upon a trust account: *Bodenham v. Hoskyns*, 2 D. M. & G. 903; and marking trust shares in co.: *Pinkett v. Wright*, 2 Ha. 120; into securities purchased with the proceeds, and as against the trustee's assignees in bankruptcy: *Frith v. Cartland*, 2 H. & M. 417; into a mortgage in the trustee's name: *Middleton v. Pollock*, 4 Ch. D. 49. The holder for value of certificates of trust shares taken without inquiry could not compel registration: *Shropshire Union, &c. v. The Queen*, L. R. 7 H. L. 496.

Trust money paid into his general banking account by a trustee or broker, with notice of the trust, may be followed if traceable: *Pennell v. Deffell*, 4 D. M. & G. 372; *Re Strachan, Exp.* Cooke, C. A., 17 Nov. 1876; 4 Ch. D. 123, C. A.; *Taylor v. Plumer*, 3 M. & S. 562; *Re Hallett's Estate, Knatchbull v. H.*, 13 Ch. D. 696, C. A.

And if the money is mixed with the trustee's own money, and sums are afterwards drawn out by him, the rule in *Clayton's Case* (1 Mer. 572, 608) does not apply, but the trustee must be taken to have drawn out his own money in preference to the trust money: *Re Hallett's Estate, Knatchbull v. H.*, 13 Ch. D. 696 (not following *Pennell v. Deffell*, 4 D. M. & G. 372, 383, 384, 390); *Re Murray, Dickson v. M.*, 57 L. T. 223.

But as between two *ca. q. t.* whose money the trustee has paid into his own banking account, the rule in *Clayton's Case* applies, so that where there is one unbroken account the first sum paid in will be treated as the first drawn out: *Re Hallett's Estate, sup.* (per Fry, J.); *Hancock v. Smith*,

41 Ch. D. 456, C. A.; *Re Stenning, Wood v. S.*, (1895) 2 Ch. 433; *Mutton v. Peat*, (1899) 2 Ch. 556; *S. C.*, (1900) 2 Ch. 73, C. A.; see *post*, p. 1369.

And the rule applies not only to an express trustee, but to every person in a fiduciary character, *e.g.*, an agent, bailee, or collector of rents: *Re Hallett's Estate, sup.* (dissenting from *Exp. Dale & Co.*, 11 Ch. D. 772); but not to an ordinary running account between stockbroker and customer: *King v. Hutton*, (1900) 2 Q. B. 504, C. A.; and a sub-agent, though he knows that his immediate principal is acting in the capacity of agent, is not in a fiduciary position as regards the ultimate principal: *New Zealand and Australian Land Co. v. Watson*, 7 Q. B. D. 374, C. A.

And where a person employed to purchase goods for another wrongfully receives a commission to the detriment of his employer, as the relation between them is that of debtor and creditor only, the money cannot be followed: *Lister v. Stubbs*, 45 Ch. D. 1, C. A.

And money paid into a bank in the ordinary course of an auctioneer's business could not be followed, though the bank knew the money was that of a customer: *Marten v. Roche, Eyton & Co.*, 53 L. T. 946; 34 W. R. 253.

But the doctrine of following trust money has no application where no money actually passes as, *e.g.*, where, instead of receiving the money, the trustee sets it off in account against a larger sum due by him to the persons liable to pay: *Re Hallett & Co; Exp. Blane*, (1894) 2 Q. B. 237, C. A.

Where a mortgagee taking with notice of the Plt's possible title as *c. q. t.*, sold under his power of sale, the Plt, adopting the sale, was entitled to the purchase-money subject to retainer by the mortgagee of his costs of sale, and any part of the mortgage-money which he could show to have been advanced for the purposes of the trust estate: *Re Champion, Dudley v. C.*, (1893) 1 Ch. 101, C. A.

The money cannot be followed as against any purchaser for value without notice, *e.g.*, a vendor who has accepted it in payment of deposit on sale: *Collins v. Stimson*, 11 Q. B. D. 142; or a trustee who has innocently accepted a transfer of stock, improperly obtained by his co-trustee, in place of a debt due to the trust: *Taylor v. Blakelock*, 32 Ch. D. 560, C. A.

Money obtained by fraud cannot be followed into the hands of persons who take it in satisfaction of a *bonâ fide* debt without notice: *Northern Counties, &c. Ins. Co. v. Whipp*, 26 Ch. D. 482, 495, C. A.; but where the payment is made without any legal consideration, as for the purpose of stifling a prosecution, the money may be followed by a person who is not a party to the illegal act: *Exp. Wolverhampton Banking Co.*, 14 Q. B. D. 32.

Proceedings to recover the money may be taken by a trustee who has actively concurred in the breach of trust: *Carson v. Sloane*, 13 L. R. Ir. 139; *Price v. Blakemore*, 6 Beav. 507.

The right of a *c. q. t.* to follow trust funds is an equitable right which will take priority over any equitable interest subsequently created, *e.g.*, that of a subsequent innocent mortgagee for value, who has not obtained the legal estate: *Cave v. C.*, 15 Ch. D. 639; but see *Re Ffrench's Estate*, 21 L. R. Ir. 283, where the C. A. in Ireland thought that the right of a *c. q. t.* to follow trust money into land was an inferior equity to that of an innocent purchaser for value of an estate in the land.

Where stock which belonged to one settlement was wrongfully transferred by the tenant for life to the trustees of the marriage settlement of his son, who supposed it to be the property of his father, the son could not, as between himself and the other beneficiaries under the first settlement, be treated as having received the stock: *Crichton v. C.*, (1896) 1 Ch. 870, C. A.

By the Partnership Act, 1890 (53 & 54 V. c. 39), s. 13, if a partner improperly employs trust property in the business or on account of the partnership, no other partner is liable to the persons beneficially interested; but this is not to prevent trust money from being followed and recovered from the firm if still in its possession or under its control.

REMEDY AGAINST TRUSTEE PERSONALLY.

Any interest of a trustee in the trust property, whether devolving on him directly under the trust or derived by purchase or otherwise, is applicable to make good claims against him: *Doering v. D.*, 42 Ch. D. 203; *Irby v. I.*, 25 Beav. 632—637; *Jacobs v. Rylance*, 17 Eq. 341; and this though the debt to the trust was contracted after the assignment: *Re Hervey, Short v. Parratt*,

61 L. T. 429; *Hopkins v. Gowan*, 1 Moll. 561; *Morris v. Livie*, 1 Y. & C. O. C. 380. But a legal interest in other property given by the same will to the trustee is not subject to a charge to make good breaches by him: *Fox v. Buckley*, 3 Ch. D. 508, C. A.; and see *Re Brown, Dixon v. B.*, 32 Ch. D. 597; and where the trustee's fund is standing to a separate account in an admon suit, an assignee of it is protected in the absence of specific notice: *Edgar v. Plomley*, (1900) A. C. 131, P. C.

A husband having sold some property of his wife's which he had, before marriage, agreed to settle, the rest of her property in his hands was subject to a lien for the amount: *Hastie v. H.*, 2 Ch. D. 304, C. A.

As between them and their *co. q. t.*, all the trustees implicated in the breach of trust are severally responsible for the whole loss: *Lewin*, 1116; but one of them may be made primarily liable *inter se*: *Thompson v. Finch*, 8 D. M. & G. 560, *et inf.* Form 4, p. 1158; *Stune v. Bennet*, W. N. (76) 152; *e.g.*, where one of the co-trustees is a solr who has been active in making an improper investment: *Re Turner, Barker v. Ivimey*, (1897) 1 Ch. 536; following *Lockhart v. Riley*, 25 L. J. Ch. 697; and see *Lewin*, 1112; or entitled to contribution from co-trustees: *Fletcher v. Green*, 33 Beav. 513, and cases there cited; but where the trustees are in *pari delicto*, there is no right to indemnity between them: *Bahin v. Hughes*, 31 Ch. D. 390, C. A.; and the one whose act has directly occasioned the loss is entitled to contribution, and as between the co-trustees time does not run under the Statutes of Limitation until the liability has been ascertained by the judgment of the Court: *Robinson v. Harkin*, (1896) 2 Ch. 415; and an agreement that trustees resident abroad should not be troubled about the trusts does not bar the right of their co-trustees to contribution: *Bacon v. Camphausen*, 58 L. T. 851; but the right to contribution does not arise where one of the trustees is also a *c. q. t.*, and has received, as between himself and his co-trustee, an exclusive benefit from the breach of trust: *Chillingworth v. Chambers*, (1896) 1 Ch. 685, C. A. This right can now be enforced in the same action: see *Jud. Act*, 1873, s. 24 (3), (7), O. XVI, 11, 55; *Butler v. B.*, 14 Ch. D. 329; *Sawyer v. S.*, 28 Ch. D. 601; *Bahin v. Hughes*, 31 Ch. D. 390, C. A.; *Re Partington*, 57 L. T. 654. Contribution as to costs paid by one could be enforced on motion in the suit under the old practice: *Pitt v. Bonner*, 1 Y. & C. C. 670.

In the case of over-payment to a beneficiary, where the deficiency has arisen from the subsequent wasting of the estate, the trustee is not liable: *Re Winslow, Frere v. W.*, 45 Ch. D. 249; *Fenwick v. Clarke*, 4 D. F. & J. 240; and see *Re Bacon's Sett.*, 42 Ch. D. 559.

For inquiry as between two defaulting trustees (Defts) in what proportions the sums lost ought to be borne, see *Butler v. B.*, 14 Ch. D. 329.

Where funds were handed by trustees for investment to a firm in which one trustee was a partner, and were misappropriated by the firm, who afterwards were bankrupt, the trustees could prove both against the joint estate of the firm and the separate estate of the defaulting trustee: *Re Parker; Exp. Sheppard*, 19 Q. B. D. 84.

Under the Merc. Law Am. Act (19 & 20 V. c. 97), s. 5, the liability of trustees *inter se* is a specialty debt, if the breach created one between them and the *co. q. t.*: *Lockhart v. Reilly*, 1 D. & J. 464; *secus*, previously: *Priestman v. Tindall*, 24 Beav. 244.

As between the trustee and *c. q. t.*, a breach of trust constitutes merely a simple contract debt, unless there is something in the creation or acceptance of the trust to raise a liability, as on a covenant, against the trustee: *Adey v. Arnold*, 2 D. M. & G. 432, and cases there cited; or express agreement or declaration to execute the trusts: *Wynch v. Grant*, 2 Drew. 312; and he must execute the deed: *Richardson v. Jenkins*, 1 Drew. 477; and see *Storv v. Gape*, 2 Jur. N. S. 706; in *Re Hawkesworth*, 10 Nov. 1883, A. 186. On motion to vary a chief clerk's certificate, V.-C. S. held that, the case being one of breach of covenant, the debt was a specialty; and so under a deed-poll: *Turner v. Wardle*, 7 Sim. 80; *Ellis v. E.*, L. C. 21 Dec. 1855; *secus*, where no covenant: *Holland v. H.*, 4 Ch. 449.

In an action to administer a trustee's real estate, it may be sold to repair a breach of trust before the amount due has been ascertained: *Bell v. Turner*, 2 Ch. D. 409.

A trustee cannot refuse to hand over money in his hands on the ground

of its being the produce of an illegal transaction: *Worthington v. Curtis*, 1 Ch. D. 419, C. A.

As to the remedies for breaches of trust being barred by time, acquiescence, &c., *v. inf.* pp. 1151 *et seq.*; and as to costs, *inf.* pp. 1168 *et seq.*

BANKRUPTCY OF TRUSTEE.

By the Bankruptcy Act, 1883 (46 & 47 V. c. 52), ss. 44, 54, the property of a bankrupt devolving on him before his discharge vests in the trustee in bankruptcy, but (as under the previous Bankruptcy Acts) such property is not to be taken to comprise property held by the bankrupt in trust for any other person.

The enactment applies not only to express trustees, but to exors, admors, factors, &c.; and if goods consigned to a factor be sold, the money, so long as it can be identified, can be followed as against the trustee in bankruptcy: *Tooke v. Hollingworth*, 5 T. R. 227; *Taylor v. Plumer*, 3 M. & S. 571; *Re Ulster Building Soc.*, 25 L. R. Ir. 24, 29; and so money in the hands of an agent, if by the course of dealing impressed with a trust: *Harris v. Truman*, 7 Q. B. D. 340; 9 Q. B. D. 264, C. A.; or proceeds of consols sold for the trustee by his stockbroker and retained by the broker: *Exp. Cooke*, 4 Ch. D. 123, C. A.; or money borrowed and not applied for the purpose of purchasing a specific property, which was to be mortgaged to secure the loan: *Gibert v. Gonard*, 54 L. J. Ch. 439; 33 W. R. 302; 52 L. T. 54; and as to the trustee's right of indemnity being available for his creditors, see *Jennings v. Mather*, (1901) 1 K. B. 108.

The order and disposition clause in the Act of 1883 (s. 44) relates only to goods of debtors engaged in some trade or business, and things in action other than debts due or growing due to the bankrupt in his trade or business are not to be deemed goods within the meaning of the section.

"Things in action" within the Acts comprise shares in companies (*Colonial Bank v. Whinney*, 11 App. Ca. 426), debentures charging the company's undertaking (*Re Pryce*, 4 Ch. D. 685), and policies of life assurance: *Exp. Ibbetson*, 8 Ch. D. 519, C. A.

Property belonging to a married woman for her separate use, and of which the husband is to be deemed a trustee for her, does not pass to his trustee in bankruptcy: *Exp. Sibeth*, 14 Q. B. D. 417, C. A.; and farming stock of a testator left in the hands of his widow as tenant for life passed *quâ* her interest only: *Exp. Barber*, 23 W. R. 522.

And shares in the name of a trustee for a company of which he was chairman were not in his order and disposition: *G. E. Ry. Co. v. Turner*, 8 Ch. 149.

And the clause did not apply where the trustee was ignorant of the property being in existence: *Re Rawbone's Trust*, 3 K. & J. 300, 476; and see *Exp. Ford*, 1 Ch. D. 521, C. A.; *Re Hickey*, 10 Ir. Rep. Eq. 117.

The debt constituted by a breach of trust, being equitable only, would not until the Bankruptcy Act, 1869, have supported a petition in bankruptcy: *Exp. Blencowe*, 1 Ch. 393; and see now the Bankruptcy Act, 1883 (46 & 47 V. c. 52), s. 6, which, though not specially mentioning equitable debts, includes them.

By the Act of 1883, s. 30, the liability after the discharge of the bankrupt trustee continues only in cases where the breach of trust is fraudulent, and (*semble*) does not, even then, extend to costs of action which he is ordered to pay: *Re Greer, Napper v. Fanshawe*, (1895) 2 Ch. 217.

Securities set apart by a sole trustee to recoup his breach of trust do not pass to his assignee or trustee in bankruptcy: *Re Bankhead*, 2 K. & J. 560; and the setting of them apart with intent to shield himself from the consequences of his breach of trust is not a fraudulent preference: *Sharp v. Jackson*, (1899) A. C. 419; *H. L. affirming C. A.*, (1897) 2 Q. B. 19 (*sub nom. New Prince and Garrard's Trustee v. Hunting*); and see *Re Vautin*, (1900) 2 Q. B. 325; and reclaiming trust property improperly pledged by and for a firm, with partnership assets, and marking it, is no fraudulent preference: *Sinclair v. Wilson*, 20 Beav. 324; nor making good misappropriations on the eve of bankruptcy: *Exp. Stubbins*, 17 Ch. D. 58, C. A.; *Exp. Taylor*, 18 Q. B. D. 295, C. A.; *Exp. Ball*, W. N. (86) 211; (87) 21; 35 W. R. 264; and securities were held not to be in the reputed ownership of bankers one of whom was one of the trustees: see *Exp. Greaves*, 8 D. M. & G. 291; *Pinkett v. Wright*, 2 Ha. 120; and where notice took them out: *Re Rogers*, 8 D. M. & G. 271.

BANKRUPTCY OF SETTLOR.

Where the trustees of a settlement decline to act, the *cs. q. t.* are the "true owners" within sect. 44 of the Bankruptcy Act, 1883, for the purpose of giving the necessary "consent or disposition" to the property being in the order and disposition of the bankrupt settlor: *Re Mills' Trusts*, (1895) 2 Ch. 564, C. A.

DIRECTORS AND OFFICERS OF COMPANIES.

Directors are not trustees in the same sense as trustees under settlements and wills: *Sheffield and S. Yorkshire Building Soc. v. Aizlewood*, 44 Ch. D. 412, C. A.; but confidential agents having a large discretion: *Marzetti's Case*, 28 W. R. 541; 42 L. T. 206; and may make advances on securities more speculative than trustees would accept: *Sheffield, &c. v. Aizlewood, sup.*; and so a liquidator is agent of the co., and not, strictly speaking, a trustee for creditors or contributories: *Knowles v. Scott*, (1891) 1 Ch. 717.

And directors of a co. bound by a trust are not personally liable for breaches of trust committed by the co.: *Wilson v. Lord Bury*, 5 Q. B. D. 518, C. A.

But directors are precluded (like trustees) from making a profit by their office: *Parker v. McKenna*, 10 Ch. 96; *Imp. Mercantile Credit Assoc. v. Coleman*, 6 Ch. 558; L. R. 6 H. L. 189; *Great Luxembourg Ry. Co. v. Magnay*, 25 Beav. 586; or paying themselves for their services, or making presents to themselves out of the co.'s assets: *Re George Newman & Co.*, (1895) 1 Ch. 674, C. A.; and see *Williams v. Scott*, (1900) A. C. 499, P. C.; and where a director accepts shares from the promoter, restitution of the shares is not sufficient, but the co. may elect to take their highest value whilst held by the director: *Nant-y-glo and Blaina Co. v. Grave*, 12 Ch. D. 738; *Eden v. Ridsdale Railway Lamp Co.*, 23 Q. B. D. 368, 372, C. A.; or under special circumstances and in the absence of moral fraud, he may be charged with the profits made on shares sold and the market value of the shares retained on the dates at which they were respectively allotted: *Shaw v. Holland*, (1900) 2 Ch. 305, C. A.; but the director ordered so to pay is not a defaulting trustee within the Debtors Act, 1869, s. 4: *Re Diamond Fuel Co., Mitcalfe's Case*, 13 Ch. D. 816.

But the doctrine that directors cannot make a profit is inapplicable where it is known to all the members of the co. that they intend to make a profit: *Re British Seamless Paper Box Co.*, 17 Ch. D. 467, C. A.; or where a reasonable salary is drawn by a managing director and entered in accounts open to all shareholders: *Felix Hadley & Co. v. Hadley* (No. 1), 77 L. T. 131; or where there is an express provision on the subject in the articles of association: *Costa Rica Ry. v. Forwood*, (1900) 1 Ch. 756; (1901) 1 Ch. 746, C. A. (following *Imp. Mercantile Credit Assoc. v. Coleman*, 6 Ch. 558, not overruled on this point in 6 H. L. 189).

The acceptance of a secret profit by a managing director is justification for his dismissal, although not discovered until after the dismissal took place: *Boston Deep Sea, &c. Co. v. Ansell*, 39 Ch. D. 339, C. A.

The directors of a building society were held not to be trustees within the Trust Investment Act, 1889: *Re National Permanent Building Soc.*, 43 Ch. D. 431.

Directors who make payments of dividends out of capital, either with actual knowledge that the capital is being misappropriated or with knowledge of the facts which establish the misappropriation, are liable as for a breach of trust: *Leeds Building and Investment Co. v. Shepperd*, 36 Ch. D. 787; *Re National Funds Ass. Co.*, 10 Ch. D. 118; *Flitcroft's Case*, 21 Ch. D. 519; *Re National Bank of Wales*, (1899) 2 Ch. 629, C. A.; but may be entitled to indemnity from the shareholders on the principle upon which ordinary trustees in like circumstances would be similarly entitled as against their *cs. q. t.*: *Mozham v. Grant*, (1899) 1 Q. B. 480; (1900) 1 Q. B. 88, C. A.; and as to injunctions to restrain payment of dividends by directors out of capital, see *ante*, Vol. I. Chap. XXXI. pp. 714, 715.

And directors who had improperly paid dividends out of capital were not allowed to plead the Statute of Limitations: *Burdick v. Garrick*, 5 Ch. 233; but see now the Trustee Act, 1888, s. 8; and *post*, p. 1156.

As to the liability of directors for the wrongful acts of their co-directors, see *Cullerne v. London and Suburban, &c. Building Soc.*, 25 Q. B. D. 485, C. A.; *London Trust Co. v. Mackenzie*, W. N. (93) 9; and as to the liability of a trustee or manager under the Trustee Savings Bank Act, 1863, s. 11, sub-s. 2, see *Re Cardiff Savings Bank, Marquis of Bute's Case*, (1892) 2 Ch. 100.

And generally as to the fiduciary relationship between the promoters of a co. and its shareholders, and between a co. and its directors as promoters, see *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392, C. A.; *Re National Bank of Wales*, (1899) 2 Ch. 629, C. A.; *Merchants Fire Office, Ltd., v. Armstrong*, W. N. (01) 163, C. A.; and that directors are not liable for all their mistakes, but only for negligence which in a business sense is culpable or gross, and are entitled to repose confidence in the officers of the co., see *Re National Bank of Wales*, (1899) 2 Ch. 629, C. A.; *S. C., Dovey v. Cory*, W. N. (01) 170, H. L.; *Dixon v. Kennaway*, (1900) 1 Ch. 833.

The dissolution of the co. is, in the absence of fraud, an absolute bar to an action for breach of trust against the directors: *Coxon v. Gorst*, (1891) 2 Ch. 73.

The declaration of a dividend does not make the co. a trustee of the dividend for the shareholder: *Re Severn and Wye and Severn Bridge Co.*, (1896) 1 Ch. 559.

By the Companies Act, 1862, s. 165, the Court may assess damages against delinquent directors or officers: see *Buckley*, 434 *et seq.*; *Carling's Case*, 20 Eq. 580; 1 Ch. D. 115, C. A.; *Perry's Case*, 34 L. T. 716.

In *McKay's Case*, 2 Ch. D. 1, C. A., the secretary was made liable for misfeasance in taking a transfer of shares from the vendor to the co.

As to the duties of an auditor and his position as an "officer" of the co., see *Re Kingston Cotton Mills*. (No. 1), (1896) 1 Ch. 6, C. A.; (No. 2), (1896) 1 Ch. 331; 2 Ch. 279, C. A.; and *London and General Bank*, (1895) 2 Ch. 673, C. A.; *Re Western Counties Steam Bakeries Co.*, (1897) 1 Ch. 617, C. A.; *Buckley*, 687.

In proceedings for rescission, the onus will be on the director to make full disclosure; but in proceedings under the section the onus is on the applicant, and he must prove a breach of duty on the part of the director which resulted in loss to the co.: *Cavendish-Bentinck v. Fenn*, 12 App. Ca. 652; and see *Re Canadian Land, &c. Co., Coventry and Dixon's Case*, 14 Ch. D. 660, C. A.

Errors of a deceased creditor cannot be proceeded against under the section: *Re British Guardian Life Ass. Co.*, 14 Ch. D. 335.

MARRIED WOMEN.

The separate estate of a married woman is not in general liable for breaches of trust or torts committed by her, whether restrained from anticipation (*Arnold v. Woodhams*, 16 Eq. 29) or not: *Wainford v. Heyl*, 20 Eq. 321; but the separate property of a wife married since 9th Aug. 1870 was rendered liable for her debts before marriage (33 & 34 V. c. 93), even though settled on the marriage without power of anticipation: *Sanger v. S.*, 11 Eq. 470; *Axford v. Reid*, 22 Q. B. D. 548, C. A., *sup.* p. 915; and see *Conlon v. Moore*, Ir. Rep. 9 C. L. 190; but she could not be made a bankrupt in respect of them (unless, at least, she had separate property): *Exp. Holland, Re Heneage*, 9 Ch. 307.

As to the liability of the separate property under the Act of 1882 in respect of ante-nuptial debts, *v. sup.* p. 918.

A husband was in general liable for breaches of trust committed by his wife before marriage without his knowledge: *Palmer v. Wakefield*, 3 Beav. 227; but husbands married between the 9th Aug. 1870, and 30th July, 1874, were not liable for their wives' debts before marriage; 33 & 34 V. c. 93, s. 12; and those married since then, and previously to the Act of 1882, only to the extent of the wife's property received, &c.: see 37 & 38 V. c. 50.

Now, by the Married Women's Property Act, 1882 (45 & 46 V. c. 75), s. 1, a married woman is capable of "entering into and rendering herself liable in respect of and to the extent of her separate property on any contract," and by sect. 24 the word "contract" includes the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of the Act as to liabilities of married women are extended to all liabilities by reason of any breach of trust or *devastavit* committed by any married woman, being a

trustee, or executrix, or administratrix, either before or after her marriage, and her husband is not to be subject to such liabilities unless he has acted or intermeddled in the trust or admon. By sect. 18, the married woman who is a trustee, &c. is enabled to sue or be sued, and transfer, or join in transferring, any public or other stocks, funds, or investments in that character without her husband, as if she were a *feme sole*; but this section does not deal with land.

A married woman administratrix disobeying an order for payment into Court of moneys found to be in her hands is liable to attachment, but *quære* whether so if the order were grounded on a mere *devastavit* or breach of trust by her: *Re Turnbull, T. v. Nicholas*, (1900) 1 Ch. 180.

And as to actions by and against married women, *v. sup.* "MARRIED WOMEN," Chap. XXXVII.; O. xvi, 11, 16; O. xviii, 4; Lewin, 920 *et seq.*

As to the remedy for breach of trust being barred by lapse of time, &c., *v. inf.* pp. 1154—1156.

PARTIES.

Trustees may sue alone to recover trust funds without making their *cs. q. t.* parties: *Horsley v. Fawcett*, 11 Beav. 565; and one the other: *May v. Selby*, 1 Y. & C. C. 235; and though Plt joined in the breach of trust: *Baynard v. Woolley*, 20 Beav. 583; *Price v. Blakemore*, 6 Beav. 507; *Carson v. Sloane*, 13 L. B. Ir. 139; and one alone, making the other a Deft: *Hughes v. Key*, 20 Beav. 395.

Two classes of trustees being liable, *cs. q. t.* could sue one class alone: *McGachen v. Dew*, 15 Beav. 84; and one of several exors or trustees liable: *Perry v. Knott*, 5 Beav. 293; *Strong v. S.*, 18 Beav. 408; but in an action to charge the estate of one trustee and take the accounts of the testator's, the other's admor is required: *Devaynes v. Robinson*, 24 Beav. 86; and the *cs. q. t.* participant are in such case necessary parties: *Jesse v. Bennett*, 6 D. M. & G. 609; *Wells v. W.*, W. N. (76) 227; and all the *cs. q. t.* to an action by some, to charge the trustees: *Phillipson v. Gatty*, 6 Ha. 26; 7 Ha. 516; *Munch v. Cockerell*, 8 Sim. 219; *Lenaghan v. Smith*, 2 Ph. 301; disapproving *Perry v. Knott*, *sup.*, on this point.

And as to the different forms or rights of suit by *cs. q. t.*, as to claims against trustees and strangers, as debtors, or liable to the trust, see *S. C.*; *Lund v. Blanshard*, 4 Ha. 28, 29; *Rowland v. Witherden*, 3 Mac. & G. 568; and other cases, *sup.* p. 1132; a trustee who had allowed breaches, and was also a *c. q. t.*, could not have a suit by a *c. q. t.* extended for his benefit: *Parnell v. Hingston*, 3 S. & G. 337.

And as to proceeding against parties to a breach of trust exclusively, or in the absence of some, or their represves, or of some or any *cs. q. t.*, or as to a fixed portion of the funds, see *Perry v. Knott*, 4 Beav. 179; 5 Beav. 293; *May v. Selby*, 1 Y. & C. C. 235; *Phillipson v. Gatty*, *Symes v. Eyre*, *Bateman v. Margerison*, 6 Ha. 26, 137, 496; *Hughes v. Key*, 20 Beav. 395; *Devaynes v. Robinson*, 24 Beav. 99, n., and cases there; *Fowler v. Reynal*, 2 D. & S. 749; *Gray v. Lewis*, 8 Ch. 1035, 1051; and see O. xvi, 4—7, 52.

Any one or more of a firm of solrs who have misapplied funds may be sued alone: *Plumer v. Gregory*, 43 L. J. Ch. 616; 18 Eq. 621; 31 L. T. 80.

Where the action is not confined to a particular breach, but asks a general account with wilful default, all the trustees, living or dead, must be represented: *Coppard v. Allen*, 2 D. J. & S. 173.

Trust fund having been lost by O., one of two trustees, a bill against A. and B., who had paid part of the fund to O., and against C. and the other trustees as to another part of the fund, was not multifarious: *Margetts v. Perks*, 12 W. B. 517; 10 L. T. 85; 34 L. J. Ch. 109.

Co-trustee, joining as Plt with beneficiaries against the other co-trustee as Deft in respect of an improper investment, being himself *in pari delicto* was held liable to contribute: *Robinson v. Harkin*, (1896) 2 Ch. 415. See Form 10, *inf.* p. 1146.

Where a trustee refuses to sue in assertion of a legal right, the *c. q. t.* may in a proper case be allowed to sue in his own name: *Yeatman v. Y.*, 7 Ch. D. 210; *Meldrum v. Scorer*, 64 L. T. 471, 474; *Bowshire v. Watkins*, 1 Russ. & My. 277; *Alcoy, &c. Co. v. Greenhill*, 76 L. T. 542; but a mere

refusal by the trustee will not entitle the *c. q. t.* so to sue; special circumstances must be shown tending to disable the trustee from suing, or rendering it inconvenient that he should do so: *Sharpe v. San Paulo Ry.*, L. R. 8 Ch. 587, 609; *Travis v. Milne*, 9 Ha. 141; *Beningfield v. Baxter*, 12 App. Ca. 167; *Meldrum v. Scorer*, *sup.*; Lewin, 1039, 1040.

An equitable tenant for life may be allowed to use the name of the trustee to defend an action of ejectment: *Longbourne v. Fisher*, 47 L. J. Ch. 379; 38 L. T. 216; 26 W. R. 276.

And though the *c. q. t.* may have a right to compel the trustee, on a proper indemnity, to lend his name to enable the *c. q. t.* to sue, yet the name of the trustee as co-Plt cannot be added without his consent in writing under O. XVI, 11; *Besley v. B.*, 37 Ch. D. 648.

As to the effect of an order in a winding-up giving persons interested in a co.'s assets leave to take proceedings in the name of the co., on giving such indemnity as the Court may direct, see *Cape Breton Co. v. Fenn*, 17 Ch. D. 198, C. A.

As a trustee's agents are in general accountable to the trustee only, an action by a *c. q. t.* against the trustee and his solr, alleging improper payments out of the trust fund by the trustee to the solr, cannot be maintained as against the solr: *Re Spencer, S. v. Hart*, 51 L. J. Ch. 271; 30 W. R. 435; 45 L. T. 645; *Re Jackson*, 40 Ch. D. 495; *Maw v. Pearson*, 28 Beav. 196; but the proper remedy is by taxation under the third-party clause: *Re Spencer, S. v. Hart, sup.*; and *v. sup.* Vol. I., Chap. XVII., pp. 289 *et seq.*

The Court refused to hear counsel for trustees in support of an application by a tenant for life whose interest was opposed to those of the remaindermen, it being the duty of the trustees to be a check on him: *Re Hotchkiss's Settled Estate*, 35 Ch. D. 41.

Cs. q. t. of legacies retained in hand by trustees are not necessary parties to an action by creditors to follow the legacies: *Re Bowden, Andrew v. Cooper*, 45 Ch. D. 444.

SECTION II.—BREACH OF TRUST BY IMPROPER INVESTMENT OR NON-CONVERSION—CONCURRENCE, ACQUIESCENCE AND LACHES, BY CESTUIS QUE TRUST.

1. *Inquiries as to Trust Funds and Loss by Improper Investment or Non-investment.*

1. ACCOUNT of the receipts and payments in respect of the trust funds received by Deft or his deceased co-trustee, or either of them; "2. An inquiry of what particulars the trust funds consist, and how they are invested; 3. And in case it shall appear, in taking the said accounts, that any unauthorized investments have been made of the said trust funds, then an inquiry whether any and what loss has been sustained thereby, and if so, how and under what circumstances; 4. An inquiry what balances from time to time remained in the hands of the said trustees, or either of them; 5. And in case it shall appear in taking the said accounts that any part of the said trust funds has improperly remained uninvested, an inquiry whether any and what loss has been sustained by reason thereof, and if so, when and under what circumstances."—*Pearson v. Best*, M. R., 8 Feb. 1860, B. 368.

2. *Investment declared improper.*

JUDGMENT to administer estate—"And declare, that the investment of any part of the personal estate of the testator by the Deft C., either by way of loan upon the deposit of exchequer bills, £5 p. c. Russian Bonds &c. [*other foreign securities*], was an improper investment: And in taking the accounts of the personal estate of the testator not specifically bequeathed, come to the hands of the Deft C., regard is to be had to the foregoing declaration."—*Knott v. Cottee*, M. R., 12 March, 1852, B. 945; 16 Beav. 77; 16 Jur. 752.

3. *The like—Payment by Instalments—Security to be sold on Default—Arrangement not to prejudice Appeal.*

"DECLARE, that the investment of the sum of £7,320, in the pleadings mentioned, on the security of the estates comprised in the indenture of &c., was, so far as regards the Plt, a breach of trust on the part of the Deft A."—Directions by arrangement for Deft A. to make good Plt's share of fund, with interest at £4 p. c., by instalments; And that in default of such payments or any of them the mortgage security be realized; and that the Plt, out of the money arising from any sale, be paid the amount due to her with her costs of suit.—"And by consent of the Plt (by her counsel), any consent or admission on the part of the Deft A., or other matter herein contained, is not to prejudice or affect any right of appeal by or on the part of the Deft A."—Liberty to apply.—*M'Leod v. Annesley*, M. R., 24 March, 1853, B. 695; 16 Beav. 600.

The rate of interest in such cases is now £3 p. c.: *Re Barclay, B. v. Andrew*, (1899) 1 Ch. 674; and see *Gilroy v. Stephen*, *sup.* p. 1120, Form 3.

For decree to replace stock sold out, and invested on mortgage, in case it did not realise the stock, see *Phillipson v. Gatty*, 7 Ha. 531.

For order, on further consideration, for Defts, the trustees, to transfer and pay into Court, within six months, stock and cash due from them in respect of a breach of trust, or such part thereof as should remain due after realizing the security on which the funds had improperly been invested, which they were to be at liberty to do, and to pay in the proceeds, to be invested in like stock, and if paid in, such proceeds to be taken in part satisfaction of the stock and cash before directed to be paid in, at the average price, one week after; Plt's costs, and the costs of infant Defts, necessary parties, to be raised and paid in the first place out of fund in Court, but to be replaced by the trustees, with declaration that, as between the Defts, the trustees, one of them was primarily liable in respect of the breach of trust and costs, see *Hanbury v. Holgate*, M. R., 4 June, 1861, A. 1293.

4. *Inquiries as to Loss by Non-conversion and Non-investment, and as to Acquiescence.*

ACCOUNT of testator's personality other than the leasehold estate (if any) comprised in the M. farm—"1. An inquiry what freehold and copyhold estates the testator was seised of at his death, and whether any and what leasehold estates were comprised in the M. farm."

2. Inquiry what parts sold, and how the purchase-money has been applied. 3. "An inquiry whether the M. farm, or any part thereof, might at any and what time subsequent to the testator's death, and previously to the actual sale thereof, have been sold for any and what sum of money greater than that for which the same was actually sold; And if so, for what reason and under what circumstances the same remained unsold; And whether the Plts, or either and which of them, after they respectively attained the age of twenty-one years, and the Defts E. &c., or any and which of them, in any and what manner, approved of or acquiesced in the same remaining unsold, and whether being aware of the direction in the testator's will for the sale thereof. 4. An inquiry, for what reason and under what circumstances the Defts D. and A. omitted to make a sufficient investment to answer the annuities of £— and £—, given by the testator's will, and whether any and what loss has been occasioned to the testator's estate by such omission."—*Adams v. Dunn*, V.-C. K., 4 Aug. 1859, A. 2087, penned by the V.-C.; and see *Taylor v. Tabrum*, 6 Sim. 281, *sup.* p. 1126.

5. Inquiry as to Acquiescence in alleged Breach of Trust.

"An inquiry, at the request of the Defts B. &c. (*accounting parties*) whether any and which of the persons beneficially interested under the will of the testator did, as mentioned in the said Defts' answer, concur in the alleged breach of trust in respect of the moneys remaining in the hands of the late Deft B. the elder, deceased, and of the Defts B. and C."—*Wrightson v. Bryant*, V.-C. K., 12 July, 1859, B. 2281.

For decree charging loss by breach of trust without prejudice to any remedy against the concurring life tenant's interest, see *Meyer v. Montrieux*, 9 Beav. 522.

For inquiry as to notice of breach of trust and acquiescence, and as to acts in evidence thereof, and with reference thereto, see *Broadhurst v. Balguy*, 1 Y. & C. C. 32; *James v. Frearson*, *ib.* 379; and as to exor acting in co-exor's lifetime, and as to acts in evidence, and consequent inquiries as to testator's estate and breaches of trust, *S. C.*; and for inquiry as to trustee's remedy against *c. q. ts.*, *Rackham v. Siddall*, 1 Mac. & G. 607, *et v. inf.* p. 1151.

In *Lincoln v. Wright*, 4 Beav. 427, an inquiry was refused for want of sufficient evidence.

6. Trustees declared liable in respect of Non-conversion and Purchase of Shares.

"DECLARE that the Defts T. H. &c. are liable to make good to the estate of P., the testator &c., all loss which has already accrued or may hereafter accrue by reason of such default, as in the statement of claim mentioned, on the part of the said Defts in (not) selling and disposing of such shares in the B— Banking Co. as formed part of the testator's estate, and also by reason of the investment of any portion of the testator's estate in the purchase of shares of the said banking co., and that the said Defts, the trustees, are liable to pay so much of the Plt's

costs of this action as are occasioned by or relate to the Plt's claim in respect of the said shares, without prejudice to the Defts' right to receive the residue of their costs out of the residuary estate."—Directions to tax and distinguish the costs relating to such claim, and for trustees to pay them.—"And Let the following &c.:—1. An inquiry what loss has (already) accrued (or may hereafter accrue (*sic*)) to the estate of the testator by reason of such default as in the statement of claim mentioned on the part of the Defts T. H. &c. [*trustees*], in not selling or disposing of such shares in the said B—Banking Co. as formed part of the testator's estate, and also by reason of the investment of any portion of the testator's estate in the purchase of shares in the said banking co."—Defts to pay in the balance found due after deducting the residue of their costs.—Usual admon judgment.—See *Sculthorpe v. Tipper*, V.-C. M., 20 Dec. 1871, B. 3412; S. C., 13 Eq. 232, *inf.* p. 1149.

7. Order to replace Stock improperly Sold.

UPON motion &c., by counsel for Plts, and upon hearing &c., for Defts; Declare that the Defts A. B. and C. D. are liable to make good to the trust estate of the settlement made on the marriage of &c., as at the death of E. F., the tenant for life under the settlement dated &c., £—Consols sold in 1875 with the dividends which would have accrued thereon as from the death of such tenant for life; And Let the Defts A. B. and C. D., on or before &c., purchase in the names of the Plts, the trustees of the said settlements, £—Consols representing the said £—Consols; And in taking the account directed by the order dated &c., the said Defts are to be charged with a sum of cash equal to the dividends which would have been produced in the interval between the death of the tenant for life and such purchase if such consols had not been sold.—*Re Massingberd's Settlement, Holloway v. Trelawny*, Kay, J., 7 Feb. 1889, B. 362; S. C., 59 L. J. Ch. 107, and *v. sup.*, Section I, Form 8, p. 1123.

8. Improper Investment—Judgment against Representatives of Deceased Trustee—Plaintiff, Tenant for Life, barred by Trustee Act, 1888, s. 8—Declaration as to Right to Income of Fund replaced.

DECLARE that the investment of the sum of £400 upon land at P., as in the pleadings mentioned, was, as against the Plts other than the Plt W. (the tenant for life), improper. And the Defts C. and S. by their defence admitting assets of J. G. C., in the pleadings mentioned, for the purposes of this action, It is ordered that the Defts C. and S. do, within ten days after service of this order, pay into Court as directed by the schedule hereto the sum of £400. Declare that the Plt W. is debarred by the Trustee Act, 1888, from maintaining any

action or other proceeding in respect of any impropriety in such investment, and accordingly from deriving any benefit from the relief hereinbefore granted. Declare that the Defts C. and S. are entitled to the income arising from the said sum of £400 during the residue of the life of the Plt W., as part of their testator's estate, and that after her decease the said sum shall be held upon the trusts subsequent to the life interest of the Plt W., declared by the settlement dated the 28th Nov. 1872, in the pleadings mentioned, of and concerning the moneys thereby settled. And Let the said sum of £400, when paid into Court, be dealt with as in the said schedule hereto directed. Declare that the Defts C. and S., upon making such payment into Court as hereinbefore directed, will, after the death of the Plt W., and in the meantime subject to her life interest therein, be entitled to the said mortgage debt as part of the testator's estate. Defts C. and S. to pay to Plts their costs of action up to and including this judgment, except so far as same increased by reason of W. being a party Plt thereto. Liberty to persons interested to apply after the death of the Plt W. for payment out of Court of the £400, or any investment representing the same, as they may be advised. [Add Lodgment and Payment Schedule directing payment of £400 and investment in consols and payment of interest accruing during life of Plt W. to Defts C. and S.]—*Want v. Campain*, Wright, J., 6 Feb. 1893, B. 806; S. C., 9 Times L. R. 254.

9. *The like—Action by Tenant for Life and Infant Children, Beneficiaries under Settlement—Impounding Interest of Tenant for Life Participant in Breach of Trust—Investment declared good for less Sum—New Trustees.*

THIS action &c.—Declare that the investment of the sum of £34,612 in the pleadings mentioned, by the Defts and G. R. H. S., deceased, on the security of the estates &c. comprised in the indentures &c. in the pleadings mentioned, was, so far as regards the Plts, W. F. S., C. S. H. S., C. S. and V. E. S. &c. (*infants*), a breach of trust on the part of the Defts and the said G. R. H. S. Declare that so far as regards the Plts W. F. S., C. S. H. S., C. S. and V. E. S. (*infants*), the said estates comprised in the said indentures would at the time of the investment of the said sum of £34,612 upon the security thereof have been a proper investment in all respects for the sum of £26,000, and no more, and ought to be deemed to have been an authorized investment for such sum of £26,000. Declare that so far as regards the Plts W. F. S. &c. (*infants*), the Defts H. Earl P., D. W. Baron D. and T. M., are jointly and severally liable to make good to the trust estate the difference between the aggregate amount of the proceeds of sale of such portion of the said estates as has been already sold, and the proceeds of sale of the remainder of such estates hereinafter directed to be sold, when sold, or the said sum of £26,000 (whichever

shall be the larger sum) on the one hand, and the said sum of £34,612 on the other hand, and that until such difference shall have been made good the said Plts are entitled to a lien for the amount of such difference upon the proceeds of sale of such portion of the said estates as has already been sold, and upon the portion of the said estates remaining unsold, and upon the proceeds thereof when sold: Let the Defts proceed with the sale of such portion of the said estates as remains unsold. Declare that so far as regards the Plt V. F. J. S. (*tenant for life*), his right to sue in respect of the matters complained of by him in this action is barred by sect. 8 of the Trustee Act, 1888; And Let the following inquiry be made: (1) An inquiry what is the amount of the difference for which the Defts are jointly and severally liable pursuant to the declaration in that behalf hereinbefore contained; And the Defts by their counsel desiring to retire from the trusts of the said indenture of settlement, Let the Plt V. F. J. S. be at liberty to exercise the power of appointment contained in the said indenture of settlement by appointing two or more proper persons trustees of the same indenture in the place of the Defts and the said G. R. H. S., deceased; and Let the Defts, after retaining their costs, charges, and expenses properly incurred by them in relation to the appointment of new trustees hereinbefore directed, convey, assign, and transfer the trust estate vested in them, under or by virtue of the above-mentioned indenture, so far as the same may not have been diminished or lost by reason of the declarations hereinbefore contained, so as to vest the same in the trustees so to be appointed and to be held by them upon the trusts declared by such indenture or such of them as are now subsisting and capable of taking effect concerning the same such conveyance, assignment, and transfer to be settled by the Judge, but this order is to be without prejudice to the right of the Defts to retain any costs, charges, and expenses properly incurred by them as trustees not being costs of this action, and Let the Defts deliver to such new trustees upon oath, all deeds and writings in their custody or power relating to the said trust estate; and Declare that the Plt V. F. J. S. is not entitled to any income arising from any sum which the Defts or any of them may pay under this judgment by way of making good the trust estate, and that the Defts, or some, or one of them are, or is entitled to such last-mentioned income during the life of the said Plt. Liberty for the Defts or any of them to apply to the Court for payment of such income in accordance with the foregoing declaration (*usual consequential directions*).—Tax costs of the infant Plts of this action, and also costs of the Defts, so far as increased by the Plt V. F. J. S. being joined as a Plt in his personal character.—Defts to pay costs of infant Plts when taxed, and Plt V. F. J. S. to pay Defts amount of their said costs when taxed.—Adjourn further consideration.—Liberty to apply.—*Re Somerset, S. v. E. Poulett*, (1894) 1 Ch. 231, Kekewich, J., 12 April, 1893, B. 488, as varied by C. A., 9 Nov. 1893, B. 1390.

10. *Declaration as to Joint and Several Liability of Trustees and Right of Contribution.*

THIS action and counterclaim coming on &c., Declare that as between the infant Plts and the Deft and the Plt B. R., the Deft and the Plt B. R. are jointly and severally liable to make good to the trust estate the £— lost by J. R. as in the pleadings mentioned; And that as between the Deft and the Plt B. R., the Plt B. R. is bound to contribute one moiety, and the Deft the other moiety of such sum. No costs given on either side.—Liberty to apply.—See *Robinson v. Harkin*, B. 3754, (1896) 2 Ch. 415.

11. *Declaration that Partners liable as Constructive Trustees for Defalcations of Co-partners.*

DECLARE that the Defts W. H. and H. C. M. are jointly and severally liable to make good to the Plt the loss he has sustained by reason of the sale by W. O. R., in the pleadings named, of the (twenty-eight) share warrants or bonds of the D. B. C. Mines Ltd. in the pleadings mentioned, and the misappropriation by him of the proceeds of such sale to his own use; And the Plt and the Defts W. H. and H. C. M. by their counsel agreeing that the share warrants and bonds aforesaid were sold by the said W. O. R. on the — day of — for the sum of (five thousand, two hundred and forty-six pounds, four shillings, and sixpence); Let the Defts W. H. and H. C. M., on or before the — day of —, pay to the Plt W. R. the said sum of (five thousand, two hundred and forty-six pounds, four shillings, and sixpence), together with interest thereon at the rate of £4 p. c. per ann. from the said — day of — to the day of payment. Defts W. H. and H. C. M. to pay Plt's costs of action and appeal to be taxed. Plt to pay costs of appeal of Defts A. M. and E. R. M. to be taxed.—See *Rhodes v. Moules*, C. A. 12 Nov. 1894, B. 0420, (1895) 1 Ch. 236, C. A.

12. *Contribution between Cestuis que Trust.*

THIS action coming on for trial &c., in the presence of counsel for the Plt and the Defts; Declare Defts are liable to contribute and pay to the Plts as trustees of &c., £—, being the amount paid by the Plts into Court in an action of *A. v. B. &c.*, with interest thereon at the rate of £4 p. c. per ann. from the — day &c.—Direction for payment of the said £— and interest.—*Bacon v. Camphausen*, Stirling, J., 8th March, 1888, A. 323; *S. C.*, 58 L. T. 851.

13. *Advances to Executor—Repayment to Mortgagee with Costs.*

THIS action coming on for trial &c., in the presence of counsel for the Plts and the Defts; Declare the Plts are entitled to a lien on £— Preference Stock of &c., deposited with them as in the statement of claim mentioned for £— and interest thereon at the rate of £5 p. c. per ann.

from &c.; Take account of what is due to the Plts on the footing of such lien for principal and interest and mortgagee's costs to be taxed, &c.—Sell Preference Stock.—Defts to join in and execute all necessary transfers for effecting such sale.—Plts to pay proceeds into Court within — days after receipt.—Direction to pay amount to be certified to be due to the Plts out of such proceeds and dispose of residue.—*Child & Co. v. Thorley, Malins, V.-C.*, 13 Nov. 1880, A. 3610; S. C., 16 Ch. D. 151.

14. *Breach of Trust at Instigation of Tenant for Life—Married Woman restrained from Anticipation—Liberty to Apply—Trustee Act, 1893, s. 45.*

AND the Deft E. H. in person, and the Defts J. M. H., A. G. H., and E. R., by their counsel respectively requesting, It is ordered that they be at liberty to apply in Chambers with reference to enforcing such rights (if any) as they may have to impound the interest of the Deft Helen E. H. in the said indentures of settlement dated the &c., 1878, and the &c., 1887, by way of indemnity to the estates of the said G. H. and S. F. R.—*In re Holt, Holt v. Holt*, 9 July, 1897, A. 1073; (1897) 2 Ch. 525.

15. *Declaration that Trustees retaining Authorised Investments not liable for Depreciation—Trustee Act, 1893—Amendment Act, 1894, s. 4.*

DECLARE that the Plts, as the executors of the will of the late H. C., and the Deft M. A. C., are not nor are any of them liable to make good to the estate of the testator J. C., any loss sustained by reason of the mortgage securities in the schedule to the said Master's certificate mentioned having been retained since the death of the said testator J. C.—*Re Chapman, Cocks v. Chapman*, (1896) 1 Ch. 323, C. A., 7 Aug. 1896, A. 3740.

16. *Trustees excused from Breach of Trust—Judicial Trustees Act, 1896, s. 3.*

THIS Court being of opinion that the Defts A. C. F. and A. F. T. C., the exors of the will of E. S., Baron de C., have acted honestly and reasonably within the meaning of sect. 3 of the Judicial Trustees Act, 1896, and ought to be excused and relieved from personal liability as regards the sums of £— and £—, making together £—, mentioned in paragraph 11 of the affidavit of A. F. T. C. filed &c., This Court doth order that the said Defts, A. C. F. and A. F. T. C., be excused and relieved accordingly.—*Re De Clifford, De Clifford v. Quilter*, 4 Aug. 1900, A. 3380; (1900) 2 Ch. 707.

NOTES.

BREACH OF TRUST—IMPROPER INVESTMENT.

As a general rule, "the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs": *Learoyd v. Whiteley*, 12 App. Ca. 727, 733, per Lord Watson; *Smethurst v. Hastings*, 30 Ch. D. 490, per Bacon, V.-C.; but it is his duty to confine himself to the class of investments which are permitted to the trust, and likewise to avoid all investments of that class which are attended with hazard: *S. C.*; and see *Knox v. Mackinnon*, 13 App. Ca. 753; *Rae v. Meek*, 14 App. Ca. 558, 569, 570; *Re Salmon*, *Priest v. Uppleby*, 42 Ch. D. 351, 367, C. A.; *Sheffield Society v. Aizlewood*, 44 Ch. D. 412, 454; *Re Whiteley*, *Learoyd v. W.*, 33 Ch. D. 347, 355 (per Lindley, L. J.); 12 App. Ca. 727; *Bullock v. B.*, 56 L. J. Ch. 221; 55 L. T. 703; *Blyth v. Fladgate*, (1891) 1 Ch. 337, 354; *Wyman v. Paterson*, (1900) A. C. 271.

The question whether the trustee has acted with ordinary prudence is one of fact to be solved according to the circumstances of each case: *Binnie v. Broom*, 14 App. Ca. 576.

And the onus is on them, though empowered to lend on "such securities as they may approve," to show a sound discretion in investing: *Stretton v. Ashmall*, 3 Drew. 9, 15; see *Zambaco v. Cassavetti*, 11 Eq. 439; *Re Smith*, *S. v. Thompson*, (1896) 1 Ch. 71.

Trustees should not lend more than two-thirds of the value of land: *Stickney v. Sewell*, 1 My. & Cr. 8; *Macleod v. Annesley*, 16 Beav. 600; nor half that of houses: *Stretton v. Ashmall*, 3 Drew. 12; *Macleod v. Annesley*, *sup.*; *Budge v. Gummow*, 7 Ch. 719; or of perpetual leaseholds for lives in Ireland at large head-rents: *Macleod v. Annesley*, *sup.*; and see *Jones v. Julian*, 25 L. R. Ir. 45; or on sub-mortgages of a speculative character: *Smethurst v. Hastings*, 30 Ch. D. 490; but, *semble*, there is no objection to a sub-mortgage where the trustees have the legal estate, and can exercise all the original mortgagee's powers: *S. C.*

And in the case of buildings used in trade, and the value of which must depend on external and uncertain circumstances, they should not, in general, lend so much as a half: *Stickney v. Sewell*, *sup.*; *Stretton v. Ashmall*; *Royds v. R.*, 14 Beav. 64; and see *Learoyd v. Whiteley*, *sup.*; *Re Pearson*, 51 L. T. 692.

Though the "two-thirds rule" is not a hard-and-fast rule (*Re Medland*, *Eland v. M.*, 41 Ch. D. 476, C. A.; *Smethurst v. Hastings*, 30 Ch. D. 490; *Re Godfrey*, *G. v. Falkner*, 23 Ch. D. 483, 490; *Stretton v. Ashmall*, 3 Drew. 12), yet it is one to which trustees will do well to adhere in every case: *Lewin*, 364, citing *Learoyd v. Whiteley*, *sup.*; *Knox v. Mackinnon*, *sup.*; *Rae v. Meek*, *sup.*; *Blyth v. Fladgate*, *sup.*

It is their duty to ascertain the value of the security on which they are lending; and trustees failing to do so, or relying upon a valuation made by a surveyor employed by the borrower, have been held personally liable for consequent loss: *Smethurst v. Hastings*, 30 Ch. D. 490; *Re Olive*, *O. v. Westerman*, 34 Ch. D. 70; *Re Partington*, *P. v. Allen*, 57 L. T. 654; *Walcott v. Lyons*, 54 L. T. 786; *Rae v. Meek*, 14 App. Ca. 558; *Ingle v. Partridge*, 34 Beav. 411; *Hopgood v. Parkin*, 11 Eq. 74; *Budge v. Gummow*, 7 Ch. 719.

They were made liable for loss from a mortgage of a seaside hotel, on the report of a London surveyor: *Budge v. Gummow*, L. R. 7 Ch. 719, following *Jones v. Lewis*, 17 Sol. J. 45, reversing *S. C.*, 3 D. & S. 474; and see *Hopgood v. Parkin*, 11 Eq. 74, *sup.* p. 1132; or where, without inquiry, they relied upon the fraudulent representation of the solicitor that the security was sufficient: *Sutton v. Wilders*, 12 Eq. 373; for lending an excessive amount on brickworks: *Learoyd v. Whiteley*, *sup.*; or on let houses: *Hoey v. Green*, W. N. (86) 236; *Fry v. Tapson*, 28 Ch. D. 268; *Smethurst v. Hastings*, 30 Ch. D. 490; or cottage property in a town: *Re Salmon*, 42 Ch. D. 351, C. A.; *Re Olive*, *O. v. Westerman*, 34 Ch. D. 74; and as to unfinished buildings, see *Rae v. Meek*, 14 App. Ca. 558, 571.

If the security is deficient, the trustees may insist on a change, though the consent of the tenant for life is required and refused: *Harrison v. Theoxton*,

4 Jur. N. S. 550; *Costello v. O'Rorke*, Ir. Rep. 3 Eq. 172. But there must be strong reasons: *Parke v. Thackray*, 24 W. R. 21.

Retaining old and buying new shares in an unlimited bank were breaches of trust: *Sculthorpe v. Tipper*, 13 Eq. 232, Form 6, p. 1142; *Edwards v. Edmunds*, 34 L. T. 522. But in *Re Hirst*, 11 L. T. 533, the Court gave its opinion that shares in the Yorkshire Banking Co. might be retained.

As to the right of trustees to employ brokers and other agents in the ordinary course of business, *v. sup.* p. 1131; and as to the right of a trustee to convert an improper investment, see *Power v. Banks*, 70 L. J. Ch. 700; 49 W. R. 679.

UNDER TRUSTEE ACT, 1893.

Now, by the Trustee Act, 1893, s. 8 (replacing s. 4 of the Trustee Act, 1888), a trustee lending money upon the security of any property is not to be chargeable with breach of trust "by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made," provided it appears (1) that the trustee was acting on a report as to value made by a person whom he reasonably believed to be an able practical surveyor or valuer; (2) instructed and employed independently of any owner of the property; (3) whether such surveyor or valuer carried on business in the locality where the property is situate, or elsewhere (overruling, *pro tanto*, *Fry v. Tapson*, 28 Ch. D. 268; and see *Budge v. Gummow*, 7 Ch. 717, 722); and (4) that the amount of the loan does not exceed two-thirds of the value stated in such report; and (5) that the loan was made under the advice of such surveyor or valuer, as expressed in such report. And the section applies to property of any tenure, whether agricultural, or house, or other.

The choice of the surveyor is a matter upon which the trustee must exercise his own judgment: see *Re Walker*, 59 L. J. Ch. 386, 391; 62 L. T. 449; 38 W. R. 766; and he cannot properly leave the nomination to his solicitor: *Fry v. Tapson*, *sup.*

The words "believed to be" do not govern the words "instructed and employed independently of any owner of the property," and, therefore, a trustee must show that the surveyor or valuer was, in fact, so instructed and employed: *Re Somerset, S. v. Earl Poulett*, (1894) 1 Ch. 231, C. A.

As to the form and contents of the report, see *Re Walker*, *sup.*; *Re Olive, O. v. Westerman*, 34 Ch. D. 74; *Leaoyd v. Whiteley*, 12 App. Ca. 735; 33 Ch. D. 351, C. A.; *Lewin*, 365.

As to particular investments, *v. inf.* p. 1184.

NATURE AND EXTENT OF TRUSTEE'S LIABILITY.

Trustees not having complied with a direction to invest a sufficient sum to provide an annuity, an inquiry what sum should have been invested was sent, and their liability declared: *Starkey v. Dyson*, 24 W. R. 37.

Trustees, with power to invest in funds or on mortgage, and doing neither, are liable for the amount with interest, and not for that, or its amount in stock, at *c. q. t.*'s option: *Robinson v. R.*, 1 D. M. & G. 247; *Re Campbell, C. v. C.*, W. N. (93) 114; *Shepherd v. Moulds*, 4 Ha. 500; *Palmer v. Wakefield*, 3 Beav. 227; *Rees v. Williams*, 1 D. & S. 314; and so where meanwhile invested in Exchequer bills: *Matthews v. Brise*, 6 Beav. 239; and where stock was sold for the purpose of making the improper investment, they were liable, at the option of the *c. q. t.*, either to replace the stock or account for the proceeds of sale, with interest at 5 p. c.: *Phillipson v. Gatty*, 7 Ha. 516; *Re Massingberd's Settlement*, 63 L. T. 296, C. A.; 59 L. J. Ch. 107; 60 L. T. 620; and see *Matthews v. Nicholls*, Form 8, *sup.* p. 1123. And so when invested in mortgage, where directed to be so in stock: *Pride v. Fooks*, 2 Beav. 430; *Lewin*, 334; but now see the Trust Investment Act, 1889; and only for the loss from buying Bank stock instead of 3½ p. c.'s.: *Hynes v. Redington*, 1 J. & L. 589.

An investment on leasehold with only fourteen years to run, and small margin of value, was called in: *Pince v. Beattie*, 11 W. R. 979; 2 N. R. 546; 9 Jur. N. S. 1119; 9 L. T. 313.

The liability of the trustee to make good the loss is not conditional upon

an option being given to him of taking over the security: *Re Salmon, Priest v. Uppleby*, 42 Ch. D. 351, C. A.; and see *Re Massingberd's Settlement*, 63 L. T. 296, C. A.; and new trustees, to whom the security is transferred by him, may realise and hold him liable for the deficiency, and may be justified in so realising without notice to him: *Re Salmon, sup.*; *Head v. Gould*, (1898) 2 Ch. 250.

But in an action by one trustee against his co-trustee in the absence of the *cs. q. t.*, the Court will not order realisation merely to ascertain the deficiency, as the *cs. q. t.* may prefer either to retain the securities or proceed to a foreclosure: *Butler v. B.*, 5 Ch. D. 554; 7 Ch. D. 116, C. A.

When the trustee is ordered to replace the fund, but existing securities are retained for more favourable re-investment, at the instance of the *cs. q. t.*, they are entitled to an interim lien on the securities: *Re Whiteley, W. v. Learoyd*, 33 Ch. D. 347; *S. C.* in D. P., *Learoyd v. Whiteley*, 12 App. Ca. 727.

By the Trustee Act, 1893, s. 9, where a trustee has improperly advanced trust money on a mortgage security, which would at the time of investment have been a proper investment in all respects (*i.e.*, in all respects other than value: *Re Walker, W. v. W.*, 59 L. J. Ch. 386; 62 L. T. 449; 38 W. R. 766) for a less sum, the security is to be deemed an authorized investment for such less sum, and the trustee is only liable for the difference.

As to the difficulty attending the construction of the section, see *Re Somerset, S. v. Earl Poulett*, (1894) 1 Ch. 231, 233, *per Kekewich, J.*, Lewin, 366.

The burden of proof is on the trustee who seeks the protection of the section: *Jones v. Julian*, 25 L. R. Ir. 45.

The original breach was not cured, though the money was recovered, re-invested, and again sold out and then lost: *Lander v. Weston*, 3 Drew. 389; and so in a case of a loss traceable to the unauthorized investment: *Fyler v. F.*, 3 Beav. 550.

A., a solr, investing on improper security, without the client's knowledge, a dividend under A.'s bankruptcy was paid towards making it good. The security afterwards turning out sufficient, and the dividend being repaid, it belonged to A.'s estate, and not to subsequent incumbrancers on the property mortgaged: *Sawyer v. Goodwin*, 1 Ch. D. 351.

A trustee of a deed of dissolution of a building society whose supineness has enabled an absconding co-trustee to commit defalcations, does not by making good the amount lost escape payment of the costs of an action for an account: *Re Second East Dulwich 745th Starr-Bowkett Building Soc.*, 68 L. J. Ch. 169; 47 W. R. 408.

And as to what investments are authorized by particular words and statutes, *v. inf.*, Section VI., p. 1184; and as to excuse of trustees for breach of trust under sect. 3 of Judicial Trustees Act, 1896, *v. inf.*, pp. 1153, 1154.

PAYMENT OF TRUST FUNDS INTO COURT.

It is not a matter of course to order payment of trust funds into Court, but a reasonable ground for making the order, such as danger to the fund, must be shown: *Re Braithwaite, B. v. Wallis*, 21 Ch. D. 121; *Ross v. R.*, 12 Beav. 89; but see *Robertson v. Scott*, 14 L. T. 187; and on the question when trust funds will be ordered into Court: *v. sup.* p. 1129.

BREACH OF TRUST—NON-CONVERSION.

Trustees directed by the will to convert immediately after the decease, or so soon thereafter as they might see fit, were liable for not selling shares in an unlimited bank within the year: *Sculthorpe v. Tipper*, 13 Eq. 232; but see Lewin, 311, 312; and see *Grayburn v. Clarkson*, 3 Ch. 605; but there is no rule that trustees of a will are under an absolute duty to call in investments within twelve months from the testator's death, even though the securities (*e.g.*, by reason of agricultural depression) have apparently become insufficient: *Re Chapman, Cocks v. C.*, (1896) 2 Ch. 763, C. A.; and where trustees, acting honestly and prudently, retain an authorized security, they

cannot be held responsible for a loss through fall in value, unless wilful default, including want of ordinary prudence, be proved: *S. C.*

Where an absolute discretion to postpone conversion, or a special power to retain existing investments, is given, the ordinary rule as to conversion within a year does not apply: *Re Norrington, Brindley v. Partridge*, 13 Ch. D. 654, C. A.; *Gray v. Siggers*, 15 Ch. D. 74, C. A.; even though the property consists in part of shares in an unlimited co.: *Re Norrington, sup.*

And where trustees had an absolute discretion to sell or convert particular bank shares, they were not liable for retaining them beyond the year, but were liable for other new shares in the bank purchased by themselves: *Edwards v. Edmunds*, 34 L. T. 522; *Re Johnson*, W. N. (86) 72.

And where on the reconstruction of a bank the old shares were altered in nominal amount, leaving 10l. not called up, new shares taken by the trustees were held to be a fresh investment, which, not being authorized by the terms of the will as had been the retainer of the old shares, must be sold: *Re Morris, Bucknill v. M.*, 33 W. R. 445; 54 L. T. 388; 52 L. T. 462.

Wasting securities, where there are persons entitled in succession, must be converted: *Howe v. Dartmouth*, 2 L. Ca. Eq. 3rd ed. 289; 4th, 320; 6th, 321; 7 Ves. 137; *Dimes v. Scott*, 4 Russ. 195; *Tickner v. Old*, 18 Eq. 422; *Re Game, G. v. Young*, (1897) 1 Ch. 881; and see *Re Hubbuck, Hart v. Stone*, (1896) 1 Ch. 754, C. A. (where apportionment was directed of a sum realized which was less than the capital advanced, notwithstanding a direction in the will that no property "not actually producing income" should be treated as producing or entitling anyone to the receipt of income); or where desirable, the value is ascertained, and 4 p. c. on that paid to the tenant for life: *Re Llewellyn*, 29 Beav. 171, and cases there; *Arnold v. Ennis*, 2 Ir. Ch. Rep. 601; *Hume v. Richardson*, 4 D. G. F. & J. 29. And, in like manner, a reversionary interest in a fund must be converted, although the tenant for life under the will may be the recipient of the income of the fund under a different title: *Re Rowells*, (1900) 2 Ch. 107, C. A.

The rule does not apply if, from discretionary powers being conferred on the trustees or otherwise, an opposite intention appears in the will: *Thursby v. T.*, 19 Eq. 395, and cases there; *Greaves v. Smith*, 22 W. R. 388; 31 L. J. Ch. 713; *Gray v. Siggers*, 15 Ch. D. 47, C. A.; *Re Leonard, Theobald v. King*, 29 W. R. 234; 43 L. T. 664; but if the discretion is not or cannot rightly be exercised, the rule remains applicable: *Re Rowells, sup.*

Leases held on absolute trusts for renewal and payment of the fines out of income must be converted if they cease to be renewable: *Maddy v. Hale*, 3 Ch. D. 327, C. A.; *Re Barber's Settled Estates*, 18 Ch. D. 624; *Re Lord Ranelagh's Will*, 26 Ch. D. 590; *secus*, where the trust is merely permissive: *Morris v. Hodges*; *Richardson v. Moore*; *Tardiff v. Richardson*, 27 Beav. 625, 629, n., 630, n.

If by the improper delay in conversion the trust property is a gainer, the trustees must nevertheless account for the excess of income meanwhile paid to the tenant for life without set-off: *Dimes v. Scott*, 4 Russ. 195, 208.

The Court has a discretion to allow retention of unauthorized investments for the benefit of infants, but will only do so under special circumstances: *Fox v. Dolby*, W. N. (83) 29.

ACQUIESCENCE AND CONCURRENCE BY OBTUIS QUE TRUST.

A person who, having a partial interest in the trust fund, induces the trustee to commit a breach of trust for his benefit, is bound to exonerate the trustee, and his interest in the trust fund may be applied for that purpose: *Lincoln v. Wright*, 4 Beav. 427; *Raby v. Ridehalgh*, 7 D. M. & G. 104; and is subject to a charge for the amount in favour of the trustee: *Williams v. Allen* (No. 2), 32 Beav. 650; although he has since ceased to be a trustee: *Barratt v. Wyatt*, 30 Beav. 442; and after the death of the tenant for life: *Tickner v. Old*, 18 Eq. 422; *secus*, when the beneficiary is a married woman, and it is not shown that she was fully informed of the state of the case, and really acted for herself: *Sawyer v. S.*, 28 Ch. D. 595, C. A.

In *Meyer v. Montrieu*, 9 Beav. 521, trustees were declared liable for breach of trust, without prejudice to their claim against the tenant for life for concurrence; and for inquiry respecting trustees' remedy against such c. q. t., see *Rackham v. Siddall*, 1 Mac. & G. 607, *et v. sup.* p. 1142.

A *c. q. t.* receiving income from an improper investment, knowing it, had to give credit for the excess, but was not bound, as to loss on the capital, by laches or concurrence: *Raby v. Ridehalgh*, 7 D. M. & G. 104; *Baynard v. Woolley*, 20 Beav. 583; *Davies v. Hodgson*, 25 Beav. 177; *Griffiths v. Porter*, *Ib.* 236, 244; and at trustees' suit: *M'Gachen v. Dew*, 15 Beav. 84; and see *Moxham v. Grant*, (1899) 1 Q. B. 480; (1900) 1 Q. B. 88, C. A.; but not after long time, and being without blame: *Bate v. Hooper*, 5 D. M. & G. 338; and see *Stroud v. Gwyer*, 28 Beav. 130, *sup.* p. 1133.

Acquiescence or lapse of time may bar the right to call for trust accounts: *Bright v. Legerton*, 2 D. F. & J. 606; 29 Beav. 60, n.; *Philips v. Pennfather*, *Ir. Rep.* 8 Eq. 474. Acquiescence can only be with full knowledge of the breach of trust: *Stretton v. Ashmall*, 3 Drew. 9, 15; *Thompson v. Finch*, 8 D. M. & G. 560; *Smethurst v. Hastings*, 30 Ch. D. 490; and as to acquiescence by *cs. q. t.*, and the distinction between what will exonerate trustees from an active breach and what will preclude *cs. q. t.* from complaining of an omission and delay to which they had contributed, see *Munch v. Cockerell*, 5 My. & C. 180, 217; 9 Sim. 339; *Burrows v. Walls*, 5 D. M. & G. 233; *Bate v. Hooper*, *Ib.* 338.

As to *c. q. t.*, who was also trustee, suing for trust funds and acquiescence, see *Butler v. Carter*, 5 Eq. 276.

A party knowingly inducing trustees to commit a breach of trust, from which he derived a benefit, was liable: *Fyler v. F.*, 3 Beav. 550; or having a claim on the estate, inducing exors to hand over assets to him improperly: *Consett v. Bell*, 1 Y. & C. O. 569; and see *Wells v. W.*, W. N. (76) 227.

Accepting from a trustee security given him as an indemnity on committing a breach was a waiver: *Farrant v. Blanchford*, 1 D. J. & S. 107.

Mere quiescence without connivance was no bar: *Phillipson v. Gatty*, 7 Ha. 516. Application by *cs. q. t.* on coming of age to the trustee who had received the money, and giving him time, did not acquit the rest: *Burrows v. Walls*, *sup.*; the trustee's answer alleging assent by some *cs. q. t.*, an inquiry went: *Fyler v. F.*, 3 Beav. 550.

A *c. q. t.* who, knowing of a breach of trust, receives what he can "from the wreck of the estate," does not thereby waive his right to full relief: *Thompson v. Finch*, 22 Beav. 316; 8 D. M. & G. 560; *Re Cross*, *Harston v. Tenison*, 20 Ch. D. 109, 122, C. A.

A creditor who merely abstains from calling upon exors to realize is not deprived of his right to sue for the devastavit; *secus*, if he has misled the exors into parting with the assets: *Re Birch*, *Roe v. B.*, 27 Ch. D. 622.

As to reversioners being barred by acquiescence and lapse of time, see *Life Assoc. of Scotland v. Siddal*, 3 D. F. & J. 58; and as to the extent of the liability of a trustee beneficiary who concurs in a breach of trust, see *Chillingworth v. Chambers*, (1896) 1 Ch. 685, C. A., and *sup.* p. 1135.

In *Morris v. Livie*, 1 Y. & C. C. 380, assignee of exor's legacy took subject to his subsequent breach of trust; and the assignee of leaseholds given to one exor indebted to the estate took subject to such debt: *Cole v. Muddle*, 10 Ha. 186; *Willes v. Greenhill*, 29 Beav. 376; though in *Cole v. Mills*, 10 Ha. 179, sale of leasehold given to an exor indebted to the estate was upheld; and trustees had a lien on the interests (derived through the settlement) of a party indebted to the trust: *Burridge v. Row*, 1 Y. & C. C. 183; and *semble*, though the settlement were voluntary, if it had been so completed as to be enforceable by the Court: *Re Weston*, *Davies v. Tagart*, (1900) 2 Ch. 164; so in the absence of notice of misfeasance by a director, a transferee of shares from him acquired a good title: *Re Goy & Co.*, (1900) 2 Ch. 149; and where the fund of a Deft trustee was carried to a separate account in an admon action the assignee's title was good, in the absence of specific notice to him that the assignor was indebted to the estate: *Edgar v. Plomley*, (1900) A. C. 431, P. C.

Directors of a co. having to replace money paid out of capital to the shareholders are entitled to indemnity from them: *Moxham v. Grant*, (1900) 1 Q. B. 88, C. A.

By the Trustee Act, 1893, s. 45, where a trustee has committed a breach of trust "at the instigation or request, or with the consent in writing, of a beneficiary," the Court may (notwithstanding that the beneficiary is a married woman entitled for her separate use with or without a restraint upon anticipation) make such order as shall seem just for impounding all

or any part of the interest of the beneficiary by way of indemnity to the trustee.

In order to bring a case within the section there must be complicity on the part of the *c. q. t.* in a breach of trust, not merely concurrence in an investment which is, but is not known to him to be, a breach of trust: *Lewin on Trusts*, 10th ed., 1121, citing *Re Somerset, S. v. Poulett*, (1894) 1 Ch. 231, 265, C. A.; and such complicity must be actual and not constructive only: *Lewin*, 1122; *Re Somerset, sup.*; and see *Mara v. Browne*, (1895) 2 Ch. 69, 93; (1896) 1 Ch. 199, C. A.; *Bolton v. Curre*, (1895) 1 Ch. 544; or subsequently to the investment and in reliance on the trustees: *Henderson v. H.*, 2 F. 1295 (Ct. of Sess.).

The words "in writing" in the commencement of the section refer only to the word "consent," and not to the words "instigation" or "request": *Griffith v. Hughes*, (1892) 3 Ch. 105; *Re Somerset, sup.*; *Mara v. Browne, sup.*

And see, as to the effect of the section generally, *Lewin*, 1121 *et seq.*; as to the right of the trustee to impound as against an assignee for value, *Willett v. Finlay*, 29 L. R. Ir. 156, 497; as to the discretion of the Court and as to the right to impound where the interest of the *c. q. t.* is not immediate, *Bolton v. Curre*, (1895) 1 Ch. 544, 549; as to the regard to be paid to the fact that the interest of a *feme covert* is subject to restraint on anticipation, *Griffith v. Hughes, sup.*; *Bolton v. Curre, sup.*; *Ricketts v. R.*, 64 L. T. 263; and as to the extent of the liability of the *c. q. t.*, *Chillingworth v. Chambers*, (1896) 1 Ch. 685, 707, C. A.; *Mara v. Browne*, (1895) 2 Ch. 69, 92, 93; and for a case in which the Court at the trial gave leave to Deft trustees, without going into evidence, to apply in Chambers with reference to enforcing their rights (if any) to indemnity against the tenant for life, *Re Holt, Re Rollason, H. v. H.*, (1897) 2 Ch. 525; and see form of order, *sup.* p. 1125.

EXCUSE FOR BREACH OF TRUST UNDER JUDICIAL TRUSTEES ACT, 1896.

By sect. 3 of the Judicial Trustees Act, 1896 (59 & 60 V. c. 35), "If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same."

On an application under this section, the Court must be satisfied, by proper evidence, that the trustee has acted reasonably as well as honestly: *Re Turner*, (1897) 1 Ch. 536; *Re Stuart*, (1897) 2 Ch. 583; *Re De Clifford, De C. v. Quilter*, (1900) 2 Ch. 707 (Form 16, *sup.* p. 1147); and the burden of showing that he acted honestly and "reasonably" lies on him: *Re Stuart*, (1897) 2 Ch. 583.

In dealing with the question of reasonableness, the Court will consider whether a prudent man would have disposed of the trust property in the manner complained of if it had been his own: *Re Turner*, (1897) 1 Ch. 536; and see *Re Grindey*, (1898) 2 Ch. 593, C. A.; and will not favour a trustee who, in making an investment upon mortgage, has omitted to obtain a valuation in accordance with the requirements of sect. 8 of the Trustee Act, 1893 (56 & 57 V. c. 53), *v. sup.* p. 1149: *Re Stuart*, (1897) 2 Ch. 583.

The Court will not excuse a trustee merely because he relied on the advice of his solr as to the value of property proposed as a security: *Re Stuart*, (1897) 2 Ch. 583; and see *Re Turner*, (1897) 1 Ch. 536; nor because he, being a layman, has acted on the advice of his co-trustee who is a solr (though he may in such case be entitled to be indemnified): *Re Turner*, (1897) 1 Ch. 536; and see *Wynne v. Tempest*, W. N. (97) p. 43; nor an executrix and trustee who, acting under the advice of a friend, a commission agent, postponed sale of bank shares and shares in limited cos. not suitable for investment of trust funds: *Re Barker, Ravenshaw v. B.*, 77 L. T. 712; 46 W. R. 296; but relief has been granted by the Court

—where trustees, erroneously assuming that they had a power of sale, sold leaseholds and thereby diminished the income of the tenant for life, though the sale would have been a proper one had they in fact possessed a power of sale: *Perrins v. Bellamy*, (1899) 1 Ch. 797, C. A.;

—and where, on the construction of the will, exors and trustees reasonably thought that it was not their duty to call in a small outstanding

debt, the smallness of the amount being treated as a circumstance in their favour in considering whether they ought to have obtained the directions of the Court: *Re Grindley*, (1898) 2 Ch. 593, C. A.;

—where an exor, having good reason to suppose that the estate was solvent and of large amount, paid sums on account of income to maintain the testator's widow and family, and large defalcations by the testator afterwards came to light (relief being limited to payments made before the issue of the writ): see *Re Kay*, (1897) 2 Ch. 518;

—where an exor, acting honestly and reasonably, has refrained from suing for a debt which he *bond fide* believes to be irrecoverable: *Re Roberts*, 76 L. T. 479; and see *Re Barker*, 77 L. T. 712; 46 W. R. 296;

—where the trustees relied on the false statement of solrs of good repute: *Re De Clifford*, *sup.*

The section applies to a devastavit by an exor; but the Court bears in mind that a prudent and reasonable exor ought to advertise for claims under 22 & 23 V. c. 35, as soon as possible: *Re Kay*, (1897) 2 Ch. 518.

STATUTES OF LIMITATION.

Express trusts were not within the Statute of Limitations: Lewin, 1052, 1053, 1079; and now by the Jud. Act, 1873, s. 25 (2), "No claim of a c. q. t. against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations": see *Edwards v. Warden*, 1 App. Ca. 281; *Smith v. S.*, Ir. Rep. 10 Eq. 273.

Although as between the c. q. t. and a stranger the claim of the c. q. t. is barred by lapse of time operating against his trustee, lapse of time is no bar as between c. q. t. and trustee: *Re Cross*, *Harston v. Tenison*, 20 Ch. D. 109, C. A.

A security by way of trust for sale is a mortgage for the purpose of limitations; but when the property has been sold under the deed, an express trust arises as to the surplus: *Locking v. Parker*, 8 Ch. 30; and see *Re Alison*, 11 Ch. D. 284, C. A.; *Rochevoucauld v. Boustead*, (1897) 1 Ch. 196, C. A.

But a mortgagee selling under the ordinary power of sale is not an express trustee of the ascertained surplus proceeds: *Banner v. Berridge*, 18 Ch. D. 254.

Under an express trust to pay legacies from land, the claim was not barred by the statute as against the trustee's estate: *Watson v. Saul*, 1 Giff. 188; 5 Jur. N. S. 404; *Obee v. Bishop*, 1 D. F. & J. 137; and, by the Real Property Limitation Act, 1874 (37 & 38 V. c. 57), s. 10, no action shall be brought to recover any money or legacy charged on, or payable out of, land or rent secured by express trust, or to recover any arrears of rent, or of interest in respect of any money or legacy so charged or payable, and so secured, except within the time within which the same would be recoverable if there were not any such trust. Under this section, if an annuity secured by an express trust has remained unpaid for more than twelve years, no arrears can be recovered, but the right to future payments is not affected: *Hughes v. Coles*, 27 Ch. D. 231.

A claim against an exor personally for a devastavit is barred after six years: *Re Gale*, *Blake v. G.*, 22 Ch. D. 820; *Re Hyatt*, *Bowles v. H.*, 38 Ch. D. 609; *Thorne v. Kerr*, 2 K. & J. 54; though he may be liable after that period for breach of trust in an action for admon of the estate: *Re Marsden*, *Bowden v. Layland*, 26 Ch. D. 783; *Re Baker*, *Collins v. Rhodes*, 20 Ch. D. 230, C. A.; *Re Birch*, *Roe v. B.*, 27 Ch. D. 622; but see the Trustee Act, 1888, s. 8, *inf.*; and an exor cannot, when called upon to account, set up his own devastavit as a defence and then claim the benefit of the Statute of Limitations: *Re Hyatt*, *sup.*

As to implied trusts being barred by lapse of time, see *Henderson v. Atkins*, 28 L. J. Ch. 913; *Re Davis*, *Evans v. Moore*, (1891) 3 Ch. 119, C. A.; as to trustee's exor claiming the statute, *Brittlebank v. Goodwin*, 5 Eq. 545; *Char. Commrs. v. Wybrants*, 2 J. & Lat. 182; *Banner v. Berridge*, *sup.*; *Churcher v. Martin*, 42 Ch. D. 312; and that the trusteeship of exors created by the Executors Act, 1830 (11 G. IV. & 1 W. IV. c. 40), does not constitute exors express trustees, *Re Lacy*; *Royal General Theatrical Fund Assoc. v. Kydd*, (1899) 2 Ch. 149; and as to what is an express trust, *Mutlow v. Bigg*, 18 Eq. 246; Lewin, 1069, 1070; *Re Davis*, *sup.*; *Re Barker*, *Buxton v. Campbell*,

(1892) 2 Ch. 491; Lewin, 1070; *Soar v. Ashwell*, (1893) 2 Q. B. 390, C. A.; *Rochevoucauld v. Boustead*, (1897) 1 Ch. 196, C. A.; *Trevor v. Hutchins*, 76 L. T. 183; *Ib.* 636, C. A.; *Re Dixon, Heynes v. D.*; and as to the extension of the doctrine of express trust to cases in which persons assume to act as trustees, or knowingly receive trust money, so that a denial of trusteeship by them would be fraudulent, see *Soar v. Ashwell, sup.*; *Rochevoucauld v. Boustead, sup.*; *Re Dixon, sup.*

And whether an express trust is necessarily confined to one in writing, *quere*: *Re Sands to Thompson*, 22 Ch. D. 614, 617, per Fry, J., observing on *Petre v. P.*, 1 Drew. 371.

A resulting trust for the heir-at-law, arising on the face of the will, is an express trust within 3 & 4 W. IV. c. 27, s. 25; *Patrick v. Simpson*, 24 Q. B. D. 128.

A conveyance of land to trustees for a term of years upon trust to raise specific sums of money is an express trust within s. 10 of the Real Property Limitation Act, 1874 (37 & 38 V. c. 57): *Williams v. W., In re Hartley, W. v. Jones*, (1900) 1 Ch. 152; and the right to raise one of the sums when the statute has run in respect to it is not preserved by the success of an action in respect of the other sum: *Williams v. W., In re Hartley, W. v. Jones*, (1900) 1 Ch. 152.

As to the distinction between a mere charge and an express trust, and that a charge in form may be an express trust in fact, as in the case of a charge coupled with a duty, see *Cunningham v. Foot*, 3 App. Ca. 974; Lewin, 1071, 1072.

Administratrix also *c. q. t.* was entitled after twenty-seven years, and a failure to prove for it under a decree, to a sum of trust money properly lent to her intestate, and covenanted by him to be paid: *Coxwell v. Franklinsky*, 12 W. R. 1072; 11 L. T. 153; moneys received by a solr for a client are not held on an express trust: *Watson v. Woodman*, 20 Eq. 721; *secus* where received under a power of attorney: *Burdick v. Garrick*, 5 Ch. 233; or where the solr has received the money knowing that it was bound by a trust: *Re Bell, Lake v. B.*, 34 Ch. D. 462; *Soar v. Ashwell*, (1893) 2 Q. B. 390, C. A.; and see *Re Dixon, sup.*; so that the relation of trustee and *c. q. t.* is thus superadded to that of principal and agent: *Power v. P.*, 13 L. R. Ir. 281.

A person who had received rents ostensibly as agent for the true heir, when ascertained, was held to have constituted himself a trustee, so that the Statute of Limitations would not run in his favour as against the heir: *Lyell v. Kennedy*, 14 App. Ca. 437; and see Lewin, 1108, 1109.

Where a trustee receives money not belonging to the *c. q. t.*, but which the *c. q. t.* can claim as his own on the ground of fraud (*e.g.*, where a director receives a bribe), the statute will run from the time when the fraud was discovered: *Met. Bank v. Heiron*, 5 Ex. D. 319, C. A.

And in favour of directors who pay dividends out of capital, the statute will not run so long as they continue in office: *Re Sharpe, Masonic Life Ass. v. Sharpe*, (1892) 1 Ch. 154, C. A.; *Flitcroft's Case, Re Exchange Bkg. Co.*, 21 Ch. D. 519, C. A.

Where a right of contribution between co-trustees arises by reason of a breach of trust (*v. sup.* p. 1135), as they are in the position of sureties *inter se*, the principle of *Wolmershausen v. Gullick*, (1893) 2 Ch. 514, applies, and time does not begin to run as between them until the claim of the *c. q. t.* has been established against them: *Robinson v. Harkin*, (1896) 2 Ch. 415.

In a suit, after long time, and the death of all the trustees, as to breach of trust, inquiries only were directed, and the Master was to report specially, if unable to proceed: *Kirkman v. Booth*, 11 Beav. 273, 282.

As to how far lapse of time is a defence, see *Bright v. Legerton*, 2 D. F. & J. 606; *Woodhouse v. W.*, 8 Eq. 514; *Sleeman v. Wilson*, 13 Eq. 36; *Re Sharpe, sup.*; and that mere lapse of time is not *per se* a bar in a case of express trust, see *Rochevoucauld v. Boustead*, (1897) 1 Ch. 196, C. A. A bill for account, filed twenty years after the estate had been distributed, was dismissed, but without costs, the trustees having no accounts or vouchers: *Payne v. Evens*, 18 Eq. 356.

By the Real Property Limitation Act, 1874 (37 & 38 V. c. 57), s. 1, which came into operation on the 1st Jan. 1879, the usual time for barring actions as to land is reduced from twenty years to twelve, and the other periods are similarly shortened.

TRUSTEE ACT, 1888, SECT. 8.

By the Trustee Act, 1888, s. 8, in any action or other proceeding after 1st Jan., 1890, against a trustee, or person claiming through him, to recover money or other property, and to which no existing Statute of Limitations applies, "except where the claim is founded upon any fraud or fraudulent breach of trust, to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee, or previously received by him and converted to his use," the Deft is enabled "to plead the lapse of time as a bar in the like manner and to the like extent as if the claim had been against him in an action for money had and received"; but there is a proviso that the statute is not to begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

As to the effect of the section, see *Lewin*, 1079 *et seq.* It is available in aid of a trustee against whom an action is brought in respect of investments negligently made, or neglect to convert trust property, or other improper dealing therewith, more than six years previously: *Re Bowden*, *Andrew v. Cooper*, 45 Ch. D. 444, per Fry, L.J.; *Re Swain*, *S. v. Bridgeman*, (1891) 3 Ch. 233; or failure to call the same in: *Re Taylor*, *Atkinson v. Lord*, 81 L. T. 812; and as to the meaning of the expression "converted to his use," see *Moore v. Knight*, (1891) 1 Ch. 547; *Mara v. Browne*, (1895) 2 Ch. 69, 87, 88; *Re Gurney*, *Mason v. Mercer*, (1893) 1 Ch. 590, where, in the absence of fraud, a trustee who had advanced funds to a mortgagor to pay off a debt to a bank in which the trustee was a partner was entitled to set up the statute.

A trustee will not be deprived of the benefit of the section because the Plt has been defrauded by some other person in respect of the matter complained of: *Thorne v. Heard*, (1894) 1 Ch. 599, C. A.; (1895) A. C. 495, H. L.

As to the exception of cases to which no "existing statute of limitations" is applicable, see *Re Swain*, (1891) 3 Ch. 233; *Robinson v. Harkin*, (1896) 2 Ch. 415.

The words "still retained" are to be referred to the point of time at which the action for breach of trust is brought: *Thorne v. Heard*, (1894) 1 Ch. 606, 613; (1895) A. C. 503; and see *How v. Earl Winterton*, (1896) 2 Ch. 626, C. A.; *Re Page*, (1893) 1 Ch. 304.

Where a husband forcibly retained the money of his wife, who did not acquiesce in the retention, the case was held to fall within the second exception: *Wassell v. Leggatt*, (1896) 1 Ch. 554.

A director of a co. who misapplies moneys of the co. which have come to his hands is a trustee within the section: *Re Lands Allotment Co.*, (1894) 1 Ch. 616, C. A.; and *Re Sharpe*, (1892) 1 Ch. 154, C. A.; but not so a trustee in bankruptcy: *Re Cornish*, (1896) 1 Q. B. 99, C. A.; and see *Re Mansel*, W. N. (92) 32.

Time under the statute begins to run when the breach of trust, as by improper investment or otherwise, is committed: *Thorne v. Heard*, (1894) 1 Ch. 599, 605; *Moore v. Knight*, (1891) 1 Ch. 547; *Re Swain*, (1891) 3 Ch. 233; except only in the case of concealed fraud, when time runs from the discovery of the fraud under the doctrine of equity adverted to in *Lewin*, 10th ed., pp. 1059, 1066, 1070.

By virtue of the proviso above stated, it may occur that a tenant for life is barred by the lapse of six years from the time when a breach of trust was committed, but that those in remainder are still entitled to sue: see *Re Somerset*, (1894) 1 Ch. 231, C. A.; (see form of judgment, *sup.* p. 1144); *Re Turner*, (1897) 1 Ch. 536; *Went v. Campaign*, 9 Times L. R. 254; (see form of judgment, *sup.* p. 1143); *Collings v. Wade* (1896), 1 I. R. 340, 352.

Where a married woman was entitled under a settlement to an interest during the joint lives of herself and her husband, and also under a resulting trust to a reversionary life interest after the decease of her husband, the last-mentioned interest did not become an "interest in possession" until the death of the husband: *Mara v. Browne*, (1895) 2 Ch. 69, per North, J.; *S. C.*, (1896) 1 Ch. 199, C. A.

Payment of interest in respect of an improper investment by the trustees to the tenant for life cannot be treated as an admission by them of liability, so as to deprive them of the benefit of the statute: *Re Somerset*, (1894) 1 Ch. 231, C. A.

MARRIED WOMEN.

As to whether a married woman can lose her rights by lapse of time and acquiescence in breaches of trust, see *Derbishire v. Home*, 3 D. M. & G. 80; *Davies v. Hodgson*, 25 Beav. 177; and see *Conquest's Case*, 1 Ch. D. 334.

With respect to property as to which she is restrained from anticipation, she cannot waive her rights by consenting to or urging the breaches: *Smith v. French*, 2 Atk. 243; *Fletcher v. Green*, 33 Beav. 426; or by admission: *Lady Bateman v. Faber*, (1898) 1 Ch. 144, C. A.; even where she has been guilty of fraud: *Cahill v. C.*, 8 App. Ca. 420, 427; *Cahill v. Martin*, 5 L. R. Ir. 227; 7 L. R. Ir. 361; *Re Glanville*, *Ellis v. Johnson*, 31 Ch. D. 532, C. A.; *Stanley v. S.*, 7 Ch. D. 589; *Thomas v. Price*, 46 L. J. Ch. 761; *secus*, where she has confirmed the consent after her husband's death: *Smith v. French*, *sup.*; but she may be bound under the Trustee Act, 1893, s. 45, *sup.* p. 1152.

But as to separate property which she has power to dispose of, she can be barred by acquiescence: *Jones v. Higgins*, 2 Eq. 538; *Rowley v. Unwin*, 2 K. & J. 138; and see *Lewin*, 1120, 1138; and the Court can, on behalf of a married woman entitled in reversion, consent to a compromise of the suit to repair a breach: *Wall v. Rogers*, 9 Eq. 58.

SECTION III.—BREACH OF TRUST—WILFUL DEFAULT—CHARGING WITH INTEREST OR PROFITS.

1. Inquiry as to wilful Default—Bankrupt Trustee.

LET the following &c.:—1. An account of all such of the moneys or funds comprised in the indenture dated &c., or from time to time subject to the trusts thereof, as have been possessed or received by the Deft C. [*bankrupt*], or by any person &c., or which might without his wilful (neglect or) default have been so possessed or received, and of his dealings with, and investments of, such moneys or funds, and of his application and disposition thereof, and of the dividends, interest, and annual proceeds thereof; 2. An inquiry whether anything and what is due from the Deft or his estate in respect thereof.—Adjourn &c.—*Welch v. Chandler*, M. R., 10 March, 1857, B. 763.

For decree setting aside a lease renewed by a trustee in his own name, with an account of profits, and charging wilful default, see *Griffin v. G.*, 1 Sch. & L. 354; and for similar decrees (with allowance for improvement), *Drew v. Power*, *ib.* 198; *Molloy v. Irwin*, *ib.* 314, *et v. inf.* p. 1164. For Forms of Orders charging wilful default generally, see Chap. XLIV., "ADMINISTRATION."

2. Further Order for leave to prove for the Balance.

LET the Plt be at liberty to go in and prove against the estate of the Deft. C., the bankrupt, under the adjudication in bankruptcy against the said Deft, for the sum of £—, the balance appearing by the Master's certificate dated &c., to be due from him or his estate in respect

of the money or funds comprised in the indenture dated &c., or at any time subject to the trusts thereof, and also for the dividends, interest, and annual proceeds thereof, and for the Plt's costs in this action, to be taxed &c.; but so as not to disturb any dividend already declared.—Liberty to apply.—*Welch v. Chandler*, M. R., 16 Feb. 1858, B. 599.

3. *Inquiry if Executors might have recovered Trust Moneys.*

AN inquiry what part of the personal estate comprised in and assigned by the indenture of settlement dated &c. came to the hands of S. and R., the trustees of the said settlement, and what funds were in the hands of the said trustees at the death of E., the testatrix in &c., and what has become of all such funds as came to the hands of the said trustees, and whether the same or any and which of them might have been recovered from the said trustees by M. and T., the exors of the said E., after the decease of the said E.—*Taylor v. Millington*, V.-C. W., 20 Jan. 1857, B. 646.

4. *Trustee to bring into Court Trust Funds misappropriated by Insolvent Co-trustee, with Interest, and to prove against his Estate.*

LET the Deft F., on or before &c., lodge in Court, as directed in the schedule hereto, the sum of £1,500, together with interest thereon at the rate of £4 p. c. per ann. from the — day of —, the date of the issue of the writ; but the said Deft is to be at liberty to prove for the amount so to be paid by him against the estate of the Deft H. [*insolvent*].—[*Add Lodgment Schedule, Form No. 3.*]—See *Thompson v. Finch*, M. R. 18 April, 1856, B. 945, S. C., 22 Beav. 316; 8 D. M. & G. 560:

As to liability of exors and trustees for the acts and defaults of each other, *v. sup.* p. 1129. As to rate of interest, *v. p.* 1164.

5. *Inquiry as to Employment of Balances.*

“AN inquiry how and in what manner the personal estate of the testator possessed by (come to the hands of) the Deft C. has been employed by him, and what balances in respect thereof have remained in his hands, and during what times respectively.”—*Mumford v. Cooke*, M. R., 3 Dec. 1807, B. 81; *Wyeth v. Hill*, V.-C. M., 2 Nov. 1871, B. 2657.

6. *Inquiry as to Executor's Balances.*

AN inquiry whether the Deft [*exor and trustee*] has from time to time had any and what balances, part of the testator's assets, in his hands;

And if so, during what time and under what circumstances.—*White v. King*, V.-C. K., 18 Feb. 1862, B. 331; *Gee v. Mahood*, L. JJ. for V.-C. W., 24 Feb. 1873, A. 712.

7. *Interest on Balances left in Bankers' Hands.*

“AND Declare that the Defts W. and L., the exors of the testatrix, are to be charged with interest at the rate of £4 p. c. per ann. on the sum of £—, the balance in their hands on account of the general personal estate of the testatrix on the — day of —, being one year from the death of the testatrix, from that day up to the time of payment, and on the respective sums of &c., the respective balances in the hands of the last-named Defts, on account of the general personal estate of the testatrix since the said — day of — up to the time of payment, and interest on the sum of £— at the same rate, from the — day of — to the time of payment thereof, which sum was received by the last-named Defts in respect of L.'s mortgage; And Declare, that the Defts are entitled to retain the interest which has from time to time been allowed by the bankers of such Defts on account of the money in their hands, forming part of the general estate of the testatrix; And Let W. and L., on or before the — day of —, lodge in Court &c., the total amount due from the last-named Defts in respect of interest on the before-mentioned balances, and on the said sum of £— as aforesaid.”—*[Add Lodgment Schedule, Form No. 3.]*—See *Williams v. W.*, L. JJ., 23 April, 1853, B. 729.

8. *Interest on Balances retained since last Order.*

LET an inquiry be made whether any and what balances have, since the date of the order dated &c., been improperly retained by the Plts, the exors of the will of the testator, in their hands belonging to his estate; And Let interest be computed on such balances (if any) at the rate of £4 p. c. per ann., from the end of each year since the date of the said order; And Let the Plts be charged with the total amount due in respect of such interest.”—*Butler v. Lowe*, V.-C. K., 6 Aug. 1857, A. 1466.

9. *Direction for Annual Rests and Compound Interest.*

ACCOUNTS of personalty—“And Let the balance of the residuary personal estate of the testator in the hands of the Deft W., at the death of C. [*the life tenant*], be ascertained; And Let annual rests be made of the clear balance of such personal estate in the hands of the Deft W. since the death of the said C.; And Let interest be computed on the balance which shall be ascertained as aforesaid at the rate of £5 p. c. per ann., and in making such annual rests (except the first) the interest

of each preceding balance is to be included in the balance then stated, so as to charge the said Deft with compound interest thereon."—Account of rents and profits since the death of the said C. received by Defts W. and S. &c.; "And in taking such account, annual rests are to be made of the clear balance of such rents and profits in the hands of the Deft W.; And Let interest be computed on such respective balances at the rate of £5 p. c. per ann.; And in making such annual rests (except the first) the interest of each preceding balance is to be included in the balance then stated, so as to charge the said Deft W. with compound interest thereon."—*Cotham v. West*, M. R., 21 Feb. 1837, A. 426; 1 Beav. 381.

This form was approved in *Heighington v. Grant*, 5 My. & C. 268.

For inquiry what balances remained in the hands of the Deft at the end of twelve months after the testator's death, and at the end of each year, after giving credit for sums paid or advanced in the admon of the estate, with interest at £4 p. c. on the balances at the end of each year, with annual rests, and the Deft to be charged accordingly, see *Knott v. Cottee*, M. R., 12 March, 1852, A. 945; 16 Beav. 77; following *Heighington v. Grant*, *sup.*, "except as to interest at £5 p. c.; but see *Cotham v. West*, *sup.* Form 9.

For similar account against two exors, with interest at £4 p. c., and half-yearly rests, see *Smith v. Wilkinson*, L. C., 9 Feb. 1798, B. 363.

For decree charging exor with interest at £4 p. c. on balances, mixed with his own moneys at his banker's, though retained to pay a debt believed to be due, except so far as it proved to be actually payable, and declaring that such interest would be distributable as income of the testator's estate, see *Melland v. Gray*, 2 Col. 302.

For order where Deft, an exor, and his co-Deft, exor of a deceased exor, were charged with interest at £5 p. c. on balances in the hands of the exors, or either of them, at the end of each year since the testator's death, with annual rests; but the amounts paid in each year for maintenance of an infant legatee, and for funeral expenses of another legatee, on account of their legacies, to be allowed; such Defts to pay Plt's costs of the inquiries for charging them with interest, and ascertaining the balances, and consequent thereon, see *Buck v. Bowker*, M. R., 11 July, 1836, A. 1094.

For direction that Deft must be charged with interest at £4 p. c. per ann. on proceeds of stock (Plt's specific legacy) sold out by trustee, from the date of the sale, and on the dividends then received, with an inquiry as to the exact balance due with simple interest, and direction for allowance of costs in a former suit as between party and party only, and deduction of the proportion to be borne by the other specific legacies, and Deft to be charged with compound interest on the balance at 4 p. c. per ann., with annual rests, from date of certificate of costs in the former suit, see *Walrond v. W.*, M. R., 18 June, 1861, B. 914; 29 Beav. 586.

For decree declaring the exors of an exor trustee chargeable with interest on money retained by him for his own use under a mistake as to his right, and for payment without interest (but see *Re Hulkes*, *Powell v. H.*, 33 Ch. D. 552), of sums by the same mistake of law paid to other persons, see *Saltmarsh v. Barrett*, M. R., 20 June, 1862, B. 1095; S. C., 31 Beav. 349; and see *Exp. Ogle and Pilling*, 8 Ch. 711.

10. *Employment of Assets in Trade—Defendant charged with Profits or Interest.*

DECLARE that the Defts F., B., and G. are bound to make good to the testator's estate such part of the assets of the testator as have been employed by the said Defts in trade, together with all profits made by such employment, or with interest at the rate of £5 p. c. per ann. on

what has been so employed; And Let the following &c.: 1. An inquiry what part of the testator's assets have been laid out or employed in the co-partnership trade carried on from time to time by the Defts F., B., and G., in the pleadings named; 2. An account of the profits which have been made by such employment of the testator's assets: And in taking such account regard is to be had to the balances stated in any settled account, in case it should be found for the benefit of the (testator's) estate to adopt any settled account; 3. An inquiry whether it is for the benefit of the testator's estate to elect to take interest at £5 p. c. per ann. on the amount of such parts of the testator's estate as have been employed in trade as aforesaid, or to take the profits which have been made by such employment in trade; Declare the Deft the executrix entitled to a lien on the partnership property for the amount found to have been so employed, with interest or profits, &c.—*Flockton v. Bunning*, L. J., 27 June, 1868, A. 2291; S. C., 8 Ch. 333, note to *Vyse v. Foster*.

For decree charging trustees with interest at £5 p. c. on balances mixed with their own moneys and used in their business, though the will authorized investing on "good private securities," see *Westover v. Chapman*, 1 Col. 177, *et inf.* p. 1165.

For inquiry what proportion of the profits received by Defts from their trades was properly attributable to trust moneys employed therein, see *Docker v. Somes*, 2 My. & K. 657; and for account of exor's balances, and declaration that they ought to be charged with the profits and advantages made by them of testator's estate, while employed by them in any trade or business since his death, see *Palmer v. Mitchell*, *ib.* 672.

11. *Account where Trustees protected by Trustee Act, 1888 (51 & 52 V. c. 59), s. 8.*

THE application of the Plt by originating summons dated &c., which upon hearing the solrs for the applicant and for the Defts &c., And upon hearing counsel &c., And upon reading &c., Let the following account be taken, that is to say: An account of the moneys in the hands of E. R., deceased, and the Deft J. D. or of either of them, on the (15 May, 1891—being a date six years anterior to the date of the originating summons) in respect of or forming part of the share of the rents, profits and income of the real and personal estate of the testator R. D., deceased, to which E. D., deceased, was entitled under the will of the said testator, and of the rents, profits and income of the testator's real and personal estate accrued between the (17 May, 1891) and the (15 Feb. 1895) (the date of the death of the said E. D.) and received after the (17 May, 1891) by the said E. R. and the Deft J. D. respectively; but in ascertaining the actual amount of the moneys in the hands of the said E. R. and the Deft J. D. on the (17 May, 1891), any payments made before that date are to be allowed to the said E. R. and the Deft J. D.; And the Deft J. D. by his counsel admitting that he has in his hands (four hundred and eighty-six pounds); Let the Deft J. D. lodge in Court as directed in the Schedule hereto, the

said sum of (four hundred and eighty-six pounds).—Tax the costs, charges and expenses of the Defts, other than their costs of the said application, of the execution of the trusts of the will and codicil of the testator so far as relates to the income of the testator's estate devised and bequeathed in trust for the said E. D., including in the costs of the Deft M. R. the costs, charges and expenses of the said E. R., deceased.—Reserve costs of application with liberty for the Plt to apply after taxation of the said costs for payment out of Court on account of her share.—[*Add Lodgment Schedule*, Form No. 3].—See *Re Davies, Ellis v. Roberts*, *Kekewich, J.*, 10 June, 1898, A. 862; (1898) 2 Ch. 142.

NOTES.

WILFUL DEFAULT.

Neglect or default may be wilful, though unintentional, and through forgetfulness (*Elliott v. Turner*, 13 Sim. 477; *Walker v. Symonds*, 3 Sw. 69); though where trustees act *bonâ fide* they may not be visited with the loss: *Garrett v. Noble*, 6 Sim. 504; and see *Smith v. Chambers*, 2 Ph. 221.

Under the usual admon order in Court or on summons, an exor or trustee can only be charged for actual receipts by self or agent, not for default of co-trustee, &c.: *Re Fryer*, 3 K. & J. 317; 3 Jur. N. S. 485; *Blakeley v. B.*, 1 Jur. N. S. 368; 3 W. R. 288; but on the common accounts of their receipts being taken, exors can be charged with a devastavit arising on the accounts themselves: *Re Stevens, Cooke v. Stevens*, (1898) 1 Ch. 162, C. A.

It is not the practice to direct exors to account for what they have received, or might have, but for their own default, except on a special case, made: *Shepherd v. Towgood*, T. & R. 388, 1823, B. 361; *Pybus v. Smith*, 1 Ves. jun. 193; but see *Bulstrode v. Bradley*, 3 Atk. 582.

And for an inquiry as to wilful default, Plt must aver and prove at least one act of wilful default: *Sleight v. Lawson*, 3 K. & J. 292; *Re Youngs, Doggett v. Revett*, 30 Ch. D. 421, C. A.; and where what is averred is admitted, only the common order can be made, adding a submission by the exor to account with respect to the matters so admitted: *Wildes v. Dudlow*, W. N. (70) 231.

The Court could not, under Cons. Ord. 35, r. 19, vary or add to a common admon decree in Chambers by directing an account for wilful default: *Partington v. Reynolds*, 4 Drew. 253. In *Brooker v. B.*, 3 S. & G. 475, it was held such decree might, on facts transpiring to justify it, be so varied; but see *Nelson v. Booth*, 3 D. & J. 119; 5 Jur. N. S. 28.

Under the present practice, where the statement of claim alleges wilful default, an order on that footing may be made at any stage of the proceedings: *Re Symons, Luke v. Tonkin*, 21 Ch. D. 757; *Job v. J.*, 6 Ch. D. 562; *Mayer v. Murray*, 8 Ch. D. 424; and see *Laming v. Gee*, 10 Ch. D. 715; and where, wilful default having been alleged, and an account on that footing claimed, the ordinary admon order was made under O. XL, 11, the account was directed on the further hearing: *Re Symons, Luke v. Tonkin*, 21 Ch. D. 757; but it is the duty of the Plt to be ready to prove his allegations at the hearing, and if he is not, the Court will not, unless a strong case is made, postpone inquiry into the conduct of the trustees: *Smith v. Armitage*, 24 Ch. D. 727; *Boylan v. Cusack*, 25 L. R. Ir. 269.

In a redemption suit against mortgagee in possession, a Plt need not charge wilful default: *Mayer v. Murray*, 8 Ch. D. 424; though the mortgage deed be in form a deed of trust: *O'Connell v. O'Callaghan*, 15 Ir. Ch. Rep. 31.

And see *Edmonds v. Robinson*, 29 Ch. D. 170, where the Court declined, after an ordinary judgment in a partnership action, to add an inquiry and direction as to return of premium.

But see *Barber v. Mackrell*, 12 Ch. D. 531, where it was questioned whether, under an order for ordinary accounts as to partnership dealings, a question as to fraudulent withdrawal of moneys and a claim for interest thereon, might not have been raised.

An exor who has been decreed to make good loss occasioned by his wilful default in not getting in outstanding assets from a trustee who has misappropriated them, is not thereby precluded from subsequently recovering the amount from the trustee: *Scotney v. Lomer*, 29 Ch. D. 535; 31 Ch. D. 380, C. A.

Exors could not be charged with breach of trust on further consideration in suit by admon summons, but an inquiry could be directed: *Re Delevante*, 6 Jur. N. S. 118; 1 L. T. 397; and upon an originating summons under O. LV, 3, 4, a trustee cannot be declared liable for wilful default otherwise than by consent: *Dowse v. Gorton*, (1891) A. C. 190, 202; but in a proper case (as e.g., where there is a trust for accumulation) on further consideration, trustees may be charged with interest on balances retained, although no case of wilful default is raised by the pleadings, and interest is not referred to in the judgment: *Re Barclay, B. v. Andrew*, (1899) 1 Ch. 674.

Exors who never had sufficient assets in their hands to pay all the testator's debts were not ordered to account on the footing of wilful default, by reason of loss of interest to the estate arising from a delay of seven years in proving the will: *Re Stevens, Cooke v. Stevens*, (1898) 1 Ch. 162, C. A., affirming, North, J., (1897) 1 Ch. 422.

The Court would not, on further directions, direct an inquiry as to wilful default, the decree directing only common accounts, though the bill made a case, and the report laid a foundation for such inquiry: *Garland v. Littlewood*, 1 Beav. 527; *Massey v. M.*, 2 J. & H. 728; *Coope v. Carter*, 2 D. M. & G. 292; *Green v. Badley*, 7 Beav. 274; *Jones v. Morrall*, 2 Sim. N. S. 241; and where the Court declares the right to such inquiry, see *Ib.* 249; but the question of interest on balances in hand was still open: *Ib.* 251; and though not prayed by the bill: *Hollingsworth v. Shakeshaft*, 14 Beav. 422. In *Dunstan v. Patterson*, 2 Ph. 341, charges of fraud were waived by taking a common decree for account on motion; and see *Passingham v. Sherborn*, 9 Beav. 424; *Morgan v. M.*, 13 Beav. 441, n. But in *Wildes v. Dudlow*, W. N. (70) 85, the right to make out a case of wilful default on further consideration was kept alive by not dismissing the bill on that point; but see *S. C.*, *Ib.* 231, *et sup.*

In *Ford v. Bryant*, 9 Beav. 410, motion for leave to examine exor in the Master's office, to charge him with a breach of trust, not raised by the pleadings, was refused with costs; but where special directions were given as to special claims, see *Ib.* 413.

And if Plt, knowing it, does not charge exors with wilful default, his exor cannot: *Garrett v. Noble*, 6 Sim. 504; and a qualified admission, not disputed, will not entitle Plt to such inquiry: *Pelham v. Hilder*, 1 Y. & C. C. 3; but in *Guidici v. Kinton*, 6 Beav. 517, a legatee, claiming under the common decree, was not precluded from asking relief against a breach of trust in a fresh suit.

Under the common decree for account against exor of extrix, also tenant for life, who had improperly sold out stock, her estate was liable for it and the dividends, and on further directions, though no particular case was made by the bill: *Davenport v. Stafford*, 14 Beav. 319; and see *Tickner v. Smith*, 3 S. & G. 42.

After decree for admon, a bill charging wilful default was a supplemental bill in the nature of a bill of review, and could not be filed without leave: *Harvey v. Bradley*, 4 Eq. 13; *Laming v. Gee*, 10 Ch. D. 715. Whether leave is now necessary, *quære*, see *Re Scott and Alvarez*, (1895) 1 Ch. 596, C. A.; D. C. F. 816; Dan. 1287.

Remainderman could not charge wilful default as to income, tenant for life not being a party: *Whitney v. Smith*, 4 Ch. 513.

A trustee taking a renewal of a lease in his own name, and the lessee under a demise by a tenant for life in fraud of a power had respectively to account with wilful default: *Molloy v. Irwin*, 1 Sc. & L. 310, 314; *Griffin v. G.*, *Ib.* 352, 354; but a purchaser for value, fixed with constructive notice, cannot be so charged, and is in general entitled to just allowances: *Howell v. H.*, 2 My. & C. 478; and see O. XXXIII, 8.

And further, as to wilful default, *v. inf.* Chap. XLIV., "ADMINISTRATION," and Chap. XLVII., "MORTGAGES."

CHARGING WITH INTEREST OR PROFITS.

Inquiries with a view to charge exors with interest seem to have been usually granted on further directions only: see *Law v. Hunter*, 1 Russ. 105; but might be so at the hearing on a special case made: *Ib.*; *Hockley v. Banketock*, 1 Russ. 142; though not prayed by the bill: *Hollingsworth v. Shakeshaft*, 14 Beav. 492.

Where balances were retained from 229 to 670 days, interest was charged: *Johnson v. Prendergast*, 28 Beav. 480.

The payment of interest on balances retained by an exor will be enforced against his assets: *Tebbs v. Carpenter*, 1 Mad. 290; *Rocke v. Hart*, 11 Ves. 68; *Younge v. Combe*, 4 Ves. 101; *Foster v. F.*, 2 B. C. C. 616.

So against a bankrupt or insolvent estate: *Dornford v. D.*, 12 Ves. 127; *Moons v. De Bernales*, 1 Russ. 301.

An exor or trustee not being ready with his accounts, is a ground for charging interest: *Pearse v. Green*, 1 J. & W. 135, 144; but *semble*, not delay because of pending suit: *Davenport v. Stafford*, 14 Beav. 323, 334, *sup.*; *Blogg v. Johnson*, 2 Ch. 225.

And he may be charged with interest on arrears of rent unreceived: *Tebbs v. Carpenter*, 1 Mad. 290; but not in general for arrears of income or annuities: *Blogg v. Johnson*, 2 Ch. 225.

The decision in *Saltmarsh v. Barrett*, 31 B. 349, that exors, who, acting *bond fide*, have distributed assets upon an erroneous construction of the will, are not liable to be charged with interest on the principle to be refunded, has been dissented from (as being inconsistent with *A. G. v. Kohler*, 9 H. L. C. 654; and *A. G. v. Alford*, 4 D. M. & G. 843): *Re Hulkes, Powell v. H.*, 33 Ch. D. 552; and see *Blyth v. Fladgate*, (1891) 1 Ch. 337, 351; *Lewin on Trusts*, 10th ed. 394.

Upon the setting aside of a sale by a trustee of trust property to himself, and the reconveyance of the property to the beneficiaries, it is not the practice of the Court to charge the trustee with interest on the rents and profits received by him since the date of the sale: *Silkstone and Haigh Moor Coal Co. v. Edey*, (1900) 1 Ch. 167; (approving the statement of the practice in *Lewin on Trusts*, 10th ed., p. 558); *Re Lord Magheramornes Estate*, W. N. (01) 152.

An admor complying with an order for payment into Court by him of a balance representing payments honestly made by him, but disallowed in his accounts in an admon action, will not be charged with interest on such balance: *Re Jones, Christmas v. Jones*, (1897) 2 Ch. 190.

Inquiry as to charging interest was not granted on petition, though brought on with further directions: *Parnell v. Price*, 14 Ves. 502; nor where reasonable misapprehension: *Bruere v. Pemberton*, 12 Ves. 386; but as to balances retained, *v. sup.*

Rate of Interest chargeable.—Until very recently the rate has been 4 p. c. in ordinary cases, and the higher or mercantile rate of 5 p. c. in special cases; but in many recent cases the rates charged have (in view of the diminished rate of interest obtainable on good investments) been reduced to 3 p. c. and 4 p. c. respectively, see *Lewin on Trusts*, 10th ed., p. 383 *et seq.* and cases there cited, and *Re Barclay, B. v. Andrew*, (1899) 1 Ch. 674; *Wentworth v. W.*, (1900) A. C. 163 (P. C.); *Wyman v. Paterson*, (1900) A. C. 271, H. L.; *Rowlls v. Bebb*, (1900) 2 Ch. 107, C. A. An exor or trustee is not charged more than the ordinary or lower rate of interest on unpaid trust money, unless he has received more, or ought to have done so (as where he had called in and retained a 5 p. c. mortgage), or where it is presumed that he has; *e.g.*, when he has used the money: *A. G. v. Alford*, 4 D. M. & G. 843, 851; *Penny v. Avison*, 3 Jur. N. S. 62; *Tebbs v. Carpenter*, 1 Mad. 292; *Re Emmet's Estate*, *E. v. E.*, 17 Ch. D. 142. The money having merely not been invested for some years, or there being no improper delay, or only mistake, as under a doubtful will, the lower rate was charged: *S. Cs.*; *Mousley v. Carr*, 4 Beav. 49.

And a higher rate of interest will not, it seems, be exacted as a penalty: *Vyse v. Foster*, L. R. 8 Ch. 333; *Burdick v. Garrick*, 5 Ch. 233.

For charging interest at the higher rate a special case must be made: *Rocke v. Hart*, 11 Ves. 58; *Hall v. Hallett*, 1 Cox, 138.

Interest at the higher rate has been charged against exors and trustees—Appropriating the money: *Mousley v. Carr*, 4 Beav. 49; *Burdick v. Garrick*, 5 Ch. 233; using testator's farming stock in carrying on a farm: *Walker v. Woodward*, 1 Russ. 107; selling stock, and not investing, nor paying debts: *Crackell v. Bethune*, 1 J. & W. 586; unduly retaining: *M. of Berwick v. Murray*, 7 D. M. & G. 519; *Dobson v. Pattinson*, 3 Jur. N. S. 1202; 5 W. R. 771; using balances of rents in trade: *A. G. v. Solly*, 2 Sim. 518; mixing the trust money with their own at a bank, and though authorized to invest "on good private securities": *Westover v. Chapman*, 1 Col. 177; *Re Jones, J. v. Searle*, 49 L. T. 91 (but see *Melland v. Gray*, 2 Col. 295, where the lower rate was charged); and where a *devastavit* had been committed: *Bick v. Motly*, 2 M. & K. 312; and see *Docker v. Somes*, 2 My. & K. 655, and cases cited *Ib.* p. 659; *Exp. Ogle and Pilling*, 8 Ch. 711; and where an admor had raised money on the estate and used it himself: *Hooper v. H.*, W. N. (74) 174.

By r. 11 of the recent rules under The Judicial Trustees Act, 1896, see *post*, p. 1281, a judicial trustee unnecessarily retaining trust money in his hands is liable to pay interest at such rate, not exceeding 5 p. c., as the Court may fix.

Interest at the rate of 4 p. c. was allowed to a tenant for life of public-house property in respect of his expenditure on land, buildings, and permanent improvements, of which he was held to be a constructive trustee for those in remainder: *Rowley v. Ginnever*, (1897) 2 Ch. 503.

Compound Interest.—Compound interest has been charged on money employed in trade; but the authorities are not uniform. In *Walrond v. W.*, 29 Beav. 586; *Saltmarsh v. Barrett*, 31 Beav. 349; *Jones v. Foxall*, 15 Beav. 388; *Williams v. Powell*, *ib.* 461; *Walker v. Woodward*, 1 Russ. 107, *et sup.*, compound interest was charged (limited in *Knott v. Cottee*, 16 Beav. 77; and *Tebbs v. Carpenter*, 1 Mad. 292, to 4 p. c., and see *Re Barclay*, (1899) 1 Ch. 674).

In *A. G. v. Solly*, 2 Sim. 518, it was refused; and payment by a solr to the banking account of his firm is not an employment of the money in trade: *Burdick v. Garrick*, 5 Ch. 233; but where an admix permitted her solr to receive and retain dividends of a fund set apart for infant next of kin, she was ordered to account for the dividends with interest at 3 p. c., with half-yearly rests: *Gilroy v. Stevens*, 51 L. J. Ch. 834; 30 W. R. 755; 46 L. T. 761.

Such interest has been given where a direction for accumulation has been neglected: see *Raphael v. Boehm*, 11 Ves. 92; 13 Ves. 407, 590; *Dornford v. D.*, 12 Ves. 127; *Cotham v. West*, 1 Beav. 386, *sup.*, p. 1160; *Heighington v. Grant*, 5 My. & Cr. 258; 1 Phil. 600; *Re Barclay, B. v. Andrew*, (1899) 1 Ch. 674 (where trust funds improperly invested were treated as balances remaining in the hands of the trustees upon which compound interest at 3 p. c. was chargeable), or there has been misconduct: *Stacpoole v. S.*, 4 Dow. 209.

In *Raphael v. Boehm*, 11 Ves. 92; 13 Ves. 407, 590, accumulation being directed by the will, and the decree directing interest at 5 p. c. to be computed on all sums received by the exor, and half-yearly rests to be made, interest was computed on each receipt from the day to the end of the half-year, and the amount of principal and interest then carried forward as a sum at interest, though the L. C. observed on the decree as harsh, and going further than any other, and as producing more than the due execution of the trust. In *Heighington v. Grant*, 5 My. & C. 258; 1 Beav. 228, the exor by his answer admitting balances in hand, and the decree directing the balances to be ascertained at the end of each year, and interest computed on them, and annual rests to be made, and interest to be charged "after the rate and in manner aforesaid upon such balances," interest computed on the balance due at the end of the first year was to form part of that at the end of the second year, and on which interest was then to be computed, and so on from year to year; and the decree in *Cotham v. West*, Form 9, *sup.*, p. 1159, was approved, as more clearly expressed to the same effect. In *Carmichael v. Wilson*, 4 Bli. N. S. 145, annual rests were directed against an exor, and payments by him were to be deducted first from the interest.

In general, rests are made to see whether interest is to be charged: see *Raphael v. Boehm*, *Tebbs v. Carpenter*, *sup.*; *Hall v. Hallett*, 1 Cox, 138; and as to adding such direction to the decree, *v. sup.* p. 1163.

Where the trust was to accumulate for twenty-one years, compound interest at 4 p. c. was given during the twenty-one years, and only simple interest after: *Wilson v. Peake*, 3 Jur. N. S. 155; but in *Re Emmet's Estate*, *E. v. E.*, 17 Ch. D. 142, where the direction was for accumulation during minority, and to pay it over on majority, the trustee retaining the fund improperly invested was regarded as continuing under an obligation to accumulate, and therefore charged with compound interest: *Re Emmet's Estate*, *E. v. E.*, 17 Ch. D. 142; distinguishing *Wilson v. Peake*; and observing upon *Amiss v. Hall*, 3 Jur. N. S. 584 (where simple interest only was charged).

Interest or Profits.—If the money has been used in trade, the *cs. q. t.* may claim interest or profits: *Docker v. Somes*, 2 M. & K. 655; *Palmer v. Mitchell*, *lb.* 672, n.; *Macdonald v. Richardson*, *Townend v. T.*, 1 Giff. 81, 201; *Flockton v. Bunning*, 8 Ch. 323, n.; and see Form 10, p. 1160; although the amount may be difficult to ascertain: *Docker v. Somes*, 2 My. & K. 665, 667; *Costa Rica Railway v. Forwood*, (1900) 1 Ch. 756, 764, 765; *S. C.*, (1901) 1 Ch. 746, C. A.; and the surviving partner wilfully refusing to produce the books was debited with 10 p. c. as net profits: *Walmley v. W.*, 3 J. & Lat. 556.

But the mere fact of delay in making a firm (in which some of the exors were partners) account for and pay a sum due to the testator, was not enough to give his estate the right to share in the profits of the business: *Vyse v. Foster*, L. R. 7 H. L. 318; 8 Ch. 309.

And a *c. q. t.*, after electing to take profits, could not, finding there were none, claim an occupation rent: *Kendall v. Marsters*, 2 D. F. & J. 200; 8 W. R. 747.

SECTION IV.—BREACH OF TRUST—FRAUDULENT TRUSTEES.

1. *Leave to prosecute Fraudulent Trustee—Larceny Act, 1861* (24 & 25 V. c. 96).

ON motion &c., Let the Plts be at liberty to prosecute the Deft B. under the provisions of the Act of the 24 & 25 V. c. 96, intituled, "An Act to consolidate and amend the statute law of England and Ireland relating to Larceny and other similar Offences" (or the Larceny Act, 1861), as they shall be advised.—Liberty to Deft to move to discharge the order; but this not to prejudice its operation in the meanwhile.—*Baillie v. B.*, L. JJ., 21 March, 1863, B. 10.

For like order, under 20 & 21 V. c. 54, now repealed, see *Wadham v. Rigg*, V.-C. K., 24 July, 1860, B. 1999; 1 Dr. & S. 216.

A copy of the order against a defaulting trustee who has admitted that the fund is standing in his name or under his control, but has neglected to transfer, should be endorsed with a memorandum as prescribed by O. XLI, 5.

NOTES.

By the Larceny Act, 1861 (24 & 25 V. c. 96), ss. 75 *et seq.*, amending previous Acts, fraudulent dealings by trustees, bankers, agents, &c., with money or property entrusted to them, with written directions as to its application, are made misdemeanours, and are liable to be punished by

imprisonment. The direction must be unconditional: *R. v. White*, 4 Car. & P. 46; sect. 80 relates to trustees (express: sect. 1), and no proceeding or prosecution under it is to be taken without the sanction of the A. G. or S. G.; or, where any civil proceeding has been taken, of the Court or Judge. Under this section evidence that the trustee had paid debts of his own with trust money was sufficient: *Wadham v. Rigg*, 1 Dr. & S. 216; by sect. 85 the above is not to be used to avoid discovery or answer; but no person making compulsory disclosure is to be liable to prosecution; and by sect. 86, nothing in or under the above is to affect any remedy at Law or in Equity; but no conviction is to be received in evidence against parties in civil suits; nor is the above to prejudice any agreement or security by a trustee to make good a breach of trust.

By the Debtors Act, 1869, imprisonment for debt is not abolished as to (*inter alia*) "default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a Court of Equity any sum in his possession or under his control." As to the effect of this section, *v. sup.* vol. I., pp. 441, 442, *et seq.*; *Lewin*, 1130 *et seq.*; *E. Aylesford v. E. Poulett*, (1892) 2 Ch. 60. The Act applies to Irish decrees enrolled here under 41 G. III. c. 90: *Ferguson v. F.*, 10 Ch. 661.

As to Ireland, see 35 & 36 V. c. 57.

As to the effect of the Bankruptcy Act, 1869, s. 4, in respect of "debts incurred by fraud or breach of trust," see *Cooper v. Prichard*, 11 Q. B. D. 351, C.A.; *Emma Silver Mining Co. v. Grant*, 17 Ch. D. 122; *Lewin*, 1129, 1130.

Under the Bankruptcy Act, 1883, the liability of a bankrupt to his *c. q. t.* continues after the discharge of the bankrupt only in cases where the breach of trust is fraudulent.

SECTION V.—COSTS, CHARGES, AND EXPENSES.

1. *Costs, Charges, and Expenses beyond Costs of Action.*

REFER &c. to tax the costs of the Plts and the Defts (all parties) of this action [*If so, add, from the foot of the last taxation*] the costs of the Defts B. and C., the exors of the will of A., the testator &c. [*or the trustees of the will of &c., or of the indenture dated &c., or of the legacy &c.*] to be taxed as between solr and client, and to include any charges and expenses properly incurred by them [*If there has been any former taxation, or any charges &c. have been allowed in the accounts, add, and not already taxed or allowed*] relating to the admon of the testator's estate [*or the execution of the trusts of the testator's will, or of the said indenture, or the said legacy, or as such exors, or trustees*] beyond their costs of this action.

2. *Same—To be raised by the Trustees.*

AND LET the said costs, when taxed, be raised and paid by the said Defts the trustees, by sale of a sufficient part of the £— Consols standing in the names &c.—*Swain v. Rayment*, V.-C. W., 22 Jan. 1853, B. 257.

For order allowing commission to exors on Indian assets, see *Cockerell v. Barber*, 1 Sim. 27; and for an order for inquiry by taxing master as to costs, charges, and expenses, see *Hiles v. Ager*, V.-C. M., 18 April, 1872, A. 798.

4. Costs against Executor of an Executor who had committed a Breach of Trust and died Insolvent.

THIS action coming on for further consideration &c., in the presence of counsel for the Plt and the Deft &c., Let it be referred to the taxing master to tax the costs [of this action] of the Plt and Deft as between solr and client, distinguishing the Deft's costs of taking the account of the estate of [the testator] A. B. (*the original testator*), and also any charges and expenses properly incurred by the Deft (*the executor of the executor*) relating to the administration of the estate of the said testator (*the original testator*) beyond his costs of action; And the taxing master is to certify the amount of one moiety of the Deft's costs of this action remaining after deducting the amounts so to be distinguished; And the Deft is to be at liberty to retain £— mentioned in the Master's certificate in respect of one such moiety; And it is ordered that the funds in Court be dealt with as directed in the Payment Schedule hereto.

(Insert in Payment Schedule.)

Pay Plt's costs to be taxed under this order.	£	s.	d.	£	s.	d.
Pay Deft's distinguished costs and charges and expenses.						
Pay one moiety of Deft's costs to be certified.						

—See *Re Griffiths, G. v. Lewis*, Chitty, J., 22 Jan. 1883, A. 1434; S. C., 26 Ch. D. 465, C. A.; following *Palmer v. Jones*, 43 L. J. Ch. 349; and see *Kitto v. Luke*, 28 W. R. 411.

N.B.—This form has been redrawn to suit S. C. F. R.

In the case of *Re Griffiths, G. v. Lewis, sup.*, the Deft was before the Court in two capacities, (1) as trustee for the Plt, (2) as exor of defaulting exor of original testator. The principle upon which the Court proceeded was to allow Deft out of the original testator's estate all the costs incurred solely with reference to that estate; but as to costs incurred by Deft solely as representative of defaulting exor to allow them solely out of defaulting exor's estate, and as to costs incurred with reference to both estates to allow half of them out of the original testator's estate. To avoid expense, however, the Court gave Deft costs of taking accounts of original testator's estate out of that estate, and gave him one half of the rest of the costs of the action. This division is not of course mathematically correct: per Fry, L. J., *S. C.*

5. Right to Indemnity.

THIS action coming on for further consideration &c., in the presence of counsel for the Plt and the Deft, Declare that the Plt, as legal pers. represe of A. B., is entitled to be indemnified by the Deft in respect of so much of the Plt's liability as contributory for sixteen shares in the Oriental Bank Corporation as the proceeds of sale of the railway debentures in the pleadings mentioned shall be insufficient to satisfy. —*Hobbs v. Wayet*, Kekewich, J., 30 June, 1887, A. 1158; S. C., 36 Ch. D. 256.

For orders for taxation and payment of costs, *v. sup.* Chap. XVII., "Costs."

NOTES.

COSTS OF ACTIONS AND PROCEEDINGS.

As between themselves and strangers to the trust, trustees and exors are only entitled to the same costs as if they were suing in their own right: *Exp. Angerstein*, 9 Ch. 479; *Lewin*, 1200, 1201; *Morg. & W.* 396; and the

loss incurred can be recovered by them from the trust fund. Where one of two exors was insolvent and indebted to the estate the other was nevertheless entitled to be paid out of the estate all the costs for which he was liable, and the debt of the other could be set off against costs paid by him: *Watson v. Row*, 18 Eq. 680; but this case has been disapproved, so far as it allowed the solvent trustee costs incurred by him as surety for his co-trustee, as the solvent exor is entitled only to his own proportion of the costs, and the proper form of order is to apportion the costs of the exors or trustees appearing by the same solr; the costs apportioned to the solvent trustee to be paid out of the estate, and those apportioned to the insolvent to be set off against his debt: *Smith v. Dale*, 18 Ch. D. 516; *McEwan v. Crombie*, 25 Ch. D. 175; and as to such set-off, see *Harmer v. Harris*, 1 Russ. 155; *Nicholson v. Norton*, 7 Beav. 67.

Sums paid by mistake may likewise be set off: *Cooper v. Pitcher*, 4 Ha. 485.

Under the Bankruptcy Act, 1869, s. 49, the liability of a trustee continued after his discharge; and, after some conflict of opinion, it was held that a defaulting exor or trustee who, pending an admon action, became bankrupt, was not entitled to his costs subsequent to the bankruptcy, until he had made good his default: *Re Basham, Hannay v. B.*, 23 Ch. D. 195; *Lewis v. Trask*, 21 Ch. D. 862; *McEwan v. Crombie*, 25 Ch. D. 175; *contra*, *Clare v. C.*, 21 Ch. D. 865; *Bowyer v. Griffin*, 9 Eq. 340; *Turner v. Mullineux*, 9 W. R. 394.

By the Bankruptcy Act, 1883, ss. 30, 37, the liability of a trustee for a breach of trust (except in case of fraud) is released by his order of discharge; and consequently he will, in the absence of fraud, be entitled to his costs as from the date of his discharge. But if the liability does not arise from breach of trust, but is that of a mere debtor to the estate, which ceases as from the date of the bankruptcy, he will be entitled to his costs from that date: *Re Fowles*, 32 C. D. 243; *Smith v. Dale*, 18 Ch. D. 516; *Re Basham, sup.*

A trustee's own debt cannot be set off against one due to the trust: *Pratt v. Keith*, 12 W. R. 394; 10 Jur. N. S. 305; 33 L. J. Ch. 528.

As to a trustee of a public company defending for it, appearing by the co's solrs, and being entitled to separate legal advice, see *Heinrich v. Sutton*, 6 Ch. 620.

But trustees and exors, as between them and their *co. q. t.*, are in general entitled to their costs from the estate, and usually as between solr and client, and all charges and expenses properly incurred are also allowed them: *Morg. & W. 399 et seq.*; and an admor is entitled to his costs of an admon action though caused by a claim by him for the allowance of payments subsequently disallowed in accounts, provided the claim was made under an honest mistake and was neither fraudulent nor monstrous: *Re Jones, Christmas v. J.*, (1897) 2 Ch. 190. But a trustee who unsuccessfully defends a collateral action incidentally connected with the trust estate, will not be allowed costs out of the trust estate beyond the amount which would have been incurred if he had applied for leave to defend the action: *Re Beddoes, Downes v. Cottam*, (1893) 1 Ch. 547, C. A.

Where an action by a stranger is dismissed against trustees, it is generally with costs as between party and party; and so where no estate: *Saunders v. S.*, 3 Jur. N. S. 727; 5 W. R. 479; but under the general discretionary power of the Court, in a proper case, costs will be given as between solr and client: *Andrews v. Barnes*, 39 Ch. D. 133, C. A. (where Kay, J., allowed costs, as between solr and client, to the trustees of a small charity fund who were unjustifiably attacked); *Edenborough v. Abp. Canterbury*, 2 Russ. 112; *Poole v. Pass*, 1 Beav. 600; and see 2 Spence, 939, n.; *A. G. v. Cuming*, 2 Y. & C. C. 155; *Turner v. Collins*, 12 Eq. 438 (varied on the merits on appeal, 7 Ch. 329). A trustee defending for the benefit of the trust estate a suit to impeach a compromise, does not lose his costs because he has also in the suit to defend his own character from a charge of fraud in relation to the compromise: *Walters v. Woodbridge*, 7 Ch. D. 504.

It seems exors are not entitled to their charges and expenses on taxation, without an express direction, as they are presumed to retain them: *Humphrys v. Moore*, 2 Atk. 108; and may be allowed them as just allowances: *Fearn v. Young*, 10 Ves. 184; but exors or trustees are now usually allowed costs of action as between solr and client, together with any charges and expenses

properly incurred, relating to the trust, beyond costs of action, on the suggestion of counsel that some particular expenses have been incurred, and the case must be supported before the taxing master; it is not the practice, in taking the account in Chambers, to allow those incurred since the action, but they are provided for on further consideration.

In an admon action a trustee is entitled to his costs as between solr and client, unless a case of misconduct is made out against him: *Re Love, Hill v. Spurgeon*, 29 Ch. D. 348, C. A.; *Turner v. Hancock*, 20 Ch. D. 303, C. A.

Where in an admon action by a beneficiary against a trustee, the Judge by his order "does not think fit to make any order as to the costs of the action," the *prima facie* right of the trustee to retain his costs is negatived: *Re Hodgkinson, H. v. H.*, (1895) 2 Ch. 190, C. A.

And as the right of a trustee to his costs rests substantially on contract, they are not "by law left to the discretion of the Court," within s. 49 of Jud. Act, 1873, and an appeal as to them will lie without leave: *Farrow v. Austin*, 18 Ch. D. 58; *Turner v. Hancock*, 20 Ch. D. 303, C. A.; *Re Sarah Knight's Will*, 26 Ch. D. 82, C. A.; *Re Love, sup.*; *Cotterell v. Stratton*, 8 Ch. D. 295 (but see *Taylor v. Dowlen*, 4 Ch. 697; *Re Hoskin's Trusts*, 6 Ch. D. 281, C. A.); *secus*, where the trust instrument, being wholly set aside, there is no contract in existence: *Dutton v. Thompson*, 23 Ch. D. 278, C. A.; but see *Merry v. Pownall*, (1898) 1 Ch. 306, where an action having been successfully brought to set aside a settlement, trustees having acted properly and not caused unnecessary expense were held entitled to retain their costs of the action as between solr and client out of the fund.

And an appeal will lie against an order allowing to a trustee costs of action (e.g., an unsuccessful action incidentally connected with the trust), which are in substance charges and expenses *quod* the administration of the trust: *Re Beddoes, Downes v. Cottam*, (1893) 1 Ch. 547, C. A.; *Lewin*, 1207.

Trustees were held entitled to their proper costs of carrying out, with the consent of the tenant for life, transactions after order on further consideration, though without the sanction of the Court: *Re Mansel, Rhodes v. Jenkins*, 54 L. J. Ch. 883.

It is the duty of trustees to protect the estate against costs, and they may be made personally to pay the costs of proceedings taken by them in the interest of their solrs: *Wood v. Calvert*, 55 L. T. 53; 34 W. R. 732.

Trustees (one of whom was a solr), on being requested by a person who claimed to be a c. q. t. to furnish accounts, were entitled to be guaranteed against the expense: *Re Bosworth, Martin v. Lamb*, 58 L. J. Ch. 432.

The costs to which a trustee is entitled are limited to those which he incurs as trustee, and do not extend to those incurred by him as surety for his co-trustee; e.g., by their joint retainer of a solr: *Smith v. Dale*, 18 Ch. D. 516; but a trustee's right of indemnity extends to all fair claims of every kind, and therefore, in a taxation or moderation of his costs, statute-barred items for costs properly incurred ought not to be excluded: *Budgett v. B.*, (1896) 1 Ch. 202.

As to costs under the Trustee Acts, see *inf.* p. 1196.

TRUSTEES SEVERING IN DEFENCE—SEPARATE SETS OF COSTS.

As to giving more than one set of costs to trustees, see *Wiles v. Cooper*, 9 Beav. 298, and cases *Ib.* 299, n.; where allowed, see *Meldrum v. Hayes*, 21 W. R. 746; *Pince v. Beattie*, 11 W. R. 979; *Aldridge v. Westbrook*, 4 Beav. 212; *Gaunt v. Taylor*, 2 Beav. 346; 2 Ha. 413, n.; *Cummins v. Bromfield*, 3 Jur. N. S. 657; where not, *Course v. Humphrey, inf.*; *Palmer v. Jones*, 43 L. J. Ch. 349.

If one of the trustees be a defaulter, or indebted to the trust estate, the others will be justified in severing from him: *Smith v. Dale*, 18 Ch. D. 516, 518; and see *Williams v. Wight*, W. N. (90) 50.

A trustee ought not to be deprived of his costs merely on the ground that he has severed from his co-trustee in an admon action, but the Court will give him an opportunity of explaining his reasons for the severance: *Re Isaac, Cronbach v. I.*, (1897) 1 Ch. 251, C. A.; and a severing trustee may appeal from an order depriving him of all costs: *Ib.*

In *Webb v. W.*, 16 Sim. 65, a trustee severing in defence for breach of trust

by his co-trustee, and only one set of costs being given, he was allowed the whole. It has sometimes been left to the taxing master to decide which trustee should have the one set: *Course v. Humphrey*, 26 Beav. 402; 5 Jur. N. S. 615; 28 L. J. Ch. 327; *A. G. v. Wyville*, 28 Beav. 464; and for an inquiry if such severing was proper, see *Woods v. W.*, 5 Ha. 229.

Where trustees and c. q. t. severing in defence were only allowed one set of costs, see *Farr v. Sheriffe*, 4 Ha. 528; and so c. q. t.: *Peillon v. Brooking*, 4 L. T. 731.

But this rule does not apply to parties whose shares are different, though their interests in opposing the Plt are identical; *Remnant v. Hood*, 27 Beav. 613, 614, n.

CHARGES AND EXPENSES.

Charges and expenses of testator's trustees do not include funeral and probate expenses: *Collis v. Robins*, 1 D. & S. 131; and see *Hardy v. Hull*, 17 Beav. 355; nor the costs of other actions, unless brought or defended by leave, or otherwise specially provided for: *Payne v. Little*, 27 Beav. 83; but exor's costs, charges and expenses, include his costs of a probate action disputing the will: *Re Price, Williams v. Jenkins*, 31 Ch. D. 485. In *Graham v. Wickham*, 2 D. J. & S. 497, costs of litigation since decree were allowed, and the Court considered whether such costs have been properly incurred: and see *Maw v. Pearson*, 3 N. R. 99; 28 Beav. 196; and an allowance (fixed by the Court itself) has been made to exors and trustees for loss of time in carrying on the testator's business and managing his property: *Forster v. Ridley*, 4 D. J. & S. 452; and trustees of a business bequeathed as part of the residuary trust estate were allowed out of capital the expenses properly incurred of employing accountants and valuers for an annual audit and stock-taking: *Re Bennett, Jones v. B.*, (1896) 1 Ch. 778, C. A.

They included costs of release of the Plt trustee, though never executed: *Stephens v. Newborough*, 11 Beav. 403.

Trustees of an invalid creditors' deed were not entitled to retain their costs: *Smith v. Dresser*, 1 Eq. 651; and as to costs of trustees of deeds set aside as void as against purchasers or creditors under the statutes of Eliz., see May, Vol. Conv. 486.

And see *Tanqueray v. Bowles*, 14 Eq. 151, where trustees had to pay all costs, after their refusal of a fair offer, the deed impeached having been set aside under the settlor's subsequent bankruptcy: *Henshall v. Fereday*, 21 W. R. 240, 570; 27 L. T. 743; 29 L. T. 46; where trustees of a voluntary settlement containing no power of revocation were refused the costs of a suit in which it was set aside.

On the appointment of a new trustee, the costs, including those of the donee of the power, are allowed out of the corpus: *Harvey v. Oliver*, W. N. (87) 149; 59 L. T. 249; Lewin, 792.

INDEMNITY AND PRIORITY.

Trustees, public or private, are entitled to reimburse themselves from the trust fund all due expenses, without any special provision to that effect: *A. G. v. M. of Norwich*, 2 M. & C. 406, 424; and by the Trustee Act, 1893 (56 & 57 V. c. 53), s. 24 (replacing s. 31 of the Law of Property Amendment Act, 1859 (22 & 23 V. c. 35)), it is enacted that "a trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys, or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default; and may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers."

And this right of indemnity is a first charge as well upon the income as the

corpus, and expenses may be retained out of income until provision can be made for raising them out of corpus: *Stott v. Milne*, 25 Ch. D. 710, C. A.

But the right is limited strictly to the trust fund, and to expenses properly incurred in the execution of the trust: *Re E. of Winchelsea's Policy Trusts*, 39 Ch. D. 168; *Stott v. Milne*, *sup.*; *Smith v. Dale*, 18 Ch. D. 516.

And where legacies have been severed and set apart, the trustee can have no right to relief from one set of investments in respect of liability incurred on behalf of beneficiaries entitled to another set: *Fraser v. Murdoch*, 6 App. Ca. 855; following *Exp. Garland*, 10 Ves. 110.

Where there was no trust fund out of which the trustee could be paid, a *c. q. t.*, at whose request he accepted the office, was liable to indemnify him: *Jervis v. Wolferstan*, 18 Eq. 18.

Where on a purchase under the trust the trustee contributes a sum to make up the purchase-money, he is entitled to a lien subject to a first charge for the balance in favour of the trust: *Re Pumfrey, Worcester, &c. Co. v. Blick*, 22 Ch. D. 255.

The trustees of an inspectorship deed, in which the creditors covenanted to indemnify them against any liability in carrying on the debtor's business, were entitled to a decree for account and contribution against all the creditors, though some had different defences from others: *Singleton v. Selwyn*, 12 W. R. 98; 3 N. B. 27; 9 Jur. N. S. 1149; 9 L. T. 408.

Trustees of a settlement originally valid, but afterwards avoided under sect. 47 of the Bankruptcy Act, 1883, are entitled to a lien for their expenses as against the trustee in bankruptcy: *Re Holden*, 20 Q. B. D. 43; *secus*, where the settlement is void *ab initio*: *Dutton v. Thompson*, 23 Ch. D. 278, C. A.; but see *Merry v. Pownall*, (1898) 1 Ch. 306, *sup.* p. 1170.

Trustees allowing tenant for life to retain heirlooms pursuant to a direction in the will were entitled to stop his income to make good loss occasioned by his allowing his landlord to distrain on the heirlooms: *Re Hope, De Cetto v. H.*, W. N. (00) 76.

A trustee who has incurred a legal liability may be entitled to indemnity from the *c. q. t.* before actual loss has occurred: *Phene v. Gillam*, 5 Ha. 1, 9, 13 (where the indemnity was by the recognizance of the Deft): *Re Pumfrey, Worcester, &c. Co. v. Blick*, 22 Ch. D. 255; and a trustee of shares for a *c. q. t.* (whether original or derivative) who is *sui juris* is entitled to be personally indemnified by him against calls: *Hardoon v. Belilios*, (1901) A. C. 118; but cannot call for indemnity in the absence of evidence that a call will be made: *Hughes-Hallett v. Indian Mammoth Gold Mines*, 22 Ch. D. 561; *secus*, where the right to indemnity was denied, and the trustee had received notice that he would be placed on the list of contributories: *Hobbs v. Wayet*, 36 Ch. D. 256, 259; and see *Re Blundell, B. v. B.*, 40 Ch. D. 377.

A bond of indemnity taken by a trustee is intended, *primâ facie*, only to indemnify him from claims against him as such, and not against loss which he may sustain in the character of beneficiary: see *Evans v. Benyon*, 37 Ch. D. 329, C. A.

Acting under counsel's advice will not necessarily entitle trustees to costs of action: *Devey v. Thornton*, 9 Ha. 232; *Stott v. Milne*, 25 Ch. D. 710, C. A.; though such advice would go a long way to justify proceedings instituted *bonâ fide* for the protection of the estate: *S. C.* at p. 714; and see *Poole v. Pass*, 1 Beav. 600, *et v. inf.* p. 1176.

Priority.

Trustees' expenses precede costs of suit, and are a lien on the property: *Morrison v. M.*, 7 D. M. & G. 214; 2 S. & G. 564; *Lewin*, 750 *et seq.*; *Gaunt v. Taylor*, 2 Ha. 413; unless payments not strictly authorized have been made without the sanction of the Court, and the estate is insufficient: *Robinson v. Killey*, 30 Beav. 520; or they have misconducted themselves: *Rose v. Sharrod*, 11 W. R. 356; and see *Ramsay v. Simpson* (1899), 1 I. R. 69. They had not such lien for the expenses of and consequent on an attempted premature sale, at the instance of the legal tenant for life: *Leedham v. Chawner*, 4 K. & J. 458; and the right is strictly limited to the trust fund: *Re E. of Winchelsea's Policy Trusts*, 39 Ch. D. 168.

Under the Commissioners Clauses Act, 1847 (10 & 11 V. c. 16), s. 60, commissioners, notwithstanding that they were defending an action as mortgagors, were held entitled, by virtue of the statutory right of indemnity, to

their costs out of the property as between solr and client in priority to all other parties: *Batten & Co. v. Dartmouth Harbour Commrs*, 45 Ch. D. 612.

And in an action by *c. q. t.*, under a creditor's deed for accounts and ascertainment of rights, there being a probability of a deficiency, the trustees were entitled to a direction for payment of their costs, charges, and expenses in priority to all other parties: *Dodds v. Tuke*, 25 Ch. D. 617.

It is an absolute rule that a trustee in default cannot receive any costs out of the estate until he has made good his default: *Stanier v. Evans*, 34 Ch. D. 470; *Doering v. D.*, 42 Ch. D. 203; *Lewin*, 1209; and therefore an order directing that his costs shall be allowed in the first place, and the balance only paid, is only to be made under special circumstances in order to avoid unnecessary circuity of payments, and the solr cannot take any benefit under such an order if made on an erroneous representation of the solvency of the trustee: *Stanier v. Evans*, *sup.*

Exoneration of Trustees in respect of Powers of Attorney.—By the Trustee Act, 1893 (56 & 57 V. c. 53), s. 23, it is enacted that "a trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying. Provided that nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made, and that the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee."

As to the effect of the section, which substantially reproduces sect. 26 of the Law of Property Amendment Act, 1859 (Lord St. Leonards' Act), 22 & 23 V. c. 35, see *Hood and Challis*, 127, 128, 362.

ALLOWANCES.

A trustee making a payment not authorized by the terms of the trust, but honestly, and under good advice to execute the trust, as a legacy objected to as being a charge on the estate, in order to complete a sale, was allowed it in account, and his costs below and on appeal: *Forshaw v. Higginson*, 8 D. M. & G. 827; but see *Fazakerly v. Culshaw*, 19 W. R. 793; 24 L. T. 773; *Vyse v. Foster*, L. R. 7 H. L. 318; *et inf.* p. 1184.

Trustees making wrong payments to legatees have a lien on their interests, even against assignees for value: *Dibbs v. Goren*, 11 Beav. 483.

And a release of exors after payment to legatee domiciled abroad, though wrong *lege loci*, was binding: *Leslie v. Baillie*, 2 Y. & C. C. 91.

An allowance (fixed by the Court itself) was made to trustees for loss of time in carrying on the testator's business, and managing his property: *Forster v. Ridley*, 4 D. J. & S. 452; but see *Lewin*, 745.

Annual sums, directed by a will to be paid to trustees and a beneficiary so long as they carried on the testator's business, were held to be subject to legacy duty: *Re Thorley*, (1891) 2 Ch. 613, C. A.

A commission of 5 p. c. was allowed to an English trustee for receiving rents, all the *co. q. t.*, and the other trustees, being resident out of the jurisdiction: *Re Freeman's Settlement*, 37 Ch. D. 148.

But, in general, a trustee may not act as a collector himself with a commission: *Re Bedingsfield, B. v. D'Eye*, 57 L. T. 332; *Nicholson v. Tutin*, 3 K. & J. 159.

And trustees who under an order of Court receive rents, and are allowed a commission, will not be allowed additional charges in respect of a collector: *Cox v. Bennett*, 39 W. R. 308.

There is no inflexible rule that a trustee, appointed receiver, is not to have remuneration, and it may be allowed in a proper case, though not mentioned in the judgment appointing him: *Re Bignell, B. v. Chapman*, (1892) 1 Ch. 59, C. A.

An advance by trustees out of the personal estate to the tenant for life for stocking and cultivating a farm, forming part of the real estate, was allowed, the outlay being beneficial for infant remaindermen: *Re Household, H. v. H.*, 27 Ch. D. 553; and a constructive trustee who expends money in permanent

improvements of the trust property is *primâ facie* entitled to be recouped his expenditure to the extent of the improved value: *Rowley v. Ginnerver*, (1897) 2 Ch. 503.

In *Conway v. Fenton*, 40 Ch. D. 512, 517, expenditure in repairing farm buildings was sanctioned; but this case was exceptional, and in general there is no jurisdiction to authorize such expenditure of settled money except in cases amounting to actual salvage: *Re Montagu, Derbyshire v. M.*, (1897) 2 Ch. 8, C. A., affirming (1897) 1 Ch. 685; *Re Hawker's Settled Estates*, 66 L. J. Ch. 341; *Hurst v. H.*, 29 L. R. Ir. 219; Lewin, 574; *Re Lord De Tabley's Settled Estates*, W. N. (96) 162.

Where a trustee and guardian of infants pays income to his co-guardian for their maintenance and education, he is not thereby discharged, but if he shows that they have been properly maintained and educated, a proper sum, on inquiry, ought to be allowed against the balance due from him without vouching details: *Re Evans, Welch v. Channell*, 26 Ch. D. 58, C. A.

Trustees were not allowed unnecessary maintenance: *Bridge v. Brown*, 2 Y. & C. C. 181; nor repairs: *S. C.*; nor maintenance as just allowances: *Cotham v. West*, 1 Beav. 381; nor advancement by one, the power being vested in two: *Palmer v. Wakefield*, 3 Beav. 227.

But trustees were allowed proper maintenance though in excess of the income: *Bridge v. Brown*, 2 Y. & C. C. 181; and sums duly expended for a c. q. t. unable to take care of himself: *Nelson v. Duncombe*, 9 Beav. 211; and for inquiries on the subject, see *Ib.* 233; and see *Wentworth v. Tubb*, 1 Y. & C. C. 171; 2 Y. & C. C. 537; and as to allowances to self-constituted trustees of one *non compos*, *Selby v. Jackson*, 6 Beav. 192.

A trustee will not be allowed interest on costs, though at the time he paid them he had no trust money in his hands: *Gordon v. Trail*, 8 Price, 416; but if he pays off a debt carrying interest, he stands in the place of the creditor *quâ* interest: *Re Beulah Park Estate*, 15 Eq. 43; *Finch v. Pescott*, 17 Eq. 554.

As to payment to, and release by, a c. q. t. representing himself as of age, when not, see *Overton v. Banister*, 3 Ha. 503; and see *Nelson v. Stocker*, 4 D. & J. 458, 462, 463.

Trustees acting on a forged marriage certificate had to make good the fund, with interest: *Eaves v. Hickson*, 30 Beav. 136; 7 Jur. N. S. 1297.

And trustees are liable for improper payments to solrs, or others: *Re Massey*, 8 Beav. 461.

And as to trustees' allowances and costs, see Lewin, 750 *et seq.*; 1200 *et seq.*

TRUSTEES TO HAVE NO COSTS OR TO PAY THEM.

To what extent an exor may be deprived of his costs in an admon action for laches, see *Heighington v. Grant*, 1 Ph. 600; or for neglect, *England v. Downs*, 6 Beav. 279; *Travers v. Townsend*, 1 Mol. 496; *Beer v. Tapp*, 10 W. R. 277; *Gresham v. Price*, 35 Beav. 47; and in admon action in Chambers, *Re King*, 34 Beav. 574.

Trustees refusing accounts and information had to pay costs up to the hearing: *Talbot v. Marshfield*, 3 Ch. 622; *Kemp v. Burn*, 4 Giff. 348; 11 W. R. 278; and see *Payne v. Evens*, 18 Eq. 356.

And neglect or refusal to account will in general make trustees liable for costs so occasioned: *Springett v. Dashwood*, 2 Giff. 521; 7 Jur. N. S. 93; *Re Hayter*, 32 W. R. 26.

But the neglect or refusal must be pertinacious: *Pince v. Beattie*, 11 W. R. 979.

Trustees have been made to pay the costs of suits occasioned by their unreasonable conduct: *Palairt v. Carew*, 32 Beav. 564; *May v. Armstrong*, W. N. (66) 233; or general dereliction of duty: *Re Weall, Andrews v. W.*, 42 Ch. D. 674; *Thomson v. Eastwood*, 2 App. Ca. 215; *Heugh v. Scard*, 33 L. T. 659; 24 W. R. 61, and cases cited, Lewin, 1206; or of proceedings taken in the interest of their solrs, and not for the protection of the trust estate: *Wood v. Calvert*, 55 L. T. 53.

Exors were not allowed the costs of an unnecessary inquiry as to the testator's family: *Westover v. Chapman*, 1 Col. 181; nor of acting by a solr without reason: *Harbin v. Darby*, 28 Beav. 325; and as to costs of consulting

counsel, and conferences with a view to compromise, see *Stephens v. Newborough*, 11 Beav. 403.

And exors or trustees improperly instituting admon proceedings may be ordered to bear the costs: *Re Cabburn*, 46 L. T. 848; and *inf.*, Chap. XLIV., "ADMINISTRATION."

A trustee who, in a suit for an account, falsely denies his indebtedness may be ordered to pay costs: *Parrot v. Treby*, Pr. Ch. 254; *Eglin v. Sanderson*, 3 Giff. 434; or at all events deprived of costs; *A. G. v. Brewers' Co.*, 1 P. W. 376; *Fozier v. Andrews*, 2 J. & Lat. 199; but where, on taking accounts, a trustee is found to be indebted in a small amount, he will not be disallowed his costs merely because he denied that he was indebted: *Turner v. Hancock*, 20 Ch. D. 303, C. A.

Where a settlement was prepared by the trustee, who persuaded the settlor to execute it, the trustee was ordered to pay the costs of a successful action to set it aside: *Dutton v. Thompson*, 23 Ch. D. 278, C. A.

As a trustee is indemnified by the decree of the Court, he will appeal from any decision to the Court above at his own risk: *Rouland v. Morgan*, 13 Jur. 23; *Tucker v. Horneman*, 4 De G. M. & G. 395; and see *Wellesley v. Mornington*, W. N. (70) 192; and if the rights are perfectly clear, and he appeals to the Court without reason, though otherwise *bond fide*, he will be answerable in costs: *Re Knight's Trust*, 27 Beav. 45; *Loneson v. Copeland*, 2 B. C. C. 166; and see *Re Chapman*, 72 L. T. 66, C. A.; and an unsuccessful appeal as to the construction of a will will be dismissed with costs, which will not come out of the estate: *Clark v. Henry*, 6 Ch. 588; and see *Exp. Angerstein*, 9 Ch. 479; *Re Pettit*, 1 Ch. D. 478; *Pitts v. La Fontaine*, 6 App. Ca. 482.

Trustees not benefiting by breach of trust had not to pay costs: *Bate v. Hooper*, 5 D. M. & G. 338; but where there has been a breach of trust costs are generally given against the trustee: *Burdick v. Garrick*, 5 Ch. 233, and all participants in the breach without reference to their degrees of culpability: *Lawrence v. Bowle*, 2 Ph. 140; *Byrne v. Norcott*, 13 Beav. 336; but between them one or more of them may be primarily liable; and see *Thompson v. Finch*, Form 4, *sup.* p. 1158.

Where a breach of trust, not depending on a mere point of construction, is established in an action, the costs of establishing it will in general be thrown upon the trustee: *Bell v. Turner*, 47 L. J. Ch. 75.

In *Lyse v. Kingdon*, 1 Col. 184, though exors were liable for costs of suit, they were paid from their testator's assets, he having committed the breach of trust; and see *Palmer v. Jones*, 43 L. J. Ch. 349; *Re Griffiths, G. v. Lewis*, 26 Ch. D. 465, C. A., *et sup.* p. 1168.

Trustee making good a breach of trust, not accompanied with fraud, and consequent costs, was allowed those subsequent: *Hewett v. Foster*, 7 Beav. 348; *Peacock v. Colling*, 33 W. R. 528; 63 L. T. 620; 64 L. J. Ch. 743, C. A.; and costs of suit other than those caused by such breach: *Knott v. Cottee*, 16 Beav. 77; *Heighington v. Grant*, 1 Ph. 600; *Pride v. Fooks*, 2 Beav. 430; and see *Samuel v. Jones*, 2 Ha. 246; *Bate v. Hooper*, 5 D. M. & G. 338; but costs arising from an unfounded claim by him were disallowed: *Fozier v. Andrews*, 2 J. & Lat. 199; and see *Easton v. Lander*, 62 L. J. Ch. 164, where costs subsequent to judgment were disallowed a trustee in an action occasioned by his previous misconduct.

A legatee in trust under the will of a defaulting trustee, having been ordered to refund, could not deduct his costs from the legacy, the same being insufficient to answer the breach of trust: *Re Knott, Bax v. Palmer*, 66 L. J. Ch. 318; 56 L. T. 161; 35 W. R. 302.

TRUSTEES DISCLAIMING OR REFUSING TO CONVEY.

A disclaiming trustee only takes costs as between party and party, unless having to act in the trust: *Legg v. Mackrell*, 1 Giff. 165; 5 Jur. N. S. 1164; *Norway v. N.*, 2 M. & K. 278; and so in *Bray v. West*, 9 Sim. 429, though Deft had disclaimed by answer, and was still continued party to the hearing; and as to the costs of disclaiming, see *Re Tryon*, 7 Beav. 496; *Martin v. Persee*, 1 Moll. 146. A man may be liable as trustee to convey without being entitled to trustee costs: *Carter v. C.*, 4 Jur. N. S. 63, 67; 3 K. & J. 617; and

a trustee's executrix refusing to act was not allowed costs, but did not pay them, because the bill asking that she should she was obliged to resist: *Legg v. Mackrell*, *sup.*

A trustee refusing to concur as Plt to recover the trust property had no costs: *Hughes v. Key*, 20 Beav. 395; *Reade v. Sparkes*, 1 Moll. 8.

Trustees unsuccessfully resisting claims of *ca. q. t.*, whose title had not been duly shown, had trustee costs: *Holford v. Phipps*, 4 Beav. 475; and parties calling on trustees to part with their estate, on the ground of the trusts being ended, must show this clearly; this not being done before suit, the trustees had their costs: *S. C.*, 3 Beav. 434; and will always, unless misconduct is shown: *Noble v. Meymott*, 14 Beav. 471; and so where they declined to transfer a fund, under an assignment, open to suspicion, though ordered by the Court: *Whitmarsh v. Robertson*, 1 Y. & C. C. 715; and so under an appointment by father to son at twenty-one: *King v. K.*, 1 D. & J. 663; and so though the trustee had wrongly refused to assign without the concurrence required by counsel: *Poole v. Pass*, 1 Beav. 600; and see *Devey v. Thornton*, 9 Ha. 232; *et sup.* p. 1172.

But in a like case a trustee was not allowed his costs of suit: *Angier v. Stannard*, 3 M. & K. 566; nor where he refused to transfer a fund as appointed and assigned: *Campbell v. Home*, 1 Y. & C. C. 664.

And where in a clear case he refused to reconvey he had to pay costs: *Hampshire v. Bradley*, 2 Col. 34, 39; and see *Coppinger v. Stapleton*, 15 L. R. Ir. 461. But untrue recitals in the reconveyance justified refusal to execute it: *Hartley v. Burton*, 3 Ch. 365; though the fact of the trusts being unknown did not, and the trustee had to pay costs: *Penfold v. Bouch*, 4 Ha. 271; and so though father and daughter were dealing with her reversionary interest: *Firmin v. Pulham*, 2 D. & S. 99; and though not satisfied with due evidence of a decease: *Lye v. Kingdon*, 1 Col. 184; and though not satisfied with due evidence of a pedigree: *Lancashire v. L.*, 1 D. & S. 288, 298; and where disputing the title to an annuity: *Roch v. Callen*, 6 Ha. 531. But as to visiting trustees with costs, see *Noble v. Meymott*, 14 Beav. 471; *Re Cull*, 20 Eq. 561; *et inf.* pp. 1196, 1197, and other cases there, *et sup.* p. 1174.

CHARGES BY TRUSTEES ACTING AS SOLICITORS, SURVEYORS, &c.

In general a solr-trustee is only entitled to costs and expenses out of pocket found by the taxing master to have been properly incurred: *Moore v. Frowd*, 3 My. & Cr. 46, 50; *Robinson v. Pett*, 2 L. C. Eq. 214; unless there has been a special power to charge for professional charges: *Re Sherwood*, 3 Beav. 338; *Moore v. Frowd*, 3 My. & C. 45; *Re Wyche*, 11 Beav. 209.

A direction in a will authorizing a trustee who is a solr to charge for professional services is a beneficial interest under sect. 15 of the Wills Act (1 V. c. 26), and therefore void if he is an attesting witness: *Re Pooley*, 40 Ch. D. 1, C. A.; *Re Barber, Burgess v. Vinnicome*, 31 Ch. D. 665; *Re White, Pennell v. Franklin*, (1898) 2 Ch. 217, C. A., affirming *ib.* 1 Ch. 297; and, being bounty, fails as against creditors: *S. C.*; and whether or not such interest is subject to legacy duty, *quære*: *Re Pooley, sup.*; *Re Thorley*, (1891) 2 Ch. 613, C. A.

Where a testator directs that his solr shall be solr "to his estate and to his trustees in the management and carrying out the provisions of the will," no trust or duty to employ such solr is imposed on the trustees: *Foster v. Elsley*, 19 Ch. D. 518.

An exor who is a solr cannot, though authorized "to charge for his professional services," charge for doing what, as exor, he ought to have done himself; nor can an exor employ a solr for such acts: *Harbin v. Darby*, 28 Beav. 325; and cases in note, p. 327.

As to what words are sufficient, see *Moore v. Frowd, sup.*; *Harbin v. Darby*, 28 Beav. 325; *Willis v. Kibble*, 1 Beav. 559; *Re Ames, A. v. Taylor*, 25 Ch. D. 72 (where non-professional charges were allowed under a direction that the solr should be allowed to make proper and reasonable charges, whether within the business of a solr or not); *Re Chapple, Newton v. Chapman*, 27 Ch. D. 584 (where they were disallowed under a direction to allow remuneration for business and trouble, as though the trustee, not being such, were employed by the trustee); *Re Fish, Bennett v. B.*, (1893) 2 Ch. 413, C. A.

(where a special clause was held to entitle a solr-trustee to charge for his trouble, as well as to make professional charges, notwithstanding that a legacy of 200*l.* was given to him conditionally on his accepting the office of exor and trustee); *Clarkson v. Robinson*, (1900) 2 Ch. 722 (where the clause, though wide, was not wide enough to cover work done outside the profession or business of the trustee).

The rule extends to the firm of which he is a member, though the business has been done by one of the firm not a trustee: *Christophers v. White*, 10 Beav. 523; *Collins v. Carey*, 2 Beav. 128.

But a trustee may employ his partner as solr to the trust if the trustee, by the articles of partnership, is precluded from any benefit: *Clack v. Carlon*, 7 Jur. N. S. 441; 9 W. R. 568; 30 L. J. Ch. 639; 4 L. T. 361.

And where trustees of a manor appointed the partner of one of them, who was a solr, to act as steward, he was not accountable to the trust in respect of his manorial fees: *Re Corsellis, Lawton v. Elwes*, 34 Ch. D. 675, C. A.

The rule, however, has been held not to apply where the solr is one of several trustees, and acts for them as Defts: *Cradock v. Piper*, 1 Mac. & G. 664; 17 Sim. 41. This exception to the rule, though anomalous (see Lewin, 304; *Mansen v. Baillie*, 2 Macq. 80; *Re Doody*, (1893) 1 Ch. 129, C. A.), is well established: *Re Corsellis, Lawton v. Elwes*, 34 Ch. D. 675, C. A.; *Re Barber, Burgess v. Vinnicome*, 34 Ch. D. 77; and applies to friendly proceedings in Chambers—e.g., an application for maintenance of an infant: *Re Corsellis, sup.*; and where the trustees are Plts, but not where the solr-trustee is acting for *cs. q. t.*: *S. C.*; or is not the solr on the record, but has merely introduced the business to the solrs of the trustees: *Vipont v. Butler*, W. N. (93) 64; and the taxing masters may apply the rule without any special direction: *Cradock v. Piper, sup.*

As to disputing after many years a bill paid by a trustee to himself as solr, see *Allen v. Jarvis*, 4 Ch. 616.

Right to charge for professional services may be given to a surveyor-trustee by the will: *Willis v. Kibble*, 1 Beav. 559; but exor and trustee, selling as auctioneer, was not allowed commission: *Kirkman v. Booth*, 11 Beav. 273; nor were auctioneers selling for a mortgagee, one of the firm: *Matthison v. Clarke*, 3 Drew. 3; and see *Sclater v. Cottam*, 3 Jur. N. S. 630; 5 W. R. 744; but a trustee for sale, an auctioneer, was, under the terms of the deed: *Douglas v. Archbutt*, 2 D. & J. 148.

As to compensation for loss of time, see *Forster v. Ridley*, 4 D. J. & S. 452, *sup.* p. 1173.

An exor who is a solr cannot, by postponing probate, entitle himself in the meantime to charge for professional work done for his co-exor in relation to the estate: *Re Barber, Burgess v. Vinnicome*, 34 Ch. D. 77.

There is no inflexible rule that a trustee can be appointed receiver of the trust property only on the terms of his having no remuneration: *Re Bignell, B. v. Chapman*, (1892) 1 Ch. 59; Lewin, 302.

SECTION VI.—INVESTMENT OF TRUST FUNDS AND MANAGEMENT OF TRUST PROPERTY.

1. *Investment on Mortgage of Freeholds or Copyholds in England or Wales.*

AND this Court being of opinion that it will be fit and proper, and for the benefit of the persons interested under &c., that the sum of £—cash in the schedule hereto mentioned should be invested [or that the £—Consols in the schedule hereto mentioned should be sold, and the money to arise by such sale be invested] on the security by way of

mortgage of the freehold [or copyhold] estate in the petition mentioned, situate &c., Let an inquiry be made whether a good title can be made to the said estate; And in case a good title can be made thereto, Let a mortgage thereof be settled by the Judge; And Let the fund in Court be dealt with as directed in the schedule hereto.—[*Add Payment Schedule, Form No. 62.*]

For form of summons, see D. C. F. 574.

2. *Inquiry as to such Investment.*

LET an inquiry be made whether it is fit and proper and for the benefit of the parties interested in the £55,000 Consols in Court to the credit of &c., that the said anns should be sold, and the proceeds thereof invested in the purchase of East India Stock, or upon mortgage of a freehold or copyhold estate, or freehold or copyhold estates, in England or Wales.—Adjourn &c. till after certificate.—*Cockburn v. Peel*, V.-C. S., 1 Mar. 1861, A. 393.

This application was ultimately refused by V.-C. S., 1 April, 1861. And again on appeal to the full Court, 12 June, 1861, 3 D. F. & J. 170; as the Court felt bound to consider the interests of all parties, and the investment did not appear to be for the benefit of the remaindermen.

3. *Liberty to Trustees to expend Money for specified Purposes.*

LET the Defts, the trustees of the will of the testator D, be at liberty, out of the income of the estate at W. to which the Plt is entitled, to expend a sum not exceeding £— in executing the works mentioned in the first column of the schedule hereto, the estimated cost of which is set forth in the second column.

The SCHEDULE above referred to.

1st Column.	2nd Column.
To paint the outside wood and iron-work of the mansion at —, and the out-offices.....	£35 0 0
To &c.	
Total.....	£

—*Dashwood v. D.*, V.-C. M. in Chambers, 19 July, 1876, A. 1594.

For form of summons, see D. C. F. 616.

4. *Declaration that Trustees of Settlement may advance on Personal Security—Liberty to apply on further Evidence as to Question of their Obligation to do so.*

LET the Defts A. N. R. and H. T. A. H., as trustees of the indenture of settlement dated &c., be at liberty to lend the whole or any part of

the trust funds (whether at the time invested or not) to the settlor, the Plt C. E. L., widow, upon her personal credit without security, if they think fit, And Let the said Defts [*the trustees*] be at liberty to apply to the Judge at Chambers, if they shall hereafter be desirous of taking the further opinion of the Judge whether they are bound to make such loan on producing further evidence as to that point.—The costs of the Plt and Defts [*the trustees*] of the application to be paid and retained out of the trust funds to be taxed, the costs of the trustees as between solr and client.—See *Re Laing's Settlement*, L. v. Radcliffe, Kekewich, J., 22 Feb. 1899, B. 1119; (1899) 1 Ch. 593.

5. Declaration that Trustees may raise Money for Repairs and Annuities—Interest to be kept down out of Income.

DECLARE in answer to Question 1 that, according to the true construction of the said will, the Plts [*the trustees*] have power to charge or mortgage so much of the testator's real estate as from time to time remains unsold, with any outlay for renewals of leases, or grants, payments of fines, or admission to or enfranchisement of copyhold hereditaments, improvements, repairs, premiums on policies, or otherwise for the benefit or in respect of the real or personal estate of the testator, and also with the costs of and incidental to raising moneys for the purposes aforesaid; And Declare, in answer to Question 1a, that the Plts have also power to charge as aforesaid the unsold real estate from time to time with sufficient moneys to enable them to make payment in full of the annuities other than the annuity to the Plt R. B.; And Declare, in answer to Question 3, that the interest on mortgages or other charges ought to be borne by income; And, in answer to Question 4, tax as between solr and client the costs of all parties of the application, And Let the amount of such costs when taxed be paid by the Plts out of the moneys raised by charging the unsold real estate as aforesaid.—See *Re Bellinger*, Durell v. B., Kekewich, J., 26 July, 1898, A. 3024; (1898) 2 Ch. 534.

6. Contract and Lease approved—Trustees to be at liberty to execute them.

LET the conditional contract entered into between the applicants, the surviving trustees of the will of W. S., deceased, of the one part, and the Board of Works for the W— district of the other part, for the lease to the said Board of Works of the premises in the said contract mentioned, be carried into effect, and the Judge having approved of the contract for the lease, and also of the lease intended to be made under such contract between T. and S. of the one part, and the Board of Works for the W— district of the other part, which together with the counterpart thereof is identified by the signature of the Master in the margin of the said contract, and also of such lease

and the counterpart thereof respectively, as a proper contract and lease; Let the applicants be at liberty to execute such contract and lease upon the counterpart thereof being executed by the said Board of Works.—Costs of the Plts and Defts to be costs in the action.—*Stratford v. Teague*, V.-C. H. at Chambers, 13 June, 1876, B. 1105.

For forms of summons and affidavit, see D. C. F. 617.

7. *Liberty to Trustee to bring Action.*

LET the appellant, as trustee of the will of the said testator, be at liberty to bring an action against the lessees of the Duke of B. as lord of the manor of C. to restrain them from making a tramway from G. to the quarries in the township of Haslingden, or to take such other proceedings in relation thereto as he may be advised.—*Holden v. H.*, V.-C. B., 8 July, 1876, A. 118.

For form of summons, see D. C. F. 614.

8. *Trustees to defend Actions.*

LET the Defts, as the exors and trustees of the will of the testator E., be at liberty to defend the action *S. v. E.*, instituted by S. and another against the said E., and also the action *S. v. E.* instituted by S. and another against the said E. and others, and be indemnified therein out of the estate of the testator.—*Re Eden, E. v. Sutton*, V.-C. H. at Chambers, 7 Nov. 1876, A. 1777.

9. *Leave to promote Bill in Parliament.*

UPON motion by way of appeal &c., by counsel for the Defts, and upon hearing counsel for the Plt, Discharge order dated &c.; And Let, notwithstanding the order dated &c., the representative committee of the bondholders appointed under the order dated &c., be at liberty to promote a Bill in the next session of Parliament carrying into effect the terms set forth in the exhibit marked &c., to the affidavit &c., but such liberty is not to be taken as expressing any approval of this Court of such terms.—*Buckham v. The Trustees &c. of Whitshaven*, C. A., 3 Nov. 1886, A. 1647; *S. C.*, 56 L. T. 694.

NOTES.

INVESTMENT OF TRUST FUNDS—GENERAL POWERS OF TRUSTEES.

Until the passing of the Law of Property Amendment Act, 1859, known as Lord St. Leonards' Act (22 & 23 V. c. 35), s. 32, investments of trust money by trustees otherwise than under special powers contained in the trust instrument or special order of the Court, were practically confined to Government securities.

For an account of the earlier enactments on the subject of investment, see Seton, 4th ed., p. 488; and for an historical review of the law on the subject, see Lewin, Chap. XIV., sect. 4, pp. 330 *et seq.*

Under the Law of Property Amendment Act, 1860 (23 & 24 V. c. 38), s. 11,

trustees, exors, or admors "having power to invest their trust funds upon Government securities, or upon parliamentary stocks, funds, or securities, or any of them," might invest in any of the stocks, funds, or securities in or upon which "cash under the control of the Court" might be invested.

For the investments in which, under O. XXII, 17, cash under the control of the Court may now be invested, *v. sup.* Vol. I., p. 235; and as to the practice under the corresponding rule in Ireland, and the circumstances under which the Court will sanction investments in securities newly authorized, see *Roberts v. Morgan*, 23 L. R. Ir. 118; *Re Phelan*, *Id.* 336; *Johnson v. O'Neil*, *Id.* 430; *Re Nesbitt's Trusts*, 25 L. R. Ir. 430.

SETTLED LAND ACT.

By the Settled Land Act, 1882 (45 & 46 V. c. 38), ss. 21, 32, all moneys in Court which are liable to be laid out in the purchase of land to be made subject to a settlement may be "invested on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock of any railway co. in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares"; and under these sections moneys in Court which have arisen from the purchase under the Lands Clauses Consolidation Act, 1845, of land belonging absolutely to a charity, have been invested in railway debenture stock: *Re Byron's Charity*, 23 Ch. D. 171.

By sect. 33, where under a settlement money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of the Act, they may, at the option of the tenant for life, invest the same as above mentioned.

Moneys are "liable to be laid out in the purchase of land" within the section if trustees are empowered so to invest them: *Re Soltan's Trusts*, (1898) 2 Ch. 629; or to invest at the request of the tenant for life in the purchase of particular land: *Re Hill, H. v. Pilcher*, (1896) 1 Ch. 962.

Where under a will money was bequeathed to trustees in trust to lay it out in the purchase of real estate, to be settled in strict settlement, with a direction that until the purchase "the legacy should be invested in Government or real securities, but not in any other mode of investment," it was held that the trustees, on the direction of the tenant for life, might invest the legacy in railway debenture stock: *Re Mackenzie's Trusts*, 23 Ch. D. 750; and see *Re Tennant*, 40 Ch. D. 594; *Re Mundy's Settled Estates*, (1891) 1 Ch. 399, C. A.; for this was only doing directly what the tenant for life could have done circuitously under the powers of the Act, by reselling the estate when purchased, and directing the investment of the money in the manner proposed. And in another case, where the will contained no clause authorizing an interim investment, the Court sanctioned the postponement of the purchase of real estate in Ireland until such a purchase could be prudently effected, and allowed an interim investment under sect. 21: *Re Maberley, M. v. M.*, 33 Ch. D. 455; and see *post*, Chap. XLV., "SETTLEMENTS."

NATIONAL DEBT CONVERSION ACT.

By the National Debt (Conversion) Act, 1888 (51 V. c. 2), provision was made for the conversion and exchange of Three p. c. Consolidated Bank Annuities, Three p. c. Reduced Bank Annuities, and New Three p. c. Annuities into a new Government Stock of a lower denomination to be called Two and Three-quarters p. c. Consolidated Stock until the 6th of April 1903, and thereafter Two and a Half p. c. Consolidated Stock (sect. 2, sub-sect. 4); and trustees having power to invest in the old stocks were empowered to invest in the new stock in lieu thereof (sect. 19). The new stock yields dividends, payable quarterly, at the rate of $2\frac{3}{4}$ p. c. until the 4th of April, 1903, and $2\frac{1}{2}$ p. c. after that date (sect. 2, sub-sects. 1, 3); and is

not to be redeemable until the 8th of April, 1923, after which date it will be redeemable at par in such manner as Parliament shall direct (sect. 2, sub-sect. 2). Special provision was made for the protection of trustees of stock appropriated to provide annuities (sect. 20), and (sect. 27: see *Re Tuckett's Trusts*, 57 L. J. Ch. 760; 58 L. T. 719; 36 W. R. 542) when any stock converted or exchanged by virtue of the Act into new stock was held by a trustee, such trustee was to be at liberty to sell the same, and to invest the proceeds in any of the securities for the time being authorized for the investment of cash under the control of the High Court, notwithstanding anything to the contrary contained in the instrument creating the trust.

TRUSTEE ACT, 1893.

By the Trustee Act, 1893 (56 & 57 V. c. 53), which (by sect. 4) applies as well to trusts created before as to trusts created after the passing of that Act, extensive powers of investment are conferred on trustees; and by sect. 1, "A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say—(a) In any of the Parliamentary stocks or public funds or Government securities of the United Kingdom; (b) on real or heritable securities in Great Britain or Ireland; (c) in the stock of the Bank of England or the Bank of Ireland; (d) in India Three and a Half p. c. Stock, and India Three p. c. Stock, or in any other capital stock which may at any time hereafter be issued by the Secretary of State in Council of India, under the authority of Act of Parliament, and charged on the revenues of India; (e) in any securities the interest of which is for the time being guaranteed by Parliament; (f) in Consolidated stock created by the Metropolitan Board of Works or by the London County Council, or in Debenture stock created by the Receiver for the Metropolitan Police District; (g) in the Debenture, or Rentcharge, or Guaranteed or Preference stock of any railway co. in Great Britain or Ireland, incorporated by special Act of Parliament, and having, during each of the ten years last past before the date of investment, paid a dividend at the rate of not less than three p. c. per ann. on its ordinary stock; (h) in the stock of any railway or canal co. in Great Britain or Ireland, whose undertaking is leased in perpetuity, or for a term of not less than 200 years, at a fixed rental to any such railway co. as is mentioned in sub-sect. (g) either alone or jointly with any other railway co.; (i) in the Debenture stock of any railway co. in India, the interest on which is paid or guaranteed by the Secretary of State in Council of India; (j) in the B. anns. of the Eastern Bengal, the East Indian, and the Scinde, Purnjau and Delhi Railways, and any like anns. which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorized by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway, also in deferred anns. comprised in the register of holders of ann. class D. and anns. comprised in the register of annuitants class C. of the East Indian Railway Co.; (k) in the stock of any railway co. in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed; (l) in the Debenture or Guaranteed or Preference stock of any co. in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than 5l. p. c. on its ordinary stock; (m) in nominal or inscribed stock, issued or to be issued by the corporation of any municipal borough, having, according to the returns of the last census prior to the date of investment, a population exceeding 50,000, or by any county council, under the authority of any Act of Parliament or Provisional Order; (n) in nominal or inscribed stock, issued or to be issued by any commrs incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding 50,000, provided that during each of the ten years last past before the date of investment the rates levied by such commrs shall not have exceeded eighty p. c.

of the amount authorized by law to be levied; (o) in any of the stocks, funds, or securities for the time being authorized for the investment of cash under the control or subject to the order of the High Court; and may also from time to time vary any such investment."

The words extending the powers of the section to all trust funds, "whether at the time in a state of investment or not," were not contained in the Trust Investment Act, 1889, and in effect embody in the Act of 1893 the decision of the House of Lords in *Hume v. Lopes*, (1892) A. C. 112 (affirming and extending the decision of the Court of Appeal in *In re Dick*, (1891) 1 Ch. 423, C. A., overruling that of North, J., in *In re Manchester Royal Infirmary*, 43 Ch. D. 420), that the powers of the Act of 1889 were not limited to cash in the hands of trustees, but extended to all the trust investments, so that, whatever might be the nature of such investments, the power of varying investments conferred by the statute was available.

A corporation incorporated by a special Act, holding funds for charitable purposes and empowered to invest the same, are trustees within the Act: *Re Manchester Royal Infirmary*, *sup.*; *secus*, trustees holding moneys which belong to a building society and are to be dealt with only under the direction of the directors, or the directors themselves: *Re National Bldg. Soc.*, 43 Ch. D. 431.

As to the meaning of the words "incorporated by Act of Parliament," see *Elve v. Boyton*, (1891) 1 Ch. 501, C. A.

In the case of *Re Blue Ribbon Life Assurance Co.*, 59 L. J. Ch. 276; 60 L. T. 660; 38 W. R. 104; North, J., without deciding whether the Court would accept B. annuities as a proper investment for funds under its control, sanctioned, under the Board of Trade Rules, the investment therein of a deposit paid in under the Life Assurance Companies Act, 1870, s. 3.

India 3½ p. c. is not a fund, the interest of which is "guaranteed by authority of Parliament" within sect. 25 of the Building Societies Act, 1874, available for investment of the surplus funds of the society: *Re National Permanent Bldg. Soc.*, W. N. (90) 117.

Where a testator empowered his trustees to set apart and invest in specified securities a sum sufficient to answer an annuity, the trustees could not avail themselves of the statute to make an investment for the purpose on securities not so specified: *Re Outhwaite, O. v. Taylor*, (1891) 3 Ch. 494; but see *Hume v. Lopes*, (1892) A. C. 112, *sup.*; and cf. *Re Mackenzie's Trusts*, 23 Ch. D. 750, *sup.* p. 1181.

INVESTMENTS SANCTIONED BY COURT.

The Court, on the application of a tenant for life, allowed Consols to be sold and invested in Bank stock, and solr and client costs were given from the fund: *Cohen v. Waley*, 7 Jur. N. S. 937; and as to Bank stock, see *Re Langford*, 2 J. & H. 458.

At instance of settlor, and at her cost, a fund was laid out in Bank and East India stock, though the remaindermen, being volunteers, opposed: *Eq. Rev. Soc. v. Fuller*, 30 L. J. Ch. 848, L. JJ.; 1 J. & H. 379; but the transfer from Consols to East India stock is in the Court's discretion; where refused, and as to the trustees' discretion, see *Cockburn v. Peel*, 3 D. F. & J. 170; 9 W. R. 725; and V.-C. Wood would not advise trustees to invest in East India stock, no due reason being shown: *Re Muddell*, 18 June, 1860; *Re Simson*, 1 J. & H. 89; 8 W. R. 388; where trustees disagree as to investment, see *Butler v. Withers*, 1 J. & H. 332.

The security of a Scotch estate was not sanctioned: *Re Miles*, 27 Beav. 579; *secus*, as to Ireland: see 4 & 5 Will. IV. c. 29; *Re Pawlett*, 1 Ph. 570; *Cotterill's Trusts*, 17 Sol. J. 165; but see *Re Maberley, M. v. M.*, 33 Ch. D. 455.

Where the object of the settlement was to produce a certain income, a change to East India stock was made against the wishes of the reversioner: *Mortimer v. Picton*, 4 D. J. & S. 166.

Where the will authorized investment in Consols and "in no other securities," the Court refused to sanction a change to other investments: *Re Ovey*, (1900) 2 Ch. 524, not following *Re Wedderburn*, 9 Ch. D. 112.

Trustees having, under a will, power to invest in the guaranteed stock of any railway co. in India, upon which a minimum rate of interest should be guaranteed by the Government of India, were allowed, under 42 & 43 V. c. cxxi. s. 37 (*East Indian Railway Company Purchase Act*, 1879), to

invest in East Indian Railway stock, Annuity B., and in Scinde, Punjab and Delhi Railway 5 p. c. Guaranteed stock: *Re Manael, Rhodes v. Jenkins*, 30 W. R. 133.

In *Carlyon v. Spry*, 16 June, 1890, A. 1429, Chitty, J., at Chambers, refused to sanction investment in the stock of an Indian railway, where a minimum amount of dividend only was guaranteed, on the ground that the market price was in such case calculated on the actual, not the guaranteed, dividend.

Trustees empowered to retain testator's funds in their then state of investment, but not empowered to invest in East Indian Railway stock, were allowed to accept stock offered in exchange by Act of Parliament: *Re Chaplin's Trusts*, V.-C. M., 28 W. R. 132.

The Court declined to authorize the sale of testator's business (by way of investment, not compromise) to a co. for shares and debentures not authorized as investments by the will: *Re Morrison*, (1901) 1 Ch. 701; but see *Re New*, W. N. (01) 162; 70 L. J. Ch. 710, as to the jurisdiction of the Court in special circumstances in reference to mercantile property.

33 & 34 V. c. 34 enables corps and trustees of charities to invest on real securities in England and Wales, notwithstanding the Statutes of Mortmain.

PARTICULAR INVESTMENTS UNDER SPECIAL POWERS.

Power to buy lands and hold them with settled lands authorized the purchase of mines under the settled lands: *Bellet v. Littler*, 22 W. R. 836; and the payment of inclosure expenses under the Inclosure Acts: *Vernon v. Manvers*, 11 W. R. 133; 1 N. R. 117; 32 L. J. Ch. 244; 9 Jur. N. S. 9.

Moneys liable to be laid out on a purchase of lands to be settled to certain uses may be laid out in the erection of new buildings, though not in the repair of old buildings on the lands already settled to those uses: *Drake v. Trefusis*, 10 L. R. Ch. App. 364; *Re Leslie's Settlement Trusts*, 2 Ch. D. 185; *Re Lytton's Settled Estates*, W. N. (84), p. 193; *Re Stock's Devised Estates*, 42 L. T. 46; *Re Arden*, 70 L. T. 506, C. A.; Lewin, 573; and see *Donaldson v. D.*, 3 Ch. D. 743; *Vine v. Raleigh*, (1891) 2 Ch. 13, C. A.; *Re Mason*, (1891) 3 Ch. 467; or in draining the lands in settlement: *Re Leslie's Settlement Trusts*, *ubi sup.*; and in general, and apart from special power, trustees of realty and personalty cannot apply the personalty to the improvement of the realty: *S. CC.*; and trustees who had *bona fide*, but without authority, expended part of the personalty in improving the realty, could at most be made to take to it, accounting for the value of the land and the sum expended: *Vyse v. Foster*, L. R. 7 H. L. 318.

Repairs of existing buildings will not be allowed: *S. C.*, *In re Nether Stowey Vicarage*, 17 Eq. 156; *Brunskill v. Caird*, 16 Eq. 493; but see *contra*, *Re Pearson*, 21 W. R. 401; *Re Hotham*, 12 Eq. 76; and expenditure in pulling down and rebuilding cannot be sanctioned by the Court unless it amounts to salvage: *Re Montagu, Derbishire v. M.*, (1897) 2 Ch. 97, C. A.; *v. sup.* p. 1174.

Purchase-money of glebe land in Court was paid to the rector to recoup him for outlay in building a farmhouse on the glebe: *Exp. Rector of Gamston*, 1 Ch. D. 477 (but not for outlay in rebuilding the rectory: *Exp. Rector of Newton Heath*, 44 W. R. 645), and purchase-money of part of a churchyard taken for street improvements was applied in the purchase, alteration, and repair of a parsonage house: *Exp. Vicar of St. Botolph, Aldgate*, (1894) 3 Ch. 544. Timber money could be applied in permanent improvements under the Settled Estates Acts: *Re Newman*, 9 Ch. 681; and money paid in under the Lands Clauses Acts has been applied in defraying expenditure necessarily incurred for the preservation of the trust estate: *Re Leigh*, 6 Ch. 887; *Re Aldred's Estate*, 21 Ch. D. 228, where service on the remaindermen was not required.

As to improvements under the Settled Land Acts, see *inf.* Chap. XLV., "SETTLEMENTS," pp. 1845 *et seq.*

A trust to repair did not authorize borrowing money for that purpose: *Fazakerly v. Culshaw*, 19 W. R. 793; but a somewhat similar arrangement was sanctioned by the Court: *Re Lee*, 32 L. T. 298.

A direction to invest on mortgage of realty was held not to comprise a mortgage of a railway undertaking: *Mant v. Leith*, 15 Beav. 524; *Mortimore v. M.*, 4 D. & J. 472; 28 L. J. Ch. 558; nor railway mortgages under the 8 & 9 V. c. 16, s. 38; nor Great Northern Railway debenture stock: *Mortimore v. M.*, *sup.*; and a long term of years did not answer the description of real securities: *Re Boyd's Settled Estates*, 14 Ch. D. 626; *Leigh v. L.*, 56

L. J. Ch. 123; 56 L. T. 634; 35 W. R. 121; *Re Chennell, Jones v. C.*, 8 Ch. D. 492, C. A.; but see now the Trustee Act, 1893 (56 & 57 V. c. 53), s. 5; Lewin, 357, 369, 370.

And trustees, unless expressly authorised, should not invest in a contributory mortgage: *Webb v. Jonas*, 39 Ch. D. 680; *Re Massingberd's Settlement*, 59 L. J. Ch. 107; 60 L. T. 620; affirmed, 63 L. T. 296, C. A.; and see *Re Walker*, 59 L. J. Ch. 386; 62 L. T. 449; 38 W. R. 766; Lewin, 10th ed. 372; nor if directed to invest in their own names should they invest in securities to bearer: *Re Roth*, W. N. (96) 16; 74 L. T. 50 (but trustees joining with their own solr in a contributory mortgage, will not necessarily be entitled to priority over the solr: *Stokes v. Prance*, (1898) 1 Ch. 212).

Where a trustee mortgages property of his own together with trust property, it would seem that as a matter of account he must be treated as having received in respect of the latter property an amount proportioned to its value, as compared with the value of the trustee's own property comprised in the mortgage: *Rochevoucauld v. Bousteau* (No. 2), (1898) 1 Ch. 550, C. A.

A second mortgage is not a proper investment for trustees: see Lewin, 371, 372; nor if the trust investments include a second mortgage should they purchase the equity of redemption: *Worman v. W.*, 43 Ch. D. 296.

Preference shares are not a "security" on the funds of a co.: *Harris v. H.*, 29 Beav. 107; 9 W. R. 444; and a direction to invest in securities does not authorize purchase of shares in a limited banking co.: *Re Kavanagh*, 27 L. R. Ir. 495.

Freehold ground rents may be purchased under a power to purchase lands and hereditaments in possession: *Peyton's Settlement*, 7 Eq. 463.

As to leaseholds as an investment, see *Townend v. T.*, 1 Giff. 211.

Without a special power, trustees ought not to purchase an equity of redemption, even though their investments comprise a second mortgage on the property, and they have power to invest upon real securities, including equitable mortgage by deposit, with power to vary investments: *Worman v. W.*, 43 Ch. D. 296; *Exp. Craven*, 17 L. J. Ch. 215; *Re Galbraith*, 10 I. R. Eq. 368; nor enter into a contract for a speculative purchase of land *in futuro*: *Ecc. Commrs v. Pinney*, (1900) 2 Ch. 736, C. A.; and trustees should not lend on the security of unlet houses, especially if the mortgagor is a builder: *Hoy v. Green*, W. N. (84) p. 236; *Fry v. Tapson*, 28 Ch. D. 268; *Smethurst v. Hastings*, 30 Ch. D. 490; *Mara v. Browne*, (1895) 2 Ch. 69, 83, per North, J.

A power to invest "in any way my exors think proper" does not allow the tenant for life to take the full income of leaseholds: *Green v. Britten*, 42 L. J. Ch. 187.

Foreign government bonds passed under a will as "investments": *Arnould v. Grinstead*, 21 W. R. 155. As to investing in foreign stocks and securities, see *Bethell v. Abraham*, 17 Eq. 24. Joint stock cos., incorporated under the Companies Act, 1862, are "public cos." within an investment clause: *Re Sharp, Rickett v. S.*, 45 Ch. D. 286, C. A.

However large their powers, trustees should not invest in shares without ascertaining the constitution of the co., and its rights against shareholders: *New London and Brazilian Bank v. Brocklebank*, 21 Ch. D. 302, C. A.

Shares in a reconstituted banking co., which are converted from being fully paid up into shares of limited liability, cannot be retained under a power to continue them in the same "state of investment": *Re Morris, Bucknill v. M.*, 54 L. J. Ch. 388; 33 W. R. 445; 52 L. T. 462; nor can trustees holding such shares accept new shares by way of bonus, unless specially authorized: *Re Pugh*, W. N. (87) 143; *Sculthorpe v. Tipper*, 13 Eq. 232.

Preference bonds of a French railway, guaranteed by the government, are not "bonds or securities of a foreign government": *Langdale's Settlement Trusts*, 10 Eq. 39; *Brackenbury's Trusts*, W. N. (74) 125; 22 W. R. 682; *Zambaco v. Cassavetti*, 11 Eq. 439; Lewin, 340, 341.

"Real or personal security" authorized continuing a loan to the husband even after separation, the wife consenting: *Pickard v. Anderson*, 13 Eq. 608.

Trustees having power with consent of tenant for life to lend on personal security may lend to him on his personal security if satisfied that there is a reasonable prospect of repayment: *Re Laing's Settlement, L. v. Radcliffe*, (1899) 1 Ch. 593; Form 4, *sup.* p. 1178 (disapproving proposition to the contrary in Lewin, 10th ed., p. 335, referring to *Keays v. Lane* (1869), Ir. R. 3 Eq. 1).

TRUSTEE HOLDING SHARES.

Trustees holding shares in a Scotch joint stock bank were personally liable although named on the register as "trust disponees," and signing the register as such: *Muir v. City of Glasgow Bank*, 4 App. Ca. 337; and the resignation of the trustee before the winding-up of the bank, but after the stoppage of it, was too late: *Mitchell's Case*, 4 App. Ca. 567; and see *Buchan's Case*, *Ib.* p. 583; *Cunninghame v. City of Glasgow Bank*, *Ib.* p. 607.

Where shares are put into the names of exors individually, although they have a right of indemnity against the estate they are liable personally, and their liability cannot be limited to the extent of the assets; and the substitution of the testator's name for that of the exors' is ineffectual, as a co. cannot validly allot shares to a dead man: *Re Cheshire Banking Co., Duff's Exors' Case*, 32 Ch. D. 301, C. A.

MANAGEMENT OF TRUST PROPERTY—EFFECT OF JUDGMENT FOR ADMINISTRATION.

As to the authority of trustees or exors in the management of a trust estate after a judgment for admon, see *Webb v. Shaftesbury*, 7 Ves. 480; *Widdowson v. Duck*, 2 Mer. 494; *Bethell v. Abraham*, 17 Eq. 24: establishing—

(1) That though the trustee is not by the judgment absolutely deprived of his discretion, he can only exercise it under the control of the Court.

(2) That however wide the powers of investment in the trustees, the Court will refuse assent to any investment of a speculative character.

But the Court will not interfere with the discretion of trustees as to the mode of applying maintenance: *Brophy v. Bellamy*, 8 Ch. 798. And see *Hilton v. H.*, 14 Eq. 468; *Stainton v. Carron Co.*, 18 Beav. 146; *Re Tegg*, 15 W. R. 52; 15 L. T. 236.

Nor is a trustee, having a power of appointing new trustees, precluded from exercising it, but the Court must sanction his choice; and if it does not approve, it will call upon him to make a new nomination: *Re Gadd, Eastwood v. Clarke*, 23 Ch. D. 134, C.A.; and see *Thomas v. Williams*, 24 Ch. D. 558, 567.

And where an order is made directing inquiries, the powers of the trustee are not interfered with except so far as they clash with the inquiries, but the trustee desiring to appoint a new trustee should apply in Chambers for the approval of the appointment: *Re Hall*, 54 L. J. Ch. 527; 51 L. T. 901; 33 W. R. 509.

The powers of a tenant for life under the Settled Land Acts are not affected by the pendency of an action for the execution of the trusts of the settlement: *Cardigan v. Curzon-Howe*, 30 Ch. D. 531.

Liberty was given to trustees to apply for a private Act: *D'Eyncourt v. Gregory*, 25 W. R. 6; and see *Lewin*, 609, 610, 684.

In *Buckham v. Trustees of Whitehaven*, 55 L. T. 694, Form 9, *sup.* p. 1180, Kay, J., made an order giving leave to a representative committee of bondholders to promote a Bill in Parliament, and gave costs out of the mortgaged property. The C. A. doubted the jurisdiction, but made an order by consent, reserving costs.

DISCRETIONARY POWERS OF TRUSTEES.

The Court does not control the exercise of discretionary powers by trustees, where their conduct is *bonâ fide* and not influenced by improper motives: *Gisborne v. G.*, 2 App. Ca. 300, 361; *Tabor v. Brooks*, 10 Ch. D. 273; *M. Camden v. Murray*, 16 Ch. D. 161; *Tempest v. L. Camoye*, 21 Ch. D. 571, 578, C. A.; *Thomas v. Williams*, 24 Ch. D. 558; *Re Courtier, Coles v. Courtier*, 34 Ch. D. 136, C. A.; *Re Lofthouse*, 29 Ch. D. 291, C. A.; and see *Lewin*, 729 *et seq.*

Where trustees for sale of real estate have a discretionary power to postpone sale, the Court will not interfere with a *bonâ fide* exercise of their discretion as to the time and mode of sale: *Re Blake, Jones v. B.*, 29 Ch. D. 913, C. A.; *Re Lever, Cordwell v. Lever*, 76 L. T. 71, C. A.

And the mere fact that a widow, tenant for life under a will, has become sole trustee, is not a ground for interference with her discretionary power of sale in the interest of the remainderman: *Re Courtier, Coles v. Courtier*, 34 Ch. D. 136, C. A.; *Re Ratcliff*, (1898) 2 Ch. 352.

A discretion as to amount of maintenance will not be interfered with: *Re Lofthouse*, 29 Ch. D. 921, C. A.; *Re Bryant, B. v. Hickley*, (1894) 1 Ch. 324; and see *Lewin*, 730; but a discretion as to time and mode of maintenance will not prevent the Court from directing resort to that part of a lunatic's property which it is most for his benefit to apply: *Re Weaver*, 21 Ch. D. 615, C. A.

As to the effect of a discretionary trust to apply income for the maintenance of A., or to other purposes, see *Lewin*, 106, 107; *Re Coleman, Henry v. Strong*, 39 Ch. D. 443, C. A.; *Re Bullock, Goode v. Lickorish*, W. N. (91) 62; 39 W. R. 472; 60 L. J. Ch. 341; 64 L. T. 736; *Re Stanger, Moorsom v. Tate*, 60 L. J. Ch. 326; 64 L. T. 693; 39 W. R. 455.

Where a power is coupled with a duty, the Court will enforce its proper and timely exercise, but will not interfere with the trustee's discretion as to the time or manner of its exercise: *Re Burrage*, 62 L. T. 752; *Tempest v. L. Camoys, inf.*

Even after admon decree, the Court will not compel trustees to exercise their powers if they have a *bonâ fide* objection to do so: *Tempest v. L. Camoys*, 21 Ch. D. 571, C. A.

Trustees having a discretionary power must exercise it according to circumstances as they exist, and cannot release or pledge it by anticipation: *Chambers v. Smith*, 3 App. Ca. 795, 815; *Oceanic Steam Navigation Co. v. Sutherland*, 16 Ch. D. 236, C. A.; *Saul v. Pattinson*, 55 L. J. Ch. 831; 54 L. T. 670; 34 W. R. 562; and see *Thacker v. Key*, 8 Eq. 408; *Re Wise, Jackson v. Parrott*, (1896) 1 Ch. 281; *Lewin*, 732.

As to discretionary powers after payment in under sect. 42 of the Trustee Act, 1893, *v. inf.* pp. 1193, 1194.

COMPROMISE.

Powers to exors to compromise, compound, and submit to arbitration debts, accounts, claims, and things relating to the estate were conferred by Lord Cranworth's Act (23 & 24 V. c. 145), s. 30, by the Conveyancing Act, 1881 (44 & 45 V. c. 41), s. 37, and now by the Trustee Act, 1893 (56 & 57 V. c. 53), and extend to the case of two or more trustees acting together, or a sole trustee, where authorized by the instrument creating the trust to execute the trusts and powers thereof.

The power conferred by Lord Cranworth's Act was not confined to claims in the nature of debts, but extended to claims by persons who seek to come in under the will as residuary legatees: *Re Warren, Weedon v. Reading*, 53 L. J. N. S. Ch. 1016; 51 L. T. 561; 32 W. R. 916.

As to the effect of a transaction in the nature of a compromise by a person filling two capacities, *e.g.*, those of trustee and exor, see *West of England Bank v. Murch*, 23 Ch. D. 138; *Corser v. Cartwright*, L. R. 7 H. L. 731.

And that a compromise affecting infants or married women restrained from anticipation cannot bind unless sanctioned by the Court, see *Brooke v. Mostyn*, 2 D. J. & S. 373; *Wilson v. Hill*, 25 L. J. Ch. 182; *Re Birchall, Wilson v. B.*, 16 Ch. D. 41, C. A.

And where a compromise of an action is sanctioned by the Court on petition it will not preclude *cs. q. t.*, parties to the action, from obtaining relief in respect of a specific breach of trust which the trustees, on the hearing of the petition, refrained from bringing to the attention of the Court: *Worman v. W.*, 43 Ch. D. 296.

SALES—RECEIPTS.~

As to the duties generally of trustees for sale, see *Lewin*, 483 *et seq.*

Trustees of personal estate authorized to call in the trust property and

invest the proceeds and vary investments, have an implied power of sale over real estate covenanted to be settled on similar trusts: *Re Garnett-Orme and Hargreave*, 25 Ch. D. 595.

A trust for sale is not *ipso facto* determined when all the beneficiaries become *sui juris*; but if they all elect to take as realty it is extinguished: *Re Tweedie and Miles*, 27 Ch. D. 315; *Biggs v. Peacock*, 22 Ch. D. 284, C. A.

As to the duration, validity, and effect of a power of sale in a settlement for the purposes of division, see *Peters v. Lewes and E. Grinstead Ry. Co.*, 18 Ch. D., C. A.; and as to the determination of the power when the property is "at home," i.e., vested absolutely in persons *sui juris*, *Re Lord Sudley and Baines & Co.*, (1894) 1 Ch. 334; *Re Dyson and Fowler*, (1896) 2 Ch. 720; *Lantsbury v. Collier*, 2 K. & J. 709; Lewin, 719, 720; and that a power of sale, where the sale is to be completed by conveyance, may be void for remoteness, see *Goodier v. Edmunds*, (1893) 3 Ch. 455; Lewin, 104.

Trustees are not justified (notwithstanding sect. 35 of the Conveyancing Act, 1881) in selling under depreciatory conditions of sale; and a contract on such conditions, being a breach of trust, could not be specifically enforced against the purchaser: *Dunn v. Flood*, 28 Ch. D. 586, C. A.; 25 Ch. D. 629; but now, under the Trustee Act, 1893, s. 14 (replacing s. 3 of the Trustee Act, 1888), upon any sale made by a trustee, the purchaser is precluded from objecting to the title on the ground that the conditions of sale were depreciatory; and the sale cannot be impeached by the *c. q. t.* unless it is shown that the consideration was thereby rendered inadequate, nor after the conveyance, unless it shall appear that the purchaser was acting in collusion with the trustee.

As to what conditions are depreciatory, see *Dunn v. Flood*, *sup.*; *Re Rayner*, 53 L. T. 496; Dart, V. & P. 6th ed. pp. 83, 84, 199.

Trustees of a reversionary chose in action may concur with the person entitled to the prior interest in calling for an immediate transfer: *Anon v. Potter*, 13 Ch. D. 141.

As to breaches of trust by improper investment, *v. sup.* p. 1148.

As to investment of trust funds generally, see Lewin, 330 *et seq.*; 3 Day. Conv. (Set.) 31, 546; under the Settled Estates Acts and the Settled Land Act, Chap. XLV., "SETTLEMENT"; and under the Lands Clauses Consolidation Act, Chap. LIII.

SECTION VII.—TRUSTEES ACTING UNDER THE AUTHORITY OF THE COURT, UNDER TRUSTEE ACT, 1893, ORDER LIVB. AND ORDER LV, R. 3.

1. Order on Originating Summons Directing Trustees to do a Particular Act in their Character as such—O. LV, r. 3, sub-sect. (e).

THE Judge being of opinion that the Plts R. W. M., J. W. P., and H. M., trustees of the will of the testator F. S., should sell the debentures hereinafter mentioned as and when they can do so with advantage, It is ordered, that the said trustees be at liberty to continue to hold and retain such of the debentures as have not been sold in S— Sons and W—, Ltd., and now standing in their names, being portion of the debentures issued to E. S. and R. W. M. pursuant to an agreement dated &c., in the order dated &c., men-

tioned, notwithstanding that the time for so doing, limited by the said order, has expired, for the purpose only of selling the said debentures.—*Re Soulbly, S. v. S., Kekewich, J., at Chambers, 12 Feb. 1900, B. 516.*

2. *Order on Originating Summons directing Executors and Trustees to abstain from doing a particular Act in their Character as such, and for Determination of a Question arising in the Administration of the Estate or Trust—Costs.—O. LV, 3, sub-sects. (e) and (g).*

It is ordered that during the life of Lady A. M. H., in the summons mentioned, or until further order, the Plts (*the exors and trustees of the will of testator*) do not take any proceedings to enforce the payment of £2,000 secured by the indenture of mortgage, dated &c. in the summons mentioned, or request the trustees of the said mortgage deed to put the sinking fund for the purpose of providing for the payment of the said sum of £2,000 into force. Costs out of testator's estate.—*Re Talbot Crosbie, Pattison v. T. C., Kekewich, J., at Chambers, 30 July, 1900, B. 3098.*

In this case the question was whether the exors and trustees of the will of the testator were bound or should request the trustees of a certain indenture of mortgage to set apart the surplus remaining after payment of a jointure of 1,000*l.* per annum assigned by such indenture (after providing for payment of interest on the 2,000*l.* secured by the said indenture) as a sinking fund to provide for payment of the said sum of 2,000*l.*

NOTES.

By the Trustee Act, 1893 (56 & 57 V. c. 53), ss. 26, 30 and 31, of the Law of Property Amendment Act, 1859 (22 & 23 V. c. 35), commonly known as Lord St. Leonard's Act, are repealed; ss. 26 and 31 of the Act of 1859 being replaced by ss. 23 and 24 of the Act of 1893, *v. sup.* pp. 1171, 1173.

The provisions of s. 30 of the 22 & 23 V. c. 35, whereby a trustee, exor or admor, was empowered to apply by petition, &c. for the Judge's opinion, advice or direction, as to the management or admon of the trust property, or the assets of a testator or intestate, and acting thereon was in the absence of *mala fides* indemnified, and the practice of the Court thereunder, are stated in Seton, 5th ed., pp. 1009, 1010.

The former procedure is now superseded by the procedure by originating summons under O. LV, 3, stated *sup.* Vol. I. p. 320, and *inf.* p. 1479, and O. LIV B, regulating proceedings under the Trustee Act, 1893, and O. LV, r. 13a, *v. inf.* p. 1255.

As to the duty of trustees to resort, where practicable, to this procedure, see Lewin on Trusts, pp. 405 *et seq.*

As to trustees acting under the authority of the Court in dealing with ecclesiastical leases, see Ecclesiastical Commrs Act, 1860 (23 & 24 V. c. 124), ss. 36, 37, 38, and the notes thereon, *inf.* Chap. XLV., "SETTLEMENT."

As to trustees passing their accounts, and being discharged, and their right to a release from the *cs. q. t.*, *v. inf.* Chap. XLIV., "ADMINISTRATION," pp. 1522, 1523.

SECTION VIII.—(I.) PAYMENT INTO COURT BY TRUSTEES.—
TRUSTEE ACT, 1893, s. 42, AND R. S. C. (TRUSTEE ACT),
1893.

1. *Form of Lodgment Schedule under Trustee Act, 1893, s. 42, R. S. C. (Trustee Act), 1893, O. LIV B, 4, to be annexed to Affidavit of the Trustee desiring to lodge Funds in Court in the Chancery Division under the said Act.*

In the High Court of Justice,
 Chancery Division.

Filed 8th Jan. 1900.

Ledger Credit. In the matter of the Trusts of the Settlement made on the Marriage of R. C. D. and A. R. H., dated the — day of —, 1855.

Particulars of Funds to be Lodged.	Names of Persons to make the Lodgment.	Amount.	
		Money.	Securities.
£— 2½ p. c. annuities (estate duty paid). (There is no other estate or other duty payable. It is desired that the above dividends to accrue on the above annuities may be invested in like annuities and accumulated.)	J. B. D. of &co., and F. H. of &co.	£ s. d. ..	£— 2½ p. c. annuities.

Sect. 42 replaces 36 G. III. c. 52, s. 32; 10 & 11 V. c. 96, ss. 1 and 2; and 12 & 13 V. c. 74, s. 1.

NOTES.

PROVISIONS AND SCOPE OF ACTS.

By the Trustee Act, 1893 (56 & 57 V. c. 53), s. 42 (replacing the provisions of the Legacy Duty Act (36 G. III. c. 52), s. 22, and Trustee Relief Acts (10 & 11 V. c. 96, and 12 & 13 V. c. 74)): “(1) Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into the High Court; and the same shall, subject to Rules of Court, be dealt with according to the orders of the High Court. (2) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into Court. (3) Where any moneys or securities are vested in any persons as trustees, and the majority are desirous of paying the same into Court, but the concurrence of the other or others cannot be obtained, the High Court may order the payment into Court to be made by the majority without the concurrence of the other or others; and where any such moneys or securities are deposited with any banker, broker, or other depository, the Court may order payment or delivery of the moneys or securities to the majority of the trustees for the purpose of payment into Court, and every transfer, payment and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the

persons entitled to the moneys and securities so transferred, paid, or delivered."

As to the object and operation of the Trustee Relief Acts, and in particular as to the Court being able to determine all questions for settling the ownership of the fund, and treating a purchase deed as invalid, see *Re Bloye*, 1 Mac. & G. 488; and the order, *lb.* 504: *S. C.*, 3 H. L. C. 607, *nom. Lewis v. Hillman*. An issue was sent under the Acts: *Re Allen, Kay*, li.; and as to the order made having the same effect as a judgment in an action, see *Lewin*, 414, 415.

PAYMENT OR TRANSFER INTO COURT—TRUSTEE'S AFFIDAVIT.

By O. LIV B, 4—" (1) Where a trustee desires to make a lodgment in Court under sect. 42 of the Act, he shall make and file an affidavit intituled in the matter of the trust (described so as to be distinguishable) and of the Act, and setting forth:—

- (a) A short description of the trust and of the instrument creating it.
- (b) The names of the persons interested in and entitled to the money or securities, and their places of residence to the best of his knowledge and belief.
- (c) His submission to answer all such inquiries relating to the application of the money or securities paid into Court, as the Court or Judge may make or direct.
- (d) The place where he is to be served with any petition, summons, or order, or notice of any proceeding relating to the money or securities.

"Provided that if the fund consists of money or securities being, or being part of, or representing a legacy or residue to which an infant or person beyond seas is absolutely entitled, and on which the trustee has paid the legacy duty, or on which no duty is chargeable, the trustee may make the lodgment (without an affidavit) on production of the Inland Revenue certificate in manner prescribed by the Supreme Court Funds Rules for the time being in force.

" (2) Where the lodgment in Court is made on affidavit—

- (a) The person who has made the lodgment shall forthwith give notice thereof, by prepaid letter through the post, to the several persons whose names and places of residence are stated in his affidavit as interested in or entitled to the money or securities lodged in Court;
- (b) No petition or summons relating to the money or securities shall be answered or issued, unless the petitioner or applicant has named therein a place where he may be served with any petition or summons, or notice of any proceeding or order relating to the money or securities or the dividends thereof;
- (c) Service of any application in respect of the money or securities shall be made on such persons as the Court or Judge may direct."

"Lodgment in Court" means payment or transfer into Court, or deposit in Court: see *S. C. F. R.*, r. 3. As to securities which may be brought into Court, and the mode of transferring and depositing various securities, see *lb.* r. 29, and *sup.* p. 210. For form of affidavit, see *D. C. F.* 1082.

A person interested in the fund and not named in the affidavit was held not to be competent to present a petition (*In re Jephson*, 1 L. T. 5), but this decision was not followed in subsequent practice: see *Re Puttrel's Trusts*, 7 Ch. D. 647; *Pelling v. Goddard*, 9 Ch. D. 185.

Under special circumstances the notice of lodgment has been dispensed with; as, for example, when a person interested had gone abroad many years previously, and had not since been heard of: *Re Hansford*, 7 W. R. 199, 254; *Re Whitaker's Trusts*, 47 L. T. 507; 31 W. R. 114; and where a *c. q. t.* was believed to be in New York, but his address was unknown, the Court allowed publication in two New York newspapers to be treated as sufficient notice: *Re Goodman's Will*, W. N. (70) 152.

In another case, where the person named in the affidavit could not be found, the Court intimated what would probably be held sufficient notice of the payment in, but declined to give any directions: *Re Hardley's Trusts*, 10 Ch. D. 664, C. A.

Where the parties were extremely numerous, the Court gave leave to substitute notice on some of them: *Re Colson's Trust*, 2 W. R. 111.

By S. C. F. R., r. 30. "In the Chancery Division a direction for a lodgment directed by an order, or in a lodgment schedule signed by a Master (in the case of purchase-moneys or receivers' balances) shall be issued; by the Paymaster upon receipt of a copy of the lodgment schedule; and a direction for a lodgment under the Trustee Act, 1893, shall be issued by him upon receipt of an office copy of the schedule mentioned in r. 41, or upon receipt of the request and certificate of the Commrs of Inland Revenue mentioned in that rule."

By r. 41. "When a legal pers. represse desires to lodge funds in Court, under the Trustee Act, 1893, without an affidavit, he shall leave with the Paymaster a request signed by him or his solr, with a certificate of the Commrs of Inland Revenue; such request and certificate to be in the Form No. 16 in the Appendix to these Rules, with such variations as may be necessary, or, as regards such certificate, in such other form as shall from time to time be adopted by the said Commrs with the consent of the Lords Commrs of Her Majesty's Treasury. The money or securities so lodged shall be placed to the credit mentioned in such request.

"When a trustee or other person desires to lodge funds in Court under the Trustee Act, 1893, upon an affidavit, he shall annex to such affidavit a schedule in the same printed form as the lodgment schedule to an order, setting forth:—

- (a) His own name and address;
- (b) The amount and description of the funds proposed to be lodged in Court;
- (c) The ledger credit in the matter of the particular trust to which the funds are to be placed;
- (d) A statement whether legacy or estate or succession duty (if chargeable) or any part thereof has or has not been paid;
- (e) A statement whether the money or the dividends on the securities so to be lodged in Court, and all accumulations of dividends thereon, are desired to be invested in any and what description of Government securities, or whether it is deemed unnecessary so to invest the same.

"An office copy of such schedule is to be left with the paymaster."

By r. 73. "A sum of money lodged in Court without an affidavit, as provided in r. 41, if or so soon as such money and the interest, if any, to be credited in respect thereof shall amount to or exceed 40*l.*, and the dividends accruing on any securities so lodged, if and when they shall amount to or exceed 20*l.*, shall be invested without any order or request in New Consols, and the dividends accruing on such New Consols and all accumulations thereof shall, if or so soon as they amount to 20*l.*, be invested in New Consols.

"When it is stated in the schedule to the affidavit made pursuant to r. 41 that it is desired that any money to be lodged in Court, and the accumulations thereof or any dividends to accrue on any securities to be so lodged, should be invested in any description of Government securities, such money, if or so soon as such money and the interest, if any, to be credited in respect thereof shall amount to or exceed 40*l.*, and the dividends accruing on such securities, if or so soon as they shall amount to or exceed 20*l.*, shall be invested accordingly, without any order or further request for that purpose.

"Dividends accruing on funds or on investments or accumulations of funds lodged in Court under the 32nd section of the Act 36 G. III. c. 52, or under the Act 10 & 11 V. c. 96, prior to the commencement of the Ch. Funds Rules, 1872, shall, when or so soon as they amount to or exceed 20*l.*, be invested without any request."

By r. 74. "Money or securities lodged in Court under the 32nd section of the Act, 36 G. III. c. 52, or under the 10 & 11 V. c. 96, prior to the 1st Jan. 1894, and securities purchased with such money, or the income thereof, shall, subject to any order affecting the same made prior to the 1st Jan. 1894, be dealt with in the same manner as if such money or securities had been lodged in Court under the 42nd section of the Trustee Act, 1893."

As to securities which may be brought into Court and the mode of transferring and depositing various securities, see Vol. I. p. 210. For forms relating to lodgment under the section, see D. C. F. 1084 *et seq.*

PAYMENT IN, WHEN JUSTIFIABLE.

Trustees were justified in paying into Court—A fund to which a married woman had become absolutely entitled, though she wished it to be transferred to her husband: *Re Swan*, 2 H. & M. 34; 12 W. R. 738;

—a fund held for the sole use and benefit of a married woman: *Gunnell v. Whitear*, 10 Eq. 664;

—a fund deposited at a bank to guarantee foreign bonds, upon actions being brought by bondholders: *Hankey v. Morley*, 4 Jur. N. S. 234;

—a fund, the person entitled to which could not be found; but not when he had been heard of after thirteen years, and was coming home, and there was no doubt as to his identity: *Re Elliott, Middleton v. Pollock*, 15 Eq. 194;

—funds for which the trustees cannot otherwise get a good discharge, as where they have no power to give receipts: *Cox v. C.*, 1 K. & J. 251; or the *c. q. t.* is an infant: *Re Hodges*, 4 D. M. & G. 491; *Re Richards*, 8 Eq. 119; *Re Beauderk*, 11 W. R. 203; or deaf, dumb and blind: *Re Biddulph*, 5 D. & S. 469; or a lunatic not so found: *Re Berry*, 13 Beav. 455; *Re Parry*, 23 W. R. 335 *et sup.*; unless proceedings in lunacy are contemplated: *Vane v. V.*, 2 Ch. D. 124; or the fund is large: *Re Irby*, 17 Beav. 334 (where it was 200*l.* a year); in which case a committee should be appointed: *Vane v. V.*, 2 Ch. D. 124. But in *Re Burke*, 2 D. F. & J. 124, 300*l.* a year was dealt with; and see *Re Macfarlane*, 2 J. & H. 673.

On sale by trustees, their want of a power to give receipts could be rectified by paying the money into Court: *Cox v. C.*, 1 K. & J. 251.

Bankers, not being trustees within the Act, were not entitled to pay money in dispute into Court: *Re Sutton's Trusts*, 12 Ch. D. 175; but by the Jud. Act, 1873, sect. 25 (6), power is given to any "debtor, trustee, or other person" liable in respect of a debt or chose in action, and who has received notice of any written assignment thereof, to pay the same into Court under the Acts for the relief of trustees. This provision is not applicable unless there has been an assignment in writing of the debt or chose in action: *Re Sutton's Trusts*, 12 Ch. D. 175 (where, however, the petr. being taken to have submitted to the jurisdiction, the bank, who paid the money in, were held entitled to their taxed costs of payment in and of the petition).

As to moneys payable under a policy of life assurance, it was held that, as the relation between the co. and the policy holder was that of debtor and creditor, the policy moneys, unless held by the co. upon trust, could not be paid into Court under the Act, so as to discharge the co.: *Matthew v. Northern Assurance Co.*, 9 Ch. D. 80; *Re Haycock's Policy*, 1 Ch. D. 611; and the provisions of the Jud. Act, 1873 (36 & 37 V. c. 66), s. 25, sub-s. 6, were available only where the co. had received notice of an assignment in writing: see *Re Sutton's Trusts*, 12 Ch. D. 175; but this difficulty has now been removed by the Life Assurance Cos. (Payment into Court) Act, 1896 (59 V. c. 8), *v. inf.* p. 1198.

Trustees should not pay money into Court under the Act when the only question arising might be decided on originating summons: *Re Giles*, 55 L. J. Ch. 695, per Kay, J.

Trustees of charitable funds (though not strictly bound so to do) should first apply to the Charity Commrs before paying the money into Court: *Re Poplar and Blackwall School*, 8 Ch. D. 543; and see Lewin, 410, n.

As to where *c. q. t.* call for payment in, see *Re Thornton*, 9 W. R. 475.

EFFECT OF PAYMENT INTO COURT.

On payment in of part of the funds, so far the trustee is discharged; the parties must proceed under the Acts, and the ordinary jurisdiction is confined to the unpaid balance: *Goode v. West*, 9 Ha. 378; *Thorp v. T.*, 1 K. & J. 438, and cases cited Dan. 1800; and a trustee may petition to have the fund paid in dealt with as in an admon action: *Re Trower*, 1 L. T. 54.

By paying in a trust fund a trustee retires from the trust: *Re Williams*, 4 K. & J. 87; Lewin, 412; and cannot afterwards exercise a discretion, nor could the Court do so: *Re Coe*, 4 K. & J. 199; *Re Tegg*, 15 W. R. 52; 15 L. T. 236; *Re Nettiefold's Trusts*, W. N. (88) 120; 59 L. T. 315; *Re Murphy's Trusts*, (1900) 1 I. B. 145; but under a trust for a class of children, a discretion conferred on trustees as to advances for maintenance, &c. may be exercised.

by the Court: *Re Ashburnham's Trusts*, 54 L. T. 84; and as to the exercise of a discretionary power personal to the trustee, see *Re Landon*, 40 L. J. Ch. 370.

Trustees ought not, unless in concert with the beneficiaries, or because of special circumstances, to petition for distribution of the fund: *Re Cazneau*, 2 K. & J. 249; *Re Hutchinson*, 1 Dr. & S. 27; nor need they always be served: *Re Thomas*, 11 W. R. 276.

But payment in does not actually deprive the trustee of his office, or constitute the Court or Paymaster-General a trustee in his place: *Thomson v. Tomkins*, 2 Dr. & Sm. 8; *Barker v. Peile*, 2 Dr. & Sm. 340; *Re Tegg*, 15 W. R. 52; 15 L. T. 236. And notice to an exor by a mortgagee was enough to take out of the order and disposition of a residuary legatee a fund paid into Court: *Thomson v. Tomkins*, 2 Dr. & S. 8.

As to whether an admon judgment destroys trustees' powers, *v. sup.* p. 1186, *et inf.* p. 1204.

The exors should not pay in to a general account, or on the trusts of the will, which would involve the general admon of the estate, but must pay in or ask to have a transfer to a particular account: *Re Wright*, 15 Beav. 367; *Re Joseph*, 11 Beav. 625; Lewin, 412; and on application for that purpose a transfer was directed from the general to a particular account: *S. C.*, 9 March, 1850, A. 704.

To enable the Court to distribute the fund it must stand to a separate account: *S. C.*, *Re Everett*, 12 Beav. 485; and trustees may be entitled to pay in the fund to the separate accounts of several *cs. q. t.*: *Re Wright*, 3 K. & J. 419.

PAYMENT OR TRANSFER OUT OF COURT.

By O. LV, 13a (as amended Feb. 1895), an application relating to a fund paid into Court in any case, coming within the provisions of r. 2 of the order (as to which, *v. sup.* p. 319), is to be made by summons in Chambers.

Applications may accordingly be made by summons under the Act (1) in any case where there has been an order declaring rights, or where the title depends only upon proof of identity, &c., and (2) in any case where the cash or securities do not exceed 1,000*l.*, or 1,000*l.* nominal value. In other cases the application must be made by petition which may be adjourned into Chambers for further hearing: *Re Moate*, 22 C. D. 635; or may be heard in the first instance by the Judge in Chambers. For forms of application, see D. C. F. 1088 *et seq.*

If the fund paid in under the Act exceeds 1,000*l.*, the application should, it seems, be by petition, notwithstanding that it asks for payment out of a portion only amounting to less than 1,000*l.*: *Re Evan Evans*, 54 L. T. 527; W. N. (86) 84; *May v. Dowse*, W. N. (84) 122.

Where the fund exceeds 1,000*l.*, and there has been no prior application in the matter of the fund, a petition, and not a summons, is the proper mode of applying for a stop order on it: *Re Toogood's Trusts*, W. N. (87) 109; 58 L. T. 703; *Re Day's Trusts*, 49 L. T. 499.

Where the title of the applicants depends not only upon proof of their identity or of the birth, marriage or death of any person, but there is also a question of construction, a petition, it seems, is necessary: *Re Hicks, Exp. N. E. R. Co.*, W. N. (94) p. 55; 63 L. J. Ch. 568; 70 L. T. 529; and see *Re Birkin*, W. N. (01) 33.

Where an order has been made upon petition, any further proceedings may be in Chambers: *Re Hodges*, 4 D. M. & G. 491; and see *Re Tracey's Trusts*, 6 I. R. Eq. 271; and where an order directing inquiries is made in Court upon a petition, the further hearing of the petition may be adjourned to Chambers: *Re Moate's Trusts*, 22 Ch. D. 635.

Where a person interested was not named in the trustee's affidavit, it was held he could not present a petition: *Re Jephson*, 1 L. T. 5; but this was not followed: *Re Puttrell*, 7 Ch. D. 647; *Pelling v. Goddard*, 9 Ch. D. 185; and the practice is now changed: *v. sup.* p. 1191.

Under the rules of 1883 leave for service out of the jurisdiction cannot be given: *v. sup.* p. 18; but notice may be given according to the principle of *Re Cliff*; *Edwards v. Brown*, (1895) 2 Ch. 21, C. A.: *sup.* p. 18.

Upon a petition for payment out of Court of a fund to which several persons, some not before the Court, were entitled, liberty was given to the

petitioner to serve the petition, a former order directing class inquiries, and the chief clerk's certificate, together with the present order, upon the persons named in the certificate: *Re Battersby's Trusts*, 10 Ch. D. 228.

On the petition of a person of unsound mind (not so found) by next friend, or of a deaf, dumb, and blind person without a next friend, the dividends will be ordered to be applied for maintenance, but the corpus was retained: *Re Biddulph*, 5 D. & S. 469; *Re Perry*, 23 W. R. 335; 31 L. T. 775; and in *Re Phelps*, 28 L. T. 350, the whole fund was paid to the parish; in *Re Macfarlane*, 2 J. & H. 673, to the father; and in *Conduit v. Soane*, 5 My. & C. 111, to the wife and son, for past maintenance of the lunatic; but a professed nun was entitled to have the fund paid to her: *Re Metcalfe*, 2 D. J. & S. 122; 3 N. R. 657; 10 Jur. N. S. 287.

Where a lunatic is entitled to the fund paid in, there is jurisdiction under the Act, on a petition in Chancery and Lunacy, to make an immediate order for transfer of the fund to the account of the lunatic: *Re Tate*, 20 Ch. D. 135, C. A.

Maintenance out of the capital was ordered: *Re Tuer*, 32 Ch. D. 39, C. A.; and see *Re Grimmett*, 56 L. J. Ch. 419; and without requiring appointment of a guardian, income was paid to the lunatic's wife for his maintenance during his life or until further order: *Re Silva*, 57 L. J. Ch. 281; 58 L. T. 46; 36 W. R. 366.

In the case of a pauper lunatic, only six years' arrears of income will be paid to the poor law authority in repayment of expenses incurred in his maintenance: *Re Newbegin's Estate*, 36 Ch. D. 477; and see *Re Watson*; *Guardians of Stamford Union v. B.*, (1897) 1 Ch. 72; *Winkle v. Bailey*, (1897) 1 Ch. 123; *Re Taylor, Edmonton Union v. Deeley*, (1901) 1 Ch. 480, C. A.; *sup.* p. 1070.

The Court declined to pay the fund of a "lunatic patient" in New South Wales to the colonial master in lunacy (who had large powers of management and suing, but in whom the fund was not vested), but directed payment only of so much as was shown to be necessary for the lunatic's maintenance and benefit: *Re Barlow*, 36 Ch. D. 287; but see *Didisheim v. London and Westminster Bank*, (1900) 2 Ch. 15, C. A.

The foreign curator of the property and person of a lunatic is not entitled as of right to an order under s. 134 of the Lunacy Act, 1890, for the transfer to him of English stock or shares standing in the name of the lunatic, although "vested" in the curator under that section, but the Court in Lunacy has a discretionary jurisdiction, and will require the curator to show that the property is required for the maintenance or other purposes of the lunatic: *Re Knight*, (1898) 1 Ch. 257, C. A. (considering *Re Brown*, (1895) 2 Ch. 666); and see *Thiery v. Chalmers*, (1900) 1 Ch. 80; *Didisheim v. London and Westminster Bank*, (1900) 2 Ch. 16, C. A.; *New York Trust Co. v. Keyser*, (1901) 1 Ch. 666; *sup.* p. 1009.

The person named in the affidavit and title of the account is entitled to have the fund paid out to him at the risk of the trustees, unless they have given the Court notice of conflicting claims: *Re Jenkins*, 3 N. R. 408; 10 Jur. N. S. 332.

In *Starbuck v. Mitchell*, W. N. (66) 253, 1501. (paid as a compromise of the suit) was ordered to be paid to the lunatic not so found, or his guardian.

An action is necessary if there are creditors or other unascertained claimants: *Re Allen, Kay, li.*; if the parties affected by a deed wish to impeach it for fraud, &c.: *Re Way*, 2 D. J. & S. 365; where the trustees require and are entitled to a complete discharge, not only as to the fund paid in, but as to past income or other matters: *Barker v. Peile*, 2 Dr. & S. 349; 11 Jur. N. S. 436. And where the accounts are disputed, they ought not to pay the money into Court: *Re Heming*, 3 K. & J. 40; 5 W. R. 33.

Money paid in under the Trustee Relief Act was dealt with in a suit to administer the estate of the same testator without a petition, the decree being intitled in the Act as well as the suit: *Dixon v. Morley*, W. N. (69) 49; followed by *V.-O. M. in Davies v. D.*, 24 July, 1869, A. 458; but see *Felling v. Goddard*, 9 Ch. D. 185.

In *Re Woods*, 16 Sim. 469, the Court would not order the fund to be paid out without inquiry as to the facts on which the title turned; and in *Re Sharpe*, *ib.* 470, sent an inquiry, without prejudice to filing a bill, reserving costs, and ordering the trustees to be served with the order; and the Court

is not bound to pay out the fund of French infants to their father, who, by the law of France, is their legal guardian, as of right, but will require evidence to be adduced showing that the fund will be applied for the benefit of the infants: *Re Chatard's Settlement*, (1899) 1 Ch. 712.

It appearing that the fund belonged to Scotch minors, payment out was ordered to them and their curator: *Re Ferguson*, Ir. R. 8 Eq. 563.

On exor discovering unpaid debts, the balance of the estate paid in by him was paid out to him on petition: *Exp. Tournay*, 3 D. & S. 677.

Where the admor of a supposed intestate paid money into Court to the credit of infants who were next of kin, and a will was afterwards discovered under which the infants were entitled to small legacies, the Court ordered payment out to the admor on proof that the legacies to the infants were secured: *Re Hood's Trusts*, (1896) 1 Ch. 270.

The material parts of the affidavit, made on payment in, should be set out in the petition for payment out: *Re Levett*, 5 D. & S. 619; *Re Courtois*, 10 Ha. lxiv.

The trustees should not take copies of *cs. q. te'* affidavits: *Re Lazarus*, 3 K. & J. 555.

COSTS.

Trustees may deduct the reasonable costs of the payment into Court where no dispute has arisen or is likely to arise as to the deduction: *Beaty v. Curson*, 7 L. R. Eq. 194; and see *Re Fortune's Trusts*, 4 Ir. R. Eq. 351; but the better course seems to be for them to pay in the whole fund, leaving it for the Court to settle the amount of costs to which they are entitled upon an application for payment out: *Re Parker's Will*, 58 L. J. Ch. 25, per Fry, L. J., S. C., 39 Ch. D. 303, C. A.; and see *Mitchell v. Cobb*, 17 L. T. 25. Where the payment is made by a pers. reprieve without an affidavit under the S. C. F. B. 1894, r. 41 (*v. sup.* p. 1192), no deduction for costs and expenses can be made. See footnote to Schedule to Rules; and see Dan. 1801.

The jurisdiction under the Act is limited to the fund paid in, and does not extend to sums deducted: *Re Bloye*, 1 Mac. & G. 488; *Re Barber*, 6 Jur. N. S. 1098; *Re Fortune*, 4 I. R. Eq. 351; *Re Parker's Will*, 39 Ch. D. 303, C. A.; and if it can be shown that the costs and expenses have been improperly retained, separate proceedings must be taken against the trustees to recover the amount: *Re Parker's Will*, 39 Ch. D. 303, C. A.

On ordering payment out, and taxation of costs, the trustee's costs of paying in may be included, and the sum then deducted by them set off: *Re Hue*, 6 Jur. N. S. 1235; 7 W. R. 562; 27 Beav. 377; 28 L. J. Ch. 893; *Re Bullas*, V.-C. M., 27 Jan. 1871, A. 251; *Re Williams*, V.-C. B., 11 March, 1876, B. 781.

Costs of paying in properly a legacy, not specifically appropriated, are borne by the testator's estate; of paying out, by the legatee, including exor's appearance: *Re Jones*, 3 Drew. 679; *Re Cawthorne*, 12 Beav. 56; but in *Re Feltham*, 1 K. & J. 528, the exor's costs on paying out were to be borne by the estate, and all other parties' costs by the fund; in case of a residue or separate fund, the costs of paying in, if not retained, are allowed from the corpus: *Re Sayers*, V.-C. W., 21 Dec. 1853, B. 228.

The payment of a legacy into Court does not relieve the residue from bearing the costs of an inquiry to ascertain the persons entitled to the legacy: *Re Birkett*, 9 Ch. D. 576; *Re Gibbon's Will*, 36 Ch. D. 486; *Re Trick*, 5 Ch. 170 (where the costs relating to a particular fund paid in by an exor having the general residue in his hands were paid thereout).

The person making it necessary to pay the fund into Court and opposing payment out may be made to pay the costs: *Re Armston*, 4 D. J. & S. 454.

The trustees are entitled to their solr and client costs: *Re Wilson*, 14 W. R. 161; *Re Swan*, 2 H. & M. 34; although the proceeding is in the nature of interpleader: *Re Webb*, 2 Eq. 456; *Re Cobbe*, 15 W. R. 29; 15 L. T. 170; *Re Kerr's Policy*, 8 Eq. 331, 337; but not to charges and expenses: *S. C.*

On an application for payment out, the trustees will not get any costs, charges, and expenses incurred before the payment in, but only those properly incurred since: *Re Behrens*, M. R., 5 Aug. 1874, A. 2309;

—nor when they have paid in funds without sufficient reason: *Re Heming*, 3 K. & J. 40; *Re Covington*, 1 Jur. N. S. 1157; 25 L. J. Ch. 238; *Re Leake's Trusts*, 32 Beav. 135; *Re Metcalfe*, 2 D. J. & S. 122, 6; 3 N. R.

657; *Re Pearson*, 17 W. R. 365; *Re Elliot*, 15 Eq. 194; *Re Cull*, 20 Eq. 561;

—and in cases of gross misconduct may be ordered to pay the costs of payment out: *Re Woodburn*, 1 D. & J. 333; *Re Cater*, 25 Beav. 361, 366; *Re Knight*, 27 Beav. 45; *Re Elliot's Trusts*, 15 Eq. 194; *Re Hoskin's Trusts*, 5 Ch. D. 229; 6 Ch. D. 281, C. A.

But *semble*, if a trustee is deprived of costs without sufficient cause, he may appeal for them: *Turner v. Hancock*, 20 Ch. D. 303, 307, C. A.; disapproving *Re Hoskin's Trusts*, *sup.*; and see *Re Beddoe*, (1893) 1 Ch. 547, C. A.

The rule will not be strictly pressed against trustees: *Re Brocklesby*, 29 Beav. 652; *Re Wyllie*, 28 Beav. 458, where Romilly, M. R., said that trustees were entitled to satisfactory evidence that there had been no appointment before distributing a fund as in default. But the statement of the solrs to the donees of the power must be accepted as sufficient: *Re Cull*, 20 Eq. 561.

A trustee who before paying into Court becomes aware that a *distringas* has been placed on the fund, and omits to mention the claim, is personally liable to pay the assignee's costs of obtaining a stop order: *Re Allen*, 40 L. T. 456.

If the only question arising could have been determined on originating summons, trustees in future will not be allowed the costs occasioned by payment into Court: *Re Giles*, 55 L. J. Ch. 695; 55 L. T. 51; 34 W. R. 712.

As to trustees requiring evidence of death, see *Dobson v. Pattinson*, 5 W. R. 771; 3 Jur. N. S. 1202.

As to costs of a liquidator with regard to a fund paid in to meet a particular claim, see *Cook's Claim* (2), 18 Eq. 655.

And as to what evidence trustees ought to act upon, *v. sup.* pp. 1174, 1175.

If the trustee by refusing to pay in the fund occasions an action, or instead of so doing brings an action, he will only be allowed such costs as under the Act: *Handley v. Davis*, 28 L. J. Ch. 873; 5 Jur. N. S. 190; *Gunnell v. Whitear*, 10 Eq. 664; *Wells v. Malbon*, 31 Beav. 48; *Weller v. Fitzhugh*, M. R., 28 May, 1870. And see *May v. Armstrong*, W. N. (66) 233.

Trustees applying to distribute, though at request of some of the beneficiaries, will have only respondents' costs: *Re Cazneau*, 2 K. & J. 249; *Re Hutchinson*, 1 Dr. & S. 27, *et sup.* p. 1194; and the major part of the next of kin appearing had the carriage of the order: *Ib.* 30. *Secus*, where the trustees applied at the wish of all parties: *Re Cooper*, *cit.* 2 K. & J. 251.

A trustee is within O. LXV, 27 (19), and if he has had tendered to him and has accepted 30s. for his costs, he will not be allowed his costs of appearing on a petition, if he comes merely to ask for his costs, and his appearance is otherwise unnecessary: *Re Sutton*, 21 Ch. D. 855.

A claimant failing was allowed costs: *Re Birch*, 2 K. & J. 369.

As to evidence of payment of legacy duty, see *Re Marsham*, 12 W. R. 45, *sup.* pp. 239, 240.

Costs of an application by a tenant for life of a fund in Court simply affecting the income are payable out of the income, and the remaindermen need not be served: *Re Marner's Trusts*, 3 Eq. 432; *Re Evans*, 7 Ch. 609; *Re Battell*, 21 W. R. 138; Lewin, 419.

And where the title of the tenant for life is clear, the trustees should not appear; in such case, the proper course is for the tenant for life to write to the trustees and tell them that he does not seek to affect the *corpus*: *Re Evans*, *sup.*; after which they will get no costs out of income: *Re Battell*, *sup.*

Costs of petitions as to income of funds paid into Court in an admonition suit are payable out of *corpus*: *Scrivener v. Smith*, 8 Eq. 310; *Longuet v. Hockley*, 22 L. T. 198; but see *Eady v. Watson*, 12 W. R. 682; 33 Beav. 481, *contra*; and of a particular fund out of general residue: *Re Trick*, 5 Ch. 170; Lewin, 419; see O. LXV, 14 b.

COUNTY COURTS.

Where the sum does not exceed 500*l.*, jurisdiction is given to the County Courts by 51 & 52 V. c. 43, s. 67. Under the corresponding provision of 28 & 29 V. c. 99, constructive trusts were held to be within the jurisdiction of the County Courts: *Olayton v. Renton*, 4 Eq. 158.

And by sect. 70 of 51 & 52 V. c. 43, trustees may pay money not exceeding 500*l.* into a post office savings bank, in the name of the registrar, and transfer or deposit stocks or securities into or in the names of the treasurers and registrars of such Court, in trust to attend the orders of the Court.

And see County Court Rules, 1889, O. XXXVIII; Annual County Court Pr. 456; and Pitt-Lewis, County Court Pr. vol. i. 171; vol. ii. 377.

SECTION VIII.—(II.) PAYMENT INTO COURT UNDER LIFE ASSURANCE COMPANIES (PAYMENT INTO COURT) ACT, 1896.

1. *Form of Lodgment Schedule to be annexed to Affidavit directed to be made under O. LIV c, 1, R. S. C. Life Assurance Companies (Payment into Court) Act, 1896, and R. S. C. (Life Assurance Companies), 1896, and S. C. F. R., 1894, r. 41a.*

LODGMET SCHEDULE.

In the High Court of Justice,
Chancery Division.

Life Assurance Companies (Payment into Court) Act, 1896.

Filed the 11th day of July, 1900.

Ledger Credit. In the Matter of two policies, Nos. — and — of the Norwich Union Life Insurance Co. on the respective lives of C. H. R., J. S. and J. C. W., and the said J. C. W. and C. H. R. respectively.

Particulars of Funds to be Lodged.	Person to make the Lodgment.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
A sum of £1,000 with bonuses assured by Policy No. — to be paid to N. T., of &c., his exors, admors, or assigns.	The Norwich Union Life Insurance Society, of 50, Fleet Street, in the city of London.	1,268 9 11	
A sum of £1,000 with bonuses assured by Policy No. — to be paid to E. R., of &c., his exors, admors, or assigns.	The same	1,235 3 0	

—*Re Norwich Union Life Insurance Society.*

LIFE ASSURANCE COMPANIES (PAYMENT INTO COURT) ACT, 1896.

The Life Assurance Companies (Payment into Court) Act, 1896 (59 V. c. 8), enables any life assurance co. (defined by sect. 2 as meaning "any corp., co., or society carrying on the business of life assurance, not being a society registered under the Acts relating to friendly societies"),

subject to Rules of Court, to pay into the High Court any moneys payable by them under a life policy (defined by sect. 2 as including "any policy not foreign to the business of life assurance"), in respect of which, in the opinion of their board of directors, no sufficient discharge can otherwise be obtained.

Rules under the Act have been issued, which are similar to those under the Trustee Act, 1893, s. 42. The co. is not to deduct any costs or expenses of or incidental to payment into Court (r. 2), and in general is not to be served with the petition or summons except when the applicant asks for payment of a further sum by the co. for costs (r. 7). The rules may be cited as the Rules of the Supreme Court (Life Assurance Companies), 1896, or as O. LIV c.

For forms under the Act, see D. C. F. 1182 *et seq.*

As to the difficulty which the Act was designed to remove, *v. sup.* p. 1193.

SECTION IX.—APPOINTING NEW TRUSTEES IN AN ACTION OR OUT OF COURT.

1. *Judgment appointing New Trustees.*

[*Enter evidence of fitness and consent to act of new trustees if named in order.*] The Deft B., by his statement of defence [*or counsel*], declining to act in the trusts of the testator's will [*or vested in him by the articles of settlement, or indenture*] dated the — day of — in the pleadings mentioned, and desiring to be discharged therefrom, This Court doth hereby appoint D. and E. [*or Let two or more proper persons be appointed*] trustees of the said will [*or articles &c.*] in his place [*jointly with C. the continuing trustee*]; And Let the Deft B. [*and C.*] convey [*assign and transfer*] the trust estate [*funds, property, and securities*] vested in him [*or them*] by the said will [*or articles &c.*], and the £— Consols standing in the name of &c. in the books of the Bank of England as in the pleadings mentioned, or the residue thereof after payment of the costs hereinafter mentioned, so as to vest the same in the said D. and E. [*or the trustees so to be appointed, if so, jointly with the said C.*], upon the trusts mentioned in [*or declared by*] the said will [*or articles &c.*], or such of them as are now subsisting and capable of taking effect [*or subject to the trusts mentioned in the said will dated &c. or articles &c.*], concerning the same &c. [*If stock add, and they are to declare the trusts thereof accordingly*]; And Let such conveyance [*or assignment, or declaration*] be settled by the Judge [*If no infants or married women, in case the parties differ*]; [*If deeds in Deft's hands, And Let the Deft B. deliver to such new [and continuing] trustees upon oath all deeds and writings in his custody or power, relating to the said trust estates &c.*]; [*If trustee to have his costs, Tax the Deft B. his costs of this action as between solr and client*]; And Let the Deft B. [*And the said C.*] be at liberty to raise and retain the same out of the said trust estate [*or funds &c.*].—Liberty to apply.

For orders vesting the trust estate and appointing new trustees, under the Trustee Acts, or the Charitable Trusts Acts, see *infra*, Sections X., XI., XII., and Chapter XLII., Sections I., II.

For direction for appointment of new trustees of the whole of trust property comprised in articles of settlement, part being alleged to have been lost by the former trustees; and an inquiry what property was comprised in the settlement, and whether any and what part thereof had been lost, and if so, under what circumstances, and whether any and what steps ought to be taken for the recovery thereof, see *Bennett v. Burgis*, 28 Feb. 1846, A. 847; and the subsequent order: 5 Ha. 296. Followed in *Hansell v. H.*, V.-C. M., 12 June, 1875, A. 954.

For decree rectifying power of appointment and directing the continuing trustee to appoint a new one under the rectified power, see *Tebbit v. T.*, 1 D. & S. 510.

For forms of application, affidavit of fitness, and consent to act &c., see D. C. F. 627 *et seq.*

2. Trustees to be appointed in Chambers, with Leave to apply for Vesting Order or Conveyance.

(AND the Plt and the Deft T. by their counsel desiring to retire from the trusts of the will of &c.) Let two or more proper persons be appointed trustees of the said will in the place of (in substitution for) the Plt and the said Deft, with liberty to the said new trustees to apply in Chambers for an order vesting in them the trust estate, or for a conveyance or assignment thereof from the retiring trustees as they may be advised.—*Couchman v. Thurnall*, V.-C. W., 28 June, 1873, A. 1830; and see *Re Kibblewhite*, *Bund v. Green*, V.-C. H., 19 Nov. 1875, B. 2073.

For further order in Chambers appointing new trustees, pursuant to direction in decree for that purpose, see *Watson v. Moore*, M. R., 26 Jan. 1854, B. 392; and for the decree, *S. C.*, 1852, B. 1412.

This order may now be made at Chambers: see O. LV, 13a.

3. Leave to exercise Power of appointing Trustees under Trustee Act, 1893, s. 10—Trustee desiring to be discharged.

UPON the application of the Defts, and upon hearing the solrs for the applicants and for the Plts, and upon reading &c.; And the Deft B. by his solr desiring to be discharged from the trusts or powers reposed in or conferred on him by the will of G. B., late of &c.; Let the Deft P., as the continuing trustee, be at liberty to exercise the powers vested in him by sect. 10 of the Trustee Act, 1893, by appointing E. B. of &c., to be a new trustee of the will of the testator G. B., to act jointly with the said P. in substitution for the Deft B.; And Let the deed appointing the said E. B. such new trustee be settled by the Judge, and upon such appointment any assurances and things requisite for vesting the trust property, or any part thereof jointly in the said P. and E. B., be executed by them and the said B.—Costs to be retained by the trustees out of the capital of the testator's estate.—See *Barkworth v. B.*, Kay, J., at Chambers, 11 July, 1883, A. 1148.

For form of summons, see D. C. F. 630.

4. Leave to appoint Trustees under Trustee Act, 1893, s. 12.

UPON the application of the Defts, and upon hearing the solrs for the applicants, for the Plt, and for E. A., B. A. &c., infants by J. A., their

father and guardian attending the proceedings; And upon reading the probate of the will of &c.; And the Deft R. by his solr desiring to retire from the trusts of the will of the testator L.; Let the applicants L. and R. be at liberty to exercise the power of appointment contained in the will of the testator L., by appointing H. of &c., a trustee of the said will in substitution for the said R., to act jointly with the applicant L., the continuing trustee thereof; And the deed by which the said H. shall be appointed a trustee as aforesaid is to contain a declaration in conformity with the 12th section of the Trustee Act, 1893, vesting any estate or interest in any land or chattel subject to the trusts of the said will or the right to recover and receive any debt or other thing in action subject to the said trusts in the said H. jointly with the said L.—Costs to be costs in the action.—See *Re Lloyd, L. v. L.*, Kay, J., at Chambers, 8 Aug. 1882, B. 1697; *Nicholas v. Lovett*, V.-C. H., 28 July, 1882, B. 1774.

5. Appointing Trustees for an Infant and for Management of his Estate—Conveyancing Act, 1881, s. 42 (1).

UPON the application of P., an infant, by A. P., his mother, and next friend, and upon hearing the solr for the applicant, and upon reading &c.; Let, in pursuance of sub-sect. 1 of the 42nd section of the Conveyancing and Law of Property Act, 1881, H. P. and W. H. be appointed trustees of the real estate to which the said infant is entitled for the purposes of the said section.—*Re Payne, an Infant*, Kay, J., at Chambers, 1 Dec. 1882, B. 1984.

This order does not require a deed stamp as on the appointment of trustees under the Trustee Act, the question having been submitted to the Commrs of Inland Revenue, and so decided on the 1st January, 1883.

6. Trustees to hold Property in trust for Infant—Conveyancing Act, ss. 42, 43.

UPON the application by originating summons of the Plt, which &c., was adjourned &c.; Declare that the residue of all such property in the hands of the Plt as exor of the will of A. B. should be held by him as trustee for the infant Deft E. F. within the meaning of sect. 43 of the Conveyancing and Law of Property Act, 1881.—*Re Smith, Roe v. Hitchins*, North, J., 2 July, 1889, B. 903; *S. C.*, 42 Ch. D. 302.

7. Court being of opinion that Appointment of Trustees is good, direct Transfer to them.

UPON the petition of R. B., W. G. M., J. P., and J. F. W. on the — day of — &c.; And upon hearing counsel for the Petrs and for T. M. P.; And upon reading &c., this Court is of opinion that the

appointment by the said indenture dated &c. of the Petrs J. F. W. and J. P. as trustees of the will of the said C. P. is a valid appointment; And the Petrs R. B., W. G. M., and J. P. by their counsel undertaking as exors of the will of J. B. P., deceased, to concur in the transfer of (£5,750) New Consols forming part of the estate of the said C. P., and in the receipt of the dividends thereon as herein-after mentioned; Let the respondent T. M. P., as another exor of the said will of J. B. P., deceased, in concurrence with the Petrs R. B., W. G. M., and J. P., transfer the said (£5,750) New Consols to the said J. F. W. and J. P., to be held by them upon the trusts of the will of the said C. P., and concur with the Petrs R. B., W. G. M., and J. P. in the receipt of the dividends now due and to accrue due upon the said New Consols before the transfer aforesaid, and in the payment thereof to the said J. F. W. and J. P., to be applied by them in accordance with the trusts of the said will; And Let the said trustees J. F. W. and J. P. raise and pay the costs of the Petrs and respondent, to be taxed out of the New Consols when so transferred to them.—See *Re Parker's Trusts*, Kekewich, J., 26 Jan. 1894, B. 382; (1894) 1 Ch. 707.

8. *Declaration that Heir-at-Law bound by Trusts of Deed and a proper Assignment to be executed.*

THIS action coming on &c., Declare that the Deft A. J. C. is a trustee for the persons beneficially interested under the said indenture of settlement of All that piece or parcel of land containing by estimation — acres, more or less, situate in W. — T. — in the county of S. —, lying within and held of the manor of T. — with M. — in the said county, to which said hereditaments the said Deft was on the — day of — admitted as customary heir of S. — C. —, deceased; Order and adjudge that the Deft A. J. C. do execute a proper assurance of the said hereditaments to the persons beneficially interested under the said indenture of settlement, or as they shall direct.—Tax the costs of the Plts and Defts (except A. P.) of and incidental to this action as between solr and client, including in the costs of the Defts, the trustees, any charges and expenses properly incurred by them in the execution of the trusts of the said indenture of settlement; Let the Defts retain and pay such costs out of the funds in their hands or under their control being or representing the proceeds of the sale of the freehold hereditaments in the — paragraph of the statement of claim mentioned.—Liberty to apply in Chambers for a vesting order or as to any questions arising in the admon of the said indenture of settlement.—See *Carter v. C.*, Stirling, J., 5 Nov. 1895, A. 5072; (1896) 1 Ch. 62.

NOTES.

APPOINTMENT OF NEW TRUSTEES BY THE COURT.

The Court, in selecting persons to be appointed trustees, *first* will regard the wishes of the authors of the trust expressed or to be inferred from the

trust instrument; *secondly*, will not appoint a trustee in the interest of some *co. q. t.* in opposition to that of others (as a rule, all the beneficiaries should be present, or should be served with notice of the order); *thirdly*, will consider whether the appointment will facilitate the execution of the trust: *Re Tempest*, 1 Ch. 485. The continuing trustee objecting to the proposed trustee is not sufficient to induce the Court to refuse to appoint him: *Id.*; and see *Marshall v. Sladden*, 7 Ha. 428.

And now, when a new trustee is to be appointed, though after an admon decree, the Court, in sanctioning an appointment, gives preference to the nominee of the donee of the power of appointing new trustees: *Re Gadd, Eastwood v. Clarke*, 23 Ch. D. 134, C. A.; *Middleton v. Reay*, 7 Ha. 106; and see *Thomas v. Williams*, 24 Ch. D. 558.

The appointment by a solr, a sole trustee, of his son and partner as his co-trustee, though not necessarily improper, will not be sanctioned by the Court: *Re Norris, Allen v. N.*, 27 Ch. D. 333; and (*semble*) the Court would decline to appoint the tenant for life or his solr: *Re Harrop*, 24 Ch. D. 717; *Re Kemp*, 24 Ch. D. 485, C. A.; *Re Earl of Stamford*, (1896) 1 Ch. 288; Lewin, 787; though such an appointment by the donee of a power would not be disturbed: *Re Earl of Stamford, sup.*; Lewin, 788.

The husband of a lady, entitled to her separate use, was appointed a trustee with another person of the fund, but a direction was inserted in the order that on his becoming a sole trustee, there should be a new trustee appointed: *Re Parrott*, 30 W. R. 97; see also *Re Hemmings*, same day, 2nd Dec. 1881, Reg. Minute Book, 98, where a like order was made.

For particular instances in which the Court will appoint new trustees, *v. inf.* p. 1222.

The Court of Chancery had inherent jurisdiction to appoint trustees where there never had been any: *Dodkin v. Brunt*, 6 Eq. 580.

Upon proper evidence of the fitness of the proposed trustees, and of their acceptance of the trust in writing, the Court will nominate the new trustees in the order: in *Hussey v. Williams*, V.-O. S., 8 Nov. 1853, A. 56, the Court did so on the hearing (of a claim), but first required it to be amended by naming the proposed trustees: *et v. inf.* p. 1226.

In *Brook v. B.*, 1 Beav. 531, the Court would not make an order for a *feme sole* to propose herself as trustee.

The Court may appoint more or less than the original number: see *Birch v. Cropper*, 2 D. & S. 256; *D'Adhemar v. Bertrand*, 35 Beav. 19; *W. of England Bk. v. Murch*, *Re Booker*, 23 Ch. D. 138, and other cases, *inf.* p. 1225.

The nominees of a corp. were accepted, the Court warning them that they and not the corp. would be responsible: *Re Brogden*, W. N. (88) 238.

Stock standing in the name of a sole surviving trustee, another was appointed on bill by remainderman: *Finlay v. Howard*, 2 Dr. & W. 490. But where shares, which by the co.'s rules could only be in a single name, were specifically bequeathed to three trustees, they could be kept in the name of one of them: *Consterdine v. C.*, 31 Beav. 330.

A discretion annexed to the office of trustees may be exercised by those appointed by the Court: *Byam v. B.*, 19 Beav. 58; *Bartley v. B.*, 3 Drew. 384.

Part of the property being lost, the Court appointed new trustees for the whole, directing inquiries as to what proceedings should be taken as to the part lost: *Bennett v. Burgis*, 5 Ha. 295.

Payment out is not made to a single trustee, unless all interested are present: *Re Roberts*, 7 Jur. N. S. 818; 9 W. R. 758; but may be made to three out of four, the other being abroad: *Clark v. Fennick*, 21 W. R. 320; 42 L. J. Ch. 320; W. N. (73) 38; Lewin, 398.

Trustees accepting trusts, though then known to be doubtful, were not compelled to execute them before the doubt was removed: *Neale v. Davis*, 5 D. M. & G. 258.

The legal estate may be disclaimed by conduct of the devisee: *Re Birchall, B. v. Ashton*, 40 Ch. D. 436, C. A.; but a trustee cannot disclaim in part, *e.g.*, as to property in a particular country: *Re Lord and Fullerton*, (1896) 1 Ch. 228, C. A.

In *Coventry v. C.*, 1 Ke. 758, trustees retiring, on account of the conduct of the tenant for life, were paid their costs from his interest; but they are

not allowed costs where they retire without cause: *Howard v. Rhodes*, *Id.* 581; and as to trustee's right, and for what causes, to retire at the expense of the estate, and by suit, see *Greenwood v. Wakeford*, 1 Beav. 576; *Forshaw v. Higginson*, 20 Beav. 485; and see *Lewin*, 764 *et seq.*

In *Angell v. Dawson*, 3 Y. & C. 318, the tenant for life was ordered to hand over the title-deeds to the trustees.

Portionists are not indispensable parties to the proceedings: *Ellison v. Cookson*, 2 Col. 52; but the mortgagor should be a party, on appointing a new trustee for sale in a mortgage deed: *Re Green*, *Id.* 91.

Where the question is whether or not the Deft ever became trustee, the procedure by originating summons is inapplicable, and an action was approved of by the Court: *Elworthy v. Hervey*, 37 W. R. 164; 60 L. T. 30.

Upon an originating summons for general admon and appointment of new trustees, all persons interested being parties, the Court, in the exercise of its general jurisdiction, ordered the appointment: *Re Allen*, *Simes v. S.*, 56 L. J. Ch. 779; 56 L. T. 611.

APPOINTMENT UNDER POWER.

A power of appointing new trustees being fiduciary, the donee cannot appoint himself: *Re Skeats*, *S. v. Evans*, 42 Ch. D. 522; *Re Newen*, (1894) 2 Ch. 297; *Lewin*, 788.

A power to appoint new trustees may be exercised by the tenant for life, donee of the power, after he has aliened his interest: *Hardaker v. Moorhouse*, 28 Ch. D. 417; but (*semble*) the concurrence of the alienee ought to be obtained: *Lewin*, 790; and see *Re Bedingfield*, (1893) 2 Ch. 232.

The appointment of a trustee under a power pending an action was good: *Graham v. G.*, 16 Beav. 550; but in case of an existing action, the Court controls trustees in appointing new trustees, though the power is given in large terms: *Webb v. E. Shaftesbury*, 7 Ves. 480; and that such appointment, without the sanction of the Court, is improper, and as to the liabilities of trustees so appointing, or otherwise acting, when the matter is before the Court, see *S. C.*; *A. G. v. Clack*, 1 Beav. 467; *Collins v. Vining*, C. P. C. (t. Br.), 472; *Hilton v. H.*, 14 Eq. 468; *Cafe v. Bent*, 3 Ha. 245; in *Osborne v. Foreman*, *Id.* 250, n., a solr-trustee was directed to have the conduct of a sale in the cause.

Where a person resident in Australia was appointed trustee "when he shall return to England," his return to this country for six months for his health, was sufficient to constitute him a trustee: *Re Arabi*, (1891) 1 Ch. 601.

Though the funds, being in Court, had not been assigned to them, the new trustees were proper parties to a suit to execute the trusts: *Nelson v. Seaman*, 1 D. F. & J. 368.

Where the power of appointing new trustees is given to the surviving or "continuing" trustees or trustee, and a trustee retires, his concurrence is not necessary in the appointment of a new trustee in his place: *Re Norris*, *Allen v. N.*, 27 Ch. D. 333; *Travis v. Illingworth*, 2 Dr. & Sm. 344; *Re Coates to Parsons*, 34 Ch. D. 370; but see *Re Glenny and Hartley*, 25 Ch. D. 611.

LORD CRANWORTH'S ACT.

By the 23 & 24 V. c. 145, s. 27, if any trustees died, retired, or would not or could not act, the nominee under the trusts, or if none, or none who could and would act, the surviving or continuing trustees, or the acting exors or admors of the last, or last retiring, might by writing appoint new trustees; the trust property was to be transferred to the trustees then being; and the trustees, when so appointed, and all appointed by the Court, were to have the same powers in all respects as if originally named trustees; and by sect. 28, the power was exercisable where the trustees died in the testator's lifetime; by sect. 29, trustees' receipts were to be discharges.

Before this Act the power to appoint successors could not be vested in new trustees appointed by the Court: *Oglander v. O.*, 2 D. & S. 381; *Holder v. Durbin*, 11 Beav. 594; except in charity cases: *A. G. v. Mayor of Coventry*, 4 March, 1712, A. 338; see *Lewin*, 1035.

Where one trustee disclaimed and the other retired, the appointment of a single trustee under the Act was supported: *W. of E. Bank v. Murch, Re Booker*, 23 Ch. D. 138.

TRUSTEE ACT, 1893.

By the Trustee Act, 1893 (56 & 57 V. c. 53), s. 10 (repealing and replacing the Conveyancing and Law of Property Act, 1881, 44 & 45 V. c. 41, s. 31 and ss. 11—30 of Lord Cranworth's Act, 23 & 24 V. c. 145), "where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the persons of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid.

"(2.) On the appointment of a new trustee for the whole or any part of trust property—

- (a) the number of trustees may be increased; and
- (b) a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and
- (c) it shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust; and
- (d) any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

"(3.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

"(4.) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will, but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

"(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to any provisions therein contained.

"(6.) This section applies to trusts created either before or after the commencement of this Act."

By s. 37, "every trustee appointed by a Court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust."

Where a private Act adopted Lord Cranworth's Act, with a provision that new trustees should be appointed with the approbation of the Court, it was held that by the repeal of Lord Cranworth's Act the provision was gone, and

could not be superadded to the general power conferred by the Conveyancing Act, 1881: *Re Lloyd's Trustees*, 57 L. J. Ch. 246; Lewin, 767.

The words "person or persons nominated for the purpose of appointing new trustees by the instrument creating the trust," in sect. 10 of the Act of 1893, refer to the persons nominated to make the appointment in the particular event which has happened, so that if, e.g., the power extends only to the event of a trustee becoming incapable, and a trustee becomes (as by bankruptcy) unfit, but not incapable, the appointment ought to be made, not by the donee under the instrument, but by the trustees under the Act: *Re Wheeler and De Rochow*, (1896) 1 Ch. 315.

The words "pers. represvee of the last surviving or continuing trustee" in sect. 31 of the Conv. Act, 1881, were held to include the case of an exor of a sole trustee: *Re Shafto*, 29 Ch. D. 247. Exors in possession of a general grant of probate are "pers. represves" within sect. 10 of the Act of 1893, to the exclusion of limited exors who subsequently obtain a grant: *Re Parker's Trusts*, (1894) 1 Ch. 707.

And where the persons having the power to appoint are not "able or willing," the represves of the last surviving trustee can exercise the power: *Re Shephard*, W. N. (88) 234.

A fetter imposed on the power conferred by the settlement was not regarded as the expression of "a contrary intention": *Cecil v. Langdon*, 28 Ch. D. 1, C. A.

The enactment does not apply where the sole trustee or all the trustees of the will have predeceased the testator: *Re Orde*, 24 Ch. D. 271; C. A.; *Re Ambler*, 59 L. T. 210; *Re Lightbody*, W. N. (85) 3; *Nicholson v. Field*, (1893) 2 Ch. 511.

But it is applicable where a lunatic tenant for life is one of the trustees, and is the person nominated by the settlement to appoint new trustees: *Re Blake*, W. N. (87) 173.

It does not extend to an appointment by the will of a sole surviving trustee: *Re Parker's Trusts*, (1894) 1 Ch. 707.

The Court will not interfere with the exercise of the statutory power by the donee of it who is willing to exercise it, even though the application to the Court to appoint new trustees is made by the majority of the beneficiaries: *Re Higginbottom*, (1892) 3 Ch. 132.

Where the donee of the power is a lunatic, there is jurisdiction under sects. 128 and 129 of the Lunacy Act, 1890, to authorize the committee of the lunatic to exercise the power on his behalf, by appointing persons named in the order to be new trustees: *Re Shortridge*, (1895) 1 Ch. 278, C. A.

By the Trustee Act, 1893, s. 47 (1), "all the powers and provisions contained in this Act with reference to the appointment of new trustees, and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of the Settled Land Acts, 1882 to 1890, whether appointed by the Court or by the settlement, or under provisions contained in the settlement. (2) This section applies and is to have effect with respect to an appointment or a discharge and retirement of trustees taking place before as well as after the commencement of this Act. (3) This section is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of this Act, otherwise than under the provisions of the Conveyancing and Law of Property Act, 1881." This enactment is in substitution for sect. 17 of the Settled Land Act, 1890 (53 & 54 V. c. 69).

The represves of a deceased trustee do not, by declining to exercise the statutory power, render themselves liable to the costs of an application to the Court to appoint new trustees: *Re Sarah Knight's Will*, 26 Ch. D. 82, C. A.

Where an appointment is made under the Act in the place of a trustee who has been out of the United Kingdom for more than twelve months, the concurrence of such trustee in the appointment is not necessary, unless he is willing and competent to concur, and the onus of showing that he was rests on those who dispute the appointment: *Re Coates to Parsons*, 34 Ch. D. 370. The absence for more than twelve months must be continuous, not broken, e.g., by a residence of a week in London: *Re Walker, Summers v. Barrow*, (1901) 1 Ch. 259.

The power of increasing the number of trustees is confined to cases where an appointment is being made to supply a vacancy: *Re Gregson*, 34 Ch. D. 209.

A person nominated by the trust instrument to appoint new trustees, has the power of filling up any vacancy occurring under the provisions of the

Act, though caused by an event (*e.g.*, absence from the United Kingdom for more than twelve months) which would not before the Act have been within the power: *Re Walker and Hughes*, 24 Ch. D. 698.

Where the power of appointing is vested in a lunatic, the better course is to apply to the Court under the Lunacy Act, 1890, s. 128: *Re Blake*, W. N. (87) 173.

A power of appointing new trustees, extending only to vacancies among the original trustees, or trustees appointed under the power, came to an end when new trustees were appointed by the Court, and a restriction imposed by such power did not extend to the general statutory power exercisable under sect. 31: *Cecil v. Langdon*, 28 Ch. D. 1, C. A.; and see *Craddock v. Witham*, W. N. (95) p. 75; Lewin, 768.

When the statutory power of appointing new trustees given by sect. 31 of the Conveyancing Act, 1881, can be exercised, application should not be made to the Court: *Re John Gibbon's Trusts*, 30 W. R. 287; 45 L. T. 756.

Sub-sect. 2 (b) of sect. 10 of the Act of 1893 incorporates sect. 6 of the Conv. Act, 1892 (55 & 56 V. c. 13), passed to obviate the difficulty which arose in *Savile v. Couper*, 36 Ch. D. 520; and in Ireland in *Re Nesbitt's Trusts*, 19 L. R. Ir. 509 (but see *Re Moss's Trusts*, 37 Ch. D. 513).

An appointment under this provision may be made even although in certain events the trusts of the several properties may become identical: *Re Hetherington's Trusts*, 34 Ch. D. 211; and see *Re Moss's Trusts*, 37 Ch. D. 513; *Re Paine's Trust*, 28 Ch. D. 725.

VESTING OF TRUST PROPERTY IN NEW OR CONTINUING TRUSTEES.

By the Trustee Act, 1893 (56 & 57 V. c. 53), s. 12, "(1.) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

"(2.) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

"(3.) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, ann. or property as is only transferable in books kept by a co. or other body, or in manner directed by or under Act of Parliament.

"(4.) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

"(5.) This section applies only to deeds executed after the 31st of December, 1881."

The expression "trustees for performing the trust," in sub-s. 1 of s. 12, is not limited to trustees having substantial duties to perform, and will extend to trustees appointed, under a power in the mortgage deed, for the better security of the mortgagee: *London & County Bank v. Goddard*, (1897) 1 Ch. 642.

It has been held that the vesting declaration may operate to take a legal estate out of an incumbrancer who has acquired it, with notice of an equitable charge: *London and County Bank v. Goddard*, (1897) 1 Ch. 642; but see Lewin on Trusts, 10th ed. pp. 773, 774; *Taylor v. London and County Bank*, (1901) 2 Ch. 231, C. A.

INSTRUMENT OF APPOINTMENT.

Where the trust instrument contemplated a single trustee being appointed to act, the refusal of a sole trustee to appoint a new trustee to act with

him was held justifiable: *Peacock v. Colling*, 54 L. J. Ch. 742; 33 W. R. 528; 53 L. T. 620.

By the Law of Property Amendment Act, 1859 (22 & 23 V. c. 35), s. 21, personality may be assigned to the assignor and other persons or corps.: *Lewin*, 771.

By the Stamp Act, 1891 (54 & 55 V. c. 39), s. 62, every instrument, and every order of any Court whereby any property on any occasion, except sale or mortgage, is transferred to or vested in any person, is chargeable as a conveyance or transfer, but if made for effectuating the appointment of a new trustee it is not to be charged more than ten shillings.

An order vesting mortgaged land bears an *ad valorem* stamp of 6d. per 100l., not exceeding 10s. where the transfer is merely on the appointment of a new trustee. If other lands or choses in action are vested by the same order in the new trustees, the ordinary deed stamp will cover the mortgaged lands also.

As to the appointment of trustees of charities, see Chap. XLII.

REMOVAL OF TRUSTEE.

The jurisdiction of the Court to remove a trustee is ancillary to its principal duty to see that the trusts are properly executed, and therefore, though charges of misconduct are not made out, or greatly exaggerated, the Court may remove him, if satisfied that his continuance as trustee would prevent the proper execution of the trusts: *Letterstedt v. Broers*, 9 App. Ca. 371.

A trustee empowered to become and becoming lessee (his co-trustee not acting) was removed, as his duties clashed, but he was allowed costs: *Passingham v. Sherborn*, 9 Beav. 424, 428; but an exor accepting an office in which his duty seemed to clash with his interest was not superseded: *Stainton v. Carron Co.*, 18 Beav. 146.

Power to appoint in case of incapacity does not include going abroad: *Withington v. W.*, 16 Sim. 104.

Residing abroad does not in general deprive a trustee of his office or power to appoint, but *cs. q. t.* may require a new appointment, and should all be consulted thereon: *O'Reilly v. Alderson*, 8 Ha. 101, 103—105; and see *Marshall v. Sladden*, 7 Ha. 428; *Re Earl of Stamford*, (1896) 1 Ch. 288, 296; *Lewin*, 708, 1032.

Mere dissension between a trustee and his *cs. q. t.* is not ground for his removal: *Forster v. Davies*, 10 W. R. 180; and see *A. G. v. Clapham*, 4 D. M. & G. 591.

Cs. q. t. may ask for the removal of a bankrupt trustee: *Harris v. H.*, 7 Jur. N. S. 955; 29 Beav. 107; though after discharge, and the trust property in receiver's hands: *Bainbridge v. Blair*, 1 Beav. 495; but the Court had a discretion: *Re Bridgman*, 6 Jur. N. S. 1065; 1 Dr. & S. 164; and costs between solr and client were, after consideration, given to bankrupt exor: *Samuel v. Jones*, V.-C. W., 30 Jan. 1843; and as to costs of bankrupt exor and trustee in admon suit, till removed, see *Turner v. Mullineux*, 9 W. R. 252; 3 L. T. 687; and of bankrupt trustee, *v. sup.* p. 1169.

Although the Court had no jurisdiction under the Trustee Act, 1850, to remove an exor, it had jurisdiction to appoint trustees to discharge the duties incident to his office: *Re Moore, McAlpine v. M.*, 21 Ch. D. 778; but see *Re Willey*, W. N. (90) 1, where Cotton, L.J., doubted the jurisdiction; and see *Lewin*, 803.

As to removal of exor and appointment of judicial trustee, *v. inf.* p. 1278.

RETIREMENT OF TRUSTEE.

Previously to the Conv. and Law of Pty Act, 1881, a trustee could not retire from the trust without seeing that a new trustee was appointed in his place, unless the settlement contained a special power authorizing him to do so, a circumstance which seldom occurred; but now, by the Trustee Act, 1893 (56 & 57 V. c. 53), s. 11 (replacing sect. 32 of the Act of 1881), it is enacted that:—

“(1) Where there are more than two trustees, if one of them by deed

declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

“(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

“(3) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

“(4) This section applies to trusts created either before or after the commencement of this Act.”

FRIENDLY SOCIETIES ACT, 1896.

59 & 60 V. c. 25, repeals previous Acts and consolidates the law of friendly societies.

By sect. 25 (2), trustees of registered societies are to be appointed at a meeting, and by sect. 25 (3), a copy of the resolution is to be sent to the registrar.

By sect. 34, if trustees are abroad, bankrupt, &c., lunatic, dead, or not known whether dead or alive, the chief registrar may order stock to be transferred.

See sects. 44—49, as to investment of funds, and vesting and devolution of property; and sect. 51 as to description of trustees in legal proceedings.

Trustees of a friendly society, who were restrained from dividing a certain fund, retired from the trust, and appointed other trustees who divided the fund contrary to the restraint. Both old and new trustees were committed for contempt: *Avory v. Andrews*, 30 W. R. 564; 51 L. J. Ch. 414; 48 L. T. 279.

In *Re Odd Fellows of Manchester*, M. R., 10 March, 1853, B. 794, where one trustee was out of the jurisdiction, and another refused to transfer after 28 days' notice, an order was made under the Trustee Act, 1850, vesting the right to transfer stock in their co-trustee, and directing him to transfer to the existing trustees: and so in *Re Amicable Soc.*, V.-C. W., 25 March, 1854, A. 779, the trustee being abroad.

As to the inalienable character of policies issued under the Friendly Societies Acts, see *Re Redman*, 70 L. J. Ch. 669; 85 L. T. 13.

SECTION X.—APPOINTMENT OF NEW TRUSTEES AND CONSEQUENTIAL VESTING, CONVEYANCE, AND TRANSFER OF TRUST PROPERTY UNDER TRUSTEE ACT, 1893, AND TRUSTEE ACT, 1893, AMENDMENT ACT, 1894.

The orders which the Trustee Acts, 1893 and 1894, give the Court power to make, may conveniently be classified as follows:—

1. Orders appointing new trustees of property, and making vesting orders as consequent thereon: Trustee Act, 1893, ss. 25, 26, 35. Forms 1 to 14 *inf.*, pp. 1210 *et seq.*

2. Orders for vesting or conveyance of property where the Court is not called upon to appoint new trustees: Trustee Act, 1893, ss. 26—29, 32—41. Forms 1 to 49, Sect. XI., pp. 1228 *et seq.*

3. Orders made for the purpose of working out any judgment for sale, mortgage, partition, or generally for the conveyance of lands, or for specific performance of contracts, by declaring persons trustees and vesting their interests in or conveying them to the purchaser or other person entitled: Trustee Act, 1893, ss. 30, 31. Forms 1 to 18, Sect. XII., p. 1261.

1. *Appointing New Trustees and Vesting Order*—Sects. 25 (1), 26 (a) (b), 32, and 50.

THE Judge &c. doth hereby appoint A. of &c., and B. of &c., trustees of the indenture dated &c. [or of the will of &c.] [If so, add in addition to (or jointly with) C. the continuing trustee, or in substitution for D., or D. and C., the trustee or trustees retiring, deceased, or under disability, or in substitution for D., and in addition to C. &c.]

Vesting Land, sects. 26 and 32.—AND Let the land &c. [Take the appropriate words from the will or other instrument creating the trust according to the tenure], now subject to the trusts of the said will [or indenture of settlement], vest in A. B. &c. [name the new trustees, and if so, add] jointly with the said C. and D. &c. [name any continuing trustee or trustees] for the estate therein of (i.e., vest for such estate as the Court may direct), such lands &c., to be held by the said A. B. &c., upon the trusts of the said will [or indenture of settlement].

If Part of the Trust Estate is invested on Mortgage of Lands &c.—AND Let the land &c. comprised in the indenture of mortgage dated &c. in the petition mentioned (and any land &c. (if any) which has since become subject to the said mortgage, or so much of the said land as now remains subject thereto) vest in A. B. &c. [name the new and continuing trustees as above] for the estate &c. [as above in any of the alternatives], but subject to any equity of redemption subsisting therein under the said mortgage; And Let the right to sue for or recover the sum of £— [or the moneys] secured by the said indenture of mortgage, and any interest in respect thereof, vest in the said A. B. &c. [name the new and continuing trustees], as such trustees as aforesaid.

Chose in Action.—AND Let the right to sue for or recover the sum of £—, secured by &c. [or, if so ordered, any chose in action, subject to the trusts of the said indenture or will], or any interest in respect thereof, vest in the said A. B. &c. [name the new and continuing trustees], to be held by them upon the trusts of the said will [or indenture of settlement].

As to this form of order, v. *inf.* p. 1227.

As to the effect of s. 30 of the Conveyancing Act, 1881, *v. inf.* p. 1220.

For form of vesting order as to stock settled by will where the survivor of the two original trustees has died without a legal pers. reprieve, and new trustees have been appointed under the will, see *Re Crowe's Trusts*, 14 Ch. D. 610, where the form of the order is set out.

For order appointing new trustees in the place of one deceased, and of the survivor who desired to retire from the trusts, see *Re Ridlington*, V.-C. W., 20 March, 1858, B. 781.

For order, where the trustees named in the will of the testator had by deed disclaimed the trusts, appointing trustees in their place, and vesting the hereditaments comprised in the trust in the new trustees for all the estate and interest therein devised to the trustees, see *Re Bumpstead*, M. R., 29 July, 1853, A. 1512.

For order, by consent of the heir-at-law, appointing new trustees in place of those named in the will, who had by deed disclaimed, and vesting the lands thereby devised in the new trustees for the same estate and upon the same trusts, see *Re Allen*, V.-C. W., 25 March, 1854, A. 1613.

For order appointing new trustees, and vesting freeholds for the estate of the infant heir of the survivor, see *Exp. Griffin*, V.-C. L. Cranworth, 8 Aug. 1851, A. 1490.

For order vesting the right to sue for and recover the moneys to become payable by virtue of the several deeds-poll, policies of insurance, or shares comprised in the trust, in the new and continuing trustees, see *Re Brown*, V.-C. L. Cranworth, 25 March, 1851, A. 696; and for sum secured by mortgage and interest, *Re Lara*, V.-C. R., 22 Nov. 1850, B. 131; for money in a colonial bank, *Re Barron*, V.-C. P., 17 Jan. 1852, A. 309; and bond debt, *Re Horlock*, V.-C. P., 12 Dec. 1851, A. 198.

For order appointing a new trustee of a will left in blank as to one name, and the hereditaments subject to the trusts to vest in him and the trustee named in the will, for the estate which would have vested in them if the new trustee had been named therein and had accepted the trusts, see *Re Hellier*, V.-C. M., 13 Jan. 1871, A. 104.

For order appointing a new trustee, and reserving the right of the *c. q. t.* against a former trustee, see *Re Blanchard*, V.-C. S., 7 Jur. N. S. 505; 3 D. F. & J. 131; and see *Re Harrison*, 22 L. J. Ch. 69; s. 25 (2), *inf.* p. 1222.

For order appointing two continuing trustees in the place of themselves and one who retired, there being a power in the will to reduce the number on any appointment, and the order being prefaced thus: "A. and B., by their counsel, desiring to retire, &c., in order that A. and B. may be appointed to act alone as trustees of," &c., *Re Stokes*, M. R., 19 Feb. 1872, B. 456; S. C., 13 Eq. 333.

Three continuing trustees were appointed trustees in the room of themselves and one who had absconded: *Re Harford's Trusts*, 13 Ch. D. 135; but in *Re Aston*, 23 Ch. D. 217, C. A., the Court refused to follow this, and simply appointed one (in place of a lunatic) to act with the others: see *inf.* p. 1225. Where the fund is immediately divisible, the right to it will be vested in the trustees who are of sound mind: *Re Martyn*, *Re Toutt's Will*, 26 Ch. D. 745, C. A.

For order appointing new trustees, one of the trustees named in the will having died without having acted, and the other two having disclaimed, and that copyholds vest, without consent of the lord, for the estate which would have vested in the trustees named in the will, had they accepted the trusts, see *Re Hurst*, V.-C. W., 20 Dec. 1855, A. 403.

For order, without the lord's consent, appointing P. a new trustee of copyholds under a will, in the place of S., who had disclaimed, and vesting in P. all the estate and interest which would have vested in S. if she had accepted the devise, without prejudice to any questions as to the fines payable, see *Paterson v. P.*, 2 Eq. 31; as varied on appeal, L. R. 5 C. P. 60, in the report of S. C. at law, *sub nom. Bristow v. Booth*.

For form of summons for appointment of new trustee and vesting order consequent thereon, see D. C. F. 1076.

2. *New Trustees, appointment of—Vesting Order—Transfer of Stock—Trustee Act, 1893, ss. 25 (1), 35 (1), and 50.*

DISCHARGE Order of 28th November, 1884.—The Petr and the other parties beneficially interested by their counsel consenting, Discharge the Order of 22nd July, 1884; And Let the Petr be at liberty to apply at Chambers for an Order “wherein shall be recited so much of the Order of the 28th June, 1884, as ordered that two or more proper persons should be appointed trustees of the will of the testatrix V. T. in substitution for P. S. L., who was out of the jurisdiction of the Court, and W. H. B., who had been adjudicated a bankrupt in Scotland, and as directed that an inquiry should be made of what the trust funds subject to the will of the testatrix V. T. consisted, and that the parties were to be at liberty to apply at Chambers for an order to vest the trust estate in the new trustees when appointed, and wherein shall be also stated so much of the chief clerk’s certificate as found of what the said trust funds consisted, and whereby in pursuance of the said Order dated 28th June, 1884, two or more proper persons may be appointed trustees of the said will in substitution for the said P. S. L. and W. H. B., and whereby it may be (*inter alia*) ordered that the right [*to call for a transfer of, and*] to transfer into their own names the trust funds in the chief clerk’s certificate mentioned, do vest in the persons so appointed trustees of the said will.”—*Re Tweedy*, 28 January, 1885, B. 399; 28 Ch. D. 529, C. A.

N.B.—The words in italics are now omitted as unnecessary.

3. *Appointment of New Trustees—Transfer of Securities—Unauthorized Securities—Trustee Act, 1893, ss. 35 (3), (4), and 50.*

(AFTER appointing J. B. H., the proposed new trustee, to be trustee of the will in substitution for N. P., the lunatic trustee, jointly with E. P. and A. P., the other existing trustees, the order proceeded;) And it being stated to be the intention of the said E. P. and A. P. and of the said J. B. H. to sell the property secured by investments not authorized by the said will, and they now undertaking before us to sell such last-mentioned property, We do ORDER that the right [*to call for a transfer of, and*] to transfer into their own names or otherwise to a purchaser or purchasers the following stocks and shares, and to execute all such deeds and instruments as may be necessary for the purpose, do vest in the said E. P. and A. P. and J. B. H., that is to say (then followed the descriptions of stocks and shares); AND WE DO ORDER that the right to receive the dividends due (if any) and to accrue due on all or any or either of the before-mentioned stocks and shares, do vest in the said E. P. and A. P. and J. B. H. (then followed vesting orders as to the lands, chattels, and mortgage debts subject to the trusts of the will).—*Re Peacock* (in Lunacy and in Chancery), 14 Ch. D. 212.

N.B.—The words in italics are now omitted as unnecessary. As to this form of order, see notes to Forms 4 and 5, *inf.* p. 1214; see also note to Form 33, *inf.* p. 1239.

4. *Appointment of New Trustees—Limited Company—Shares not fully paid up—Vesting Order—“Stock”—“Into the Names of New Trustees”—“Any Purchaser or Purchasers”—Trustee Act, 1893, ss. 25 (1), 35 (1), (3), (4), (5), and 50.*

UPON the application of the Plts &c., And upon reading &c., The Judge doth appoint C. A. of &c. to be a new trustee of the will of the above-named &c., in substitution for A. A., who has been adjudicated bankrupt, jointly with the Deft J. F. A., the existing trustee; And it appearing by affidavit &c. that the testatrix was at the time of her death beneficially entitled to the stocks and shares mentioned in the schedule to this order now standing in the names of the said J. F. A. and A. A., except the — shares [*these shares were not fully paid up*] in the N. Z. T. and L. Co., which are standing in the name of the said A. A. alone, but as trustee of the testatrix; Let the right [*to call for a transfer of, and*] to transfer the said sums of stock and shares to any purchaser or purchasers, and to receive the dividends accrued and to accrue due thereon, vest in the said J. F. A. and C. A. as such trustees, the said J. F. A. and C. A. by their solrs undertaking to hold the proceeds of the sale thereof (if any) upon the trusts of the said will; And Let the right to sue for and recover any chose in action subject to the trusts &c., or any interest in respect thereof, including any dividends or interest on the said stocks and shares, and also the moneys in the hands of the Union Bank of London in the joint names of the said J. F. A. and A. A., vest in the said J. F. A. and C. A. as such trustees.

The Schedule :—

Part I. Stocks and shares still remaining subject to the trusts of the will of E. A., deceased [*description*].

Part II. Stocks and shares since bought [*description*].

—*Alcock v. Alcock*, Chitty, J., 8 March, 1892, A. 379; approved by C. A. in *Re New Zealand Trust and Loan Co.*, (1893) 1 Ch. 403.

N.B.—The words in italics are now omitted as unnecessary.

The above form (Form 4) may be used where shares are being dealt with on which there is a liability to calls. The next following form (Form 5) is the ordinary form for cases where there is no such liability, but it is competent for a Judge to make an order in either form according to the special circumstances of the case: see *Re Gregson*, (1893) 3 Ch. 233, C. A., where Form 4 is explained and Form 5 (which is identical with Form 4, p. 1073, Seton, 5th ed.) approved of.

5. *Appointing New Trustees where Government or other Stocks or Shares fully paid up, comprised in the Trust—Sects. 25 (1), (2), 26, 32, 35 (1), (3), (4), 36, and sect. 50.*

AND it appearing to the satisfaction of the Court or Judge that A. and B., the trustees of the said indenture &c. [*or of the will of &c.*], are both dead [*or that A., one of the trustees of &c., is dead, and that B., the surviving trustee thereof, is out of the jurisdiction of this Court, or cannot be found &c., or, under sect. 25 (1), hath been convicted of felony, or if there be any other disability, state it, or desires to retire*

from the said trust], and that it is expedient to appoint a new trustee [or new trustees] of the said indenture [or will], and inexpedient [or difficult, or impracticable] so to do without the assistance of this Court, and that the Petr [or Petrs] is [or are] beneficially interested in the property, subject to the trusts of the said indenture [or will], comprising the (New Consols) hereinafter mentioned [or has [or have] been duly appointed trustee [or trustees] of the said indenture [or will], and that the (New Consols) hereinafter mentioned are (comprised in the property), subject to the trusts thereof] :—Direction to appoint trustees and vest land and choses in action, if any [Form 1, p. 1210]; And Let the right to [call for a transfer of and to] transfer £— (New Consols) standing in the name of A. [If so, deceased] in the books of the Bank of England by the description of &c. [or in the names of A. and B. [If so, deceased] as trustee [or trustees] of the said indenture [or will], and to receive any dividends now due and to accrue due on the said (New Consols)] vest in the said &c. [name the new trustee or trustees]; And Let him or them transfer the said (New Consols) into his [or their] own name [or names], to be held by him [or them] upon the trusts &c. Form 1, p. 1210, and note, pp. 1210, 1211.

N. B.—This form, which was settled by the late Sir Geo. Jessel, M. R., and is identical with Form 4, p. 1073, Seton, 5th ed., was approved of by C. A. in *Re Gregson*, (1893) 3 Ch. 233. The words in italics as to calling for transfer are now omitted as unnecessary.

For order vesting stock in new liquidator, the old one being *ex jur.*, see *Crown Co-operative Co.*, Chitty, J., 30 Nov. 1881, A. 2318, *inf.* p. 1246.

For order appointing two new trustees of a settlement in the room of two retiring, to act with two who continued, and directing the bank officer to transfer stock comprised in the trust to the four, see *Re D. of Hamilton*, M. R., 29 July, 1855, A. 1515.

For order appointing new trustees in place of two deceased, and one who could not be found, and directing bank officer to transfer stock to them and the new trustees, and that any one of them might receive the dividends due, or to accrue due, previous to the transfer, see *Re Kean*, V.-C. K. 9 May, 1853, A. 832.

For order under sects. 23 & 24 of Trustee Act, 1850, now under sect. 35 (1) of Trustee Act, 1893, for new trustees to receive arrears of dividends, see *Re Hartnall*, 5 D. & S. 115; but see *Re Peyton*, 2 D. & J. 290.

For order vesting right to transfer Consols in new trustees, where exor named in the will of the last surviving trustee was abroad, and had not proved, see *Re Martyr*, V.-C. L. Cranworth, 13 Dec. 1850, B. 250.

For order appointing new trustees and vesting a government life annuity, see *Re Sampson*, V.-C. B., 21 Dec. 1872.

6. *New Trustees—Executors refusing to Transfer—Vesting Right to transfer Stock—Sects. 25 (1), 35 (1), (3), (4), and sects. 49 and 50.*

AND it appearing that T., the trustee and surviving exor of the will of B., deceased, the testator &c., died on the — day of —, having duly made his will, dated &c., and thereby appointed E. and C. exors

thereof, who have duly proved the same, and they by their counsel now refusing to transfer the £— New Consols hereinafter mentioned, and to receive the dividends thereof, Let L. and H., in the petition named, be appointed trustees of the will of the said B., deceased, in lieu of (substitution for) the said T., deceased; And Let the right to transfer the £— New Consols standing in the books of the Bank of England, in the name of the said T., and to receive the dividends now due or hereafter to accrue on the said New Consols, vest in the said L. and H.; And Let the said L. and H. transfer the said £— New Consols into their own names, to be held by them upon the trusts of the will of the said B. deceased.—See *Re Barnes*, M. R., 16 Jan. 1853, A. 279.

In this case the Master of the Rolls held the refusal of the exors of the surviving trustee, by their counsel at the bar, to transfer, sufficient to enable the Court to make the order under sect. 32 of Trustee Act, 1850 (now represented by sect. 25 (1) of Trustee Act, 1893). The language as to vesting the right to transfer has been since always followed; and the language used in *Re Lonsdale*, Form 34, *inf.* p. 1239, was settled with the solr to the bank.

And compare Form 42, *inf.* p. 1242, where an exor neglects for twenty-eight days to transfer after request; and see p. 1252.

7. *New Trustee in place of a Bankrupt on Motion.*

UPON the application &c. by counsel for the Plt; the Judge doth, pursuant to the 117th section of the Bankruptcy Act, 1869, and the Trustee Act, 1893, appoint A. B. of &c., and C. D. of &c., trustees of the indenture of settlement dated &c., in substitution for the Defts. Vest land &c.—See *Formby v. Smith*, M. R., 2 March, 1876, A. 473.

8. *Trust Company appointed a Trustee.*

UPON the application of A. B. &c.; And the Judge being of opinion that the £— may be paid and settled in favour of A. B. and her husband and children as hereinafter directed, without any separate examination of A. B.; Doth hereby appoint the Trustees, Exors, and Agency Co., Limited, whose chief office is situated in Melbourne in the colony of Victoria, pursuant to sect. 5 of the Act of the Legislative Council and Legislative Assembly of Victoria, No. 644, to be a trustee of the said £—, for the said A. B., her husband and children, upon the trusts hereinafter mentioned.—*Re Foster*, Hall, V.-C., 26 May, 1882, A. 1791.

9. *Vesting right to transfer Railway Stock in New Trustees.*

DIRECTIONS to appoint new trustees and vest mortgaged lands and sum secured.—And the applicants H. and E. by their counsel admitting that the £— Preference Stock of the W. H. Ry. Co., standing in their names as exors of W. [*deceased trustee*], and the £— Stock of

the G. I. P. Ry. Co., standing in the name of the said E., are subject to the trusts of the said will of B.; Let the right to transfer the said sums of railway stock, and to receive the dividends or income thereof, vest in the said E. and N., as such new trustees of the will of the said B.; And Let the said E. and N. transfer the same stock into their own names to be held by them upon the trusts of the said will, or such of them &c.—*Re Bampton*, V.-C. H., 18 Aug. 1876, A. 1597.

10. *Vesting Right to apply to the Bank for Payment of Cash carried over to the Commissioners of the National Debt.*

AND it appearing that the applicants H. &c., are beneficially interested in the £— cash hereinafter mentioned, subject to the trusts of the indenture dated &c., and that it is expedient to appoint new trustees of the said sum, and impracticable so to do without the assistance of this Court, the Judge doth hereby appoint B. and E. trustees of the said sum of £—; And Let the right to sue for or recover the said sum of £— cash, formerly standing in the names of L. and M., being the balance of a sum issued for paying the principal of certain £5 p. c. Anns, which said sum of £— was carried over, by reason of non-claim, to the Commrs for the Reduction of the National Debt, vest in the said B. and E.; And Let the said B. and E. be at liberty to apply to the Governor and Company of the Bank of England for payment to them, the said B. and E., of the said sum of £—.—*Bond v. Bourdillon*, M. R., 15 March, 1856, A. 775.

11. *Appointment of New Trustees—Vesting Stock and Cash arisen from Conversion of East India Stock, standing in Name of Deceased Trustee, as Survivor in a Joint Account.*

AND it appearing to the satisfaction of the Judge that C., H., W., and R., the trustees of the indenture of settlement dated &c., are all dead, and that the £— New Consols comprised in the trusts of the said indenture of settlement are standing in the books of the Bank of England in the name of the said R., as a survivor in a joint account with the said H., deceased, by the description of R., of &c., and H., of &c., deceased; and that the sum of £— cash, which has arisen from the payment off of the £— Stock, under the provisions of the Act &c., and also comprised in the trusts of the said indenture of settlement, is standing in the names of the said R. as the survivor, in a joint account with the said H., by the description of R., of &c., and H., of &c., deceased; and that the said R. died intestate, and that his pers. represve cannot be found; And it appearing that the applicants, A. B. &c., are beneficially interested &c., and that the applicants F. and G. have been duly appointed trustees of the said indenture of settlement; Let the right [*to call for a transfer of*], and to transfer the said £— New Consols, and to receive the said £— cash and any dividend payable in respect of the

said Consols and stock, vest in the Petrs F. and G., as the trustees of the said indenture of settlement; And Let the Petrs F. and G. transfer the said New Consols into their own names, to be held by them upon the trusts of the said indenture of settlement.—*Re Bradshaw*, V.-C. M., 24 July, 1874, A. 2238.

N.B.—The words in brackets are now omitted as unnecessary.

12. *Appointment of New Trustees of Stock standing to the Account at the Bank of a Body that had ceased to exist, and Vesting Right to Transfer, &c.*—Sects. 25 (1), 35 (1), and 50.

DECLARE that the Lords of His Majesty's Royal Regency of Hanover were trustees of the £— New Consols in the bill (statement of claim) mentioned, for the persons entitled thereto under the statute or family law of the — day of — in the bill (statement of claim) also mentioned; And it appearing that it is expedient to appoint new trustees of the said Consols, and that such appointment cannot be made except with (or, that it is impracticable to do so without) the assistance of this Court; Let A. and B. be appointed trustees of the said £— New Consols standing in the names (to the account in the books of the Bank of England) of the Lords &c. (*as above*); And Let the right to transfer the said £— Consols, and to receive the dividends accrued and to accrue due thereon, vest in the said A. and B., and they are to transfer the said Consols into the names of (the King and Crown Prince of Hanover and Duke of Brunswick), to be held by them in trust for the persons entitled thereto by virtue of the said statute or family law.—Costs of Defts out of the said dividends.—Residue thereof to be paid to the King.—See *Hanover (King of) v. Bank of E.*, V.-C. J., 8 May, 1869, A. 1658; *S. C.*, 8 Eq. 350.

13. *Costs and Expenses made a Charge*—Sect. 38.

LET the costs and expenses of the Petrs [*or, applicants*] and respondents of and relating to this application and consequent thereon [*or if so, any conveyance or transfer in pursuance of this order*] be a charge on the land in respect whereof this application is made and be raised by mortgage of a sufficient part thereof with the approbation of the Judge; And Let such mortgage be settled by the Judge, and be executed by all proper parties as he shall direct.—Interest to be kept down by the trustees, and the money to be applied in payment of the said costs and expenses.

See also *inf.* Form 48, p. 1245, and notes, pp. 1246 *et seq.* Sect. 38 also provides for payment of costs and expenses in such manner and by such persons as to the Court may seem just, but it has been considered unnecessary to give such a form here as the costs are always directed to be paid out of the trust estate.

14. *Undertaking by Beneficiaries when appointed Trustees.*

UPON the application &c.—And the applicants A. B. and C. D., by their counsel, undertaking to take steps immediately for the appoint-

ment of a co-trustee in the case of the decease of either of them, Let A. B. and C. D. be appointed trustees of &c.—*Re Lightbody, Kay, J.*, 19 Dec. 1884, B. 1634; *S. C.*, 52 L. T. 40.

NOTES.

DEFINITION OF WORDS USED—SECT. 50.

By the Trustee Act, 1893 (56 & 57 V. c. 53), s. 50, the sense in which the words "lands," "stock," "seised," "possessed," "contingent right," "convey," "conveyance," "assign," "assignment," "transfer," "Lord Chancellor," "trust," "trustee," "lunatic," "person of unsound mind," "devisee," and "mortgage," are used in the Act, is defined.

Similar definitions of "contingent right," "convey," "conveyance," "land," "lease," "lunatic," "property," "stock," "transfer," "trust," "trustee," "seised," and "possessed," are contained in the Lunacy Act, 1890, s. 341; and the Lunacy Act, 1891, s. 28.

Where the word "lands" only had been used in an order to vest the property subject to the trusts, which consisted of rent-charges, the order was, at the request of the petitioners, directed to be amended by inserting "hereditaments," but without deciding as to the effect of "lands" in the order: *Re Harrison, M. R.*, 28 Jan. 1862, Reg. Min. 122.

"Stock" has been held to include shares in a joint-stock bank: *Re Angelo*, 5 D. & S. 278; and see *Morrice v. Aylmer*, 10 Ch. 148; and shares of a limited co., whether fully paid up or not: *Re New Zealand Trust and Loan Co.*, (1893) 1 Ch. 403, C. A.; and it is apprehended that this holds good under the Act of 1893, so far as vesting orders are concerned.

"TRUST" AND "TRUSTEE" WITHIN THE ACTS.

By the Trustee Act, 1893 (56 & 57 V. c. 53), s. 50, "the expression "trust" does not include the duties incident to an estate conveyed by way of mortgage; but with this exception the expressions 'trust' and 'trustee' include implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property and the duties incident to the office of personal representative of a deceased person."

This exception of the duties incident to an estate conveyed by way of mortgage is to be read as confined to the continuance of the security, during which no relation of trustee and c. q. t. is constituted, and does not extend to a case where there is an express trust, as, for example, a provision that the mortgagor shall hold in trust for the mortgagee: *London and County Bank v. Goddard*, (1897) 1 Ch. 642.

By virtue of the corresponding provision in the Act of 1850 (s. 2), it was held (by Kay, J.) that a trustee may be appointed to perform the duties of an exor: *Re Moore, M'Alpine v. M.*, 21 Ch. D. 778; but this was doubted (by Cotton, L. J.): see *Re Willey*, W. N. (90) 1.

One of several mortgagees whom it is wished to pay off cannot be treated as a trustee, though a trustee of the mortgage money: *Re Osborn*, 12 Eq. 392; but a mortgagee who has been paid off is a trustee: *Re Walker*, 3 Ch. D. 209; and on the death of a mortgagee in fee his heir became a trustee for his exors: *Re Skitter*, 4 W. B. 791. And a mortgage in the form of a deed of trust for sale, and for payment of a sum lent, and the balance to the borrower, was held a trust: *Re Underwood*, 3 K. & J. 745; *Re Keeler*, 11 W. R. 62; and see *Locking v. Parker*, 8 Ch. 30, *et sup.* p. 1154.

As to cases in which the trustee has some beneficial interest, it has been held that where stock is standing in the name of an infant or infants beneficially entitled to it, subject to trusts for maintenance, &c. during minority, the infants can be treated as trustees, and the right to transfer the stock vested and the stock transferred into Court, so that the dividends may be received and applied: *Sanders v. Homer*, 25 Beav. 467, *et inf.* p. 1243; *Gardner v. Cowles*, 3 Ch. D. 304, *et inf.* pp. 1243, 1244; and see *Re Findlay*, 32 Ch. D. 221, 641.

In *Re Westwood*, 6 N. R. 61, 316, however, V.-C. S. discharged a similar order on the objection of the Bank, and made an order under 1 W. IV. c. 65, s. 32; and see *Rives v. R.*, W. N. (66) 144; 14 L. T. 351, *inf.* p. 1252.

Where stock was standing in the names of three trustees and an infant, and two of the trustees were dead, and the third was out of the jurisdiction, the Court appointed a guardian and allowed maintenance, and vested the right to receive the dividends in the guardian, during the infant's minority: *Re Morgan*, 16 July, 1853, B. 1231. And see *Gardner v. Coules*, 3 Ch. D. 304, *inf.* p. 1243.

In *Re Findlay*, 32 Ch. D. 221, 641, the Bank of England declined to act upon an order declaring the infant a trustee of stock, standing in his name and applicable for his maintenance, and vesting the right to transfer it, and the order was confined to vesting the right to receive the dividends in the guardian; and in *Re Kemp*, 59 L. T. 209; 36 W. R. 729; W. N. (88) 138, the Bank declined to act on an order for accumulating the dividends, and the order made was for payment of the dividends to the trustees of the will under which the infant was entitled, to be by them applied for her benefit; but see now National Debt Stockholders' Relief Act, 1892 (55 & 56 V. c. 39), s. 3, *inf.* p. 1254.

The following persons also have been held to be trustees within the Act without suit for declaring them so:—

—trustees of a composition deed: *Re Price*, 6 Eq. 460; *Re Bache*, W. N. (68) 223; of a deed registered under the Bankruptcy Act, 1861: *Re Donisthorpe*, 10 Ch. 55; and a bankrupt's assignee: *Re Joyce*, 2 Eq. 576;

—a vendor of copyholds who has covenanted to surrender and received the price: *Re Collingwood*, 6 W. R. 536; though there was no trust until admittance declared: *Re Cuming*, 5 Ch. 72. The customary heir of a covenantor to surrender copyholds: *Re Bradley's Settled Estates*, 34 W. R. 140; 54 L. T. 43.

—vendors of land generally where there is no dispute as to title or contract: *Re Louvy*, 15 Eq. 78; *Warrender v. Foster*, *inf.* p. 1272; *Re Russell*, 12 Jur. N. S. 224; 35 L. J. Ch. 461; or the contract has been executed: *Re Cuming*, 5 Ch. 72; *Re Colling*, 32 Ch. D. 333, C. A.; *Re Bradley*, 54 L. T. 43; 34 W. R. 140; or been the subject of an award: *Re Taylor*, W. N. (66) 5; but where the right is not clear it must first be established in an action: *Re Carpenter*, Kay, 418; *Re Weeding*, 4 Jur. N. S. 707; *Re Faulder*, W. N. (66) 83; *Re Colling*, *sup.*; and see *Smith v. Hibbard*, 2 Dick. 730;

—a vendor: *Re Angelo*, 5 D. & S. 278; or other constructive trustee of stock or shares or legacies: *Re Davies*, 12 Eq. 214;

—the infant heir of an heir who had elected to take under a will: *Dewar v. Maitland*, 2 Eq. 834.

Where land purchased by a co. was conveyed to their secretary as absolute owner, the Court doubted its jurisdiction to appoint a new trustee in his place until the trusteeship had been established in an action: *Re Martin*, W. N. (86) 183.

As to the heir of a testator whose trustees all died in his lifetime, *v. inf.* p. 1256.

DEVOLUTION OF TRUST AND MORTGAGE ESTATES.

A bequest of "securities for money" to the exors, passed an estate mortgaged in fee, and no order was necessary to vest it in them: *Re King*, 5 D. & S. 644; and see *Re Field*, 9 Ha. 414; *Knight v. Robinson*, 2 K. & J. 503; *Re Williams*, 5 D. & S. 515; but see *Re Cantley*, 17 Jur. 124; 22 L. J. Ch. 391; 1 W. R. 158; and *Smith v. Boucher*, 1 Sm. & G. 72; a general devise to an ascertained class did not pass trust estates: *Re Finney*, 3 Giff. 465.

And as to when the legal estate in trust and mortgaged estates passes, see 1 Jarm. 658; *Lord Braybrooke v. Inskip*, 8 Ves. 417; *Re Packman*, 1 Ch. D. 214; *Re Brown and Sibley's Contract*, 3 Ch. D. 156; *Re Smith*, 4 Ch. D. 70; *Lewin*, 243 *et seq.*

By the Vendor and Purchaser Act, 1874, s. 4, the legal pers. represes of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee had been admitted might, on payment of all sums secured by the

mortgage, convey or surrender the mortgaged estate, whether the mortgage were in form an assurance subject to redemption or an assurance upon trust.

And by the Land Transfer Act, 1875 (38 & 39 V. c. 87), s. 48 (amending the Vendor and Purchaser Act, 1874, s. 5), hereditaments with an unregistered title vested in fee simple in any bare trustee dying intestate after 1 Jan. 1876, shall devolve on his legal pers. represves like chattels real.

The legal estate of a bare trustee dying while the Vendor and Purchaser Act, 1874, s. 5, was in operation (from 7th Aug. 1874, to 1st Jan. 1876), and no conveyance of it having been made under that section before Jan. 1876, devolved on his heir: *Christie v. Ovington*, 1 Ch. D. 279; and as to the meaning of the expression "bare trustee," see *S. C.*; and *Re Docwra, D. v. Faith*, 29 Ch. D. 693; *Re Cunningham and Frayling*, (1891) 2 Ch. 567; following *Christie v. Ovington*, and not following *Morgan v. Swansea Urban Sanitary Authority*, 9 Ch. D. 582; *Lewin*, 236 n. But see *London and County Bank v. Goddard*, (1897) 1 Ch. 642, to the same effect as *Morgan v. Swansea Urban Authority*, 9 Ch. D. 582.

DEVOLUTION UNDER CONVEYANCING, COPYHOLD, AND LAND TRANSFER ACTS.

By the Conveyancing Act, 1881 (44 & 45 V. c. 41), the last-mentioned enactment is repealed in the case of deaths occurring after the 31st Dec. 1881; and it is provided (sect. 30), "where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his pers. represves or repreve from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint pers. represves, as well as for a single pers. repreve, and for all the pers. represves together, to dispose of and otherwise deal with the same, shall belong to the deceased's pers. represves or repreve from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and for the purposes of this section the pers. represves for the time being of the deceased shall be deemed in law his heirs and assigns within the meaning of all trusts and powers." This section applied to copyholds: *Re Hughes, W. N.* (84) 53; but by the Copyhold Act (57 & 58-V. c. 46), s. 88, it is provided that the section "shall not apply to land of copyhold or customary tenure vested in the tenant on the Court rolls on trust or by way of mortgage." This enactment replaces sect. 45 of the Copyhold Act, 1887 (50 & 51 V. c. 73), which was held to be retrospective, so that the legal estate in copyholds which had devolved upon the personal representatives of a sole trustee dying after the 31st December, 1881, and before the passing of the Act of 1887, was divested from them, and vested in the customary heir or devisee, but the validity of any disposition previously made by such representatives was unaffected: *Re Mill's Trusts*, 37 Ch. D. 312; *S. C.* on appeal, 40 Ch. D. 14 (where, however, there was no decision upon this point, but see the queries of Lindley, L. J., at p. 18).

By the Land Transfer Act, 1897 (60 & 61 V. c. 65) s. 1, sub-s. 1, "where real estate is vested in any person" dying on or after 1st January, 1898, "without a right in any other person to take by survivorship, it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his pers. represves or repreve from time to time as if it were a chattel real vesting in them or him," but the expression "real estate" is not to be "deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant," sub-s. 4. As to the effect of the section, see *Brickdale*, 235 *et seq.*

JURISDICTION OF HIGH COURT.

The exclusive jurisdiction of the Court of Chancery under the Trustee Acts is assigned to the Ch. Div.: *Jud Act*, 1873, s. 34 (2) (3). The Trustee Act, 1893, does not extend to Scotland (see s. 52); but by the Trustee Act, 1894

(57 V. c. 10), s. 2, the powers conferred on the High Court in England by sect. 41 of the Trustee Act, 1893, to make vesting orders as to all land and personal estate in Her Majesty's dominions except Scotland, are also given to and may be exercised by the High Court in Ireland. As to lands in Ireland, see *Re Hewitt*, 6 W. R. 537; *Re Taitt*, W. N. (70) 257; *Re Steele, Gold v. Brennan*, 53 L. T. 716; W. N. (85) 218; and that the Judges of the Court of Appeal in Lunacy under their twofold jurisdiction can appoint new trustees and make vesting orders as to property in Ireland, see *Re Smyth*, 55 L. T. 37; 34 W. R. 493; *Re Hodgson*, 11 Ch. D. 888, C. A.; *Re Lamotte*, 4 Ch. D. 325, C. A.; or as to lands in Canada, *Re Groom*, 11 L. T. 336; *Re Schofield*, 24 L. T. 322, where an order was made vesting the lands in the sole *c. q. t.*

JURISDICTION IN LUNACY.

By the Lunacy Act, 1890 (53 V. c. 5), s. 342, certain sections of the Trustee Acts of 1850 and 1852 were repealed, and powers of making vesting orders (see sects. 133—140), appointing new trustees (sect. 141), and awarding costs (sect. 142), similar to and in substitution for those given by the Trustee Acts, are conferred on the "Judge in Lunacy," whose jurisdiction (sect. 108) is to be exercised by the Lord Chancellor for the time being entrusted by the sign manual of Her Majesty with the care, &c. of lunatics, acting alone or jointly with any one or more of the Judges of the Supreme Court so entrusted, or by any one or more of such Judges; and *v. inf.* p. 1259.

JURISDICTION OF PALATINE AND COUNTY COURTS.

By the Trustee Act, 1893, s. 46, "the provisions of this Act with respect to the High Court shall, in their application to cases within the jurisdiction of a palatine court or county court, include that court, and the procedure under this Act in palatine courts and county courts shall be in accordance with the Acts and rules regulating the procedure of those courts."

By the Chancery of Lancaster Act, 1890 (53 & 54 V. c. 23), the Court of Chancery of the County Palatine of Lancaster shall from and after the passing of that Act, as regards all persons, bodies corporate, and property within or becoming subject to its jurisdiction, have and exercise the like powers and jurisdiction, and in a similar manner, and subject to the same restrictions in all respects, as the High Court in its Chancery Division now has and exercises, or may, under or by virtue of any Act of Parliament hereafter passed, and not expressly enacting to the contrary thereof, have and exercise, in respect of all persons, bodies corporate, and property within its jurisdiction.

It has no jurisdiction in Lunacy under the Trustee Acts: *Re Ormerod*, 3 D. & J. 249.

Where a lunatic, illegitimate and unmarried, was resident in the County Palatine, and part of the property consisted of copyholds held of the Duchy, the A. G. of the Duchy was not entitled to attend proceedings, the rights of the Crown being sufficiently represented by the Queen's A. G., who had leave to attend: *Re Kershaw*, 21 Ch. D. 613, C. A.

As to what orders must be made in Lunacy, and what can be made in Chancery only, *v. inf.* pp. 1259, 1260.

COUNTY PALATINE COURT OF DURHAM.

By the Palatine Court of Durham Act, 1889 (52 & 53 V. c. 47), s. 8, it is provided that "all the powers and authorities under the Trustee Act, 1850, and by the Act of the fifteenth and sixteenth years of the Queen, chapter fifty-five, exercisable by Her Majesty's High Courts of Justice, and all the provisions therein contained, shall and may be exercised in like manner by the Palatine Court with respect to all lands and personal estate within the County Palatine: provided always, that no person who is anywhere within

the limits of the jurisdiction of the said High Court shall be deemed by the Palatine Court to be an absent trustee or mortgagee within the meaning of the said Acts."

County Courts can now make orders under the Trustee Act when the value or amount of trust property does not exceed 500*l.*: 51 & 52 V. c. 43, s. 67; and see the County Court Rules, 1889 and 1892.

APPOINTMENT OF NEW TRUSTEES.

By the Trustee Act, 1893 (56 & 57 V. c. 53), s. 25, "(1) The High Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular, and without prejudice to the generality of the foregoing provision, the Court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt. (2) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated. (3) Nothing in this section shall give power to appoint an exor or admor."

By sect. 37, "Every trustee appointed by a Court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust." This enactment replaces sect. 33 of the Trustee Act, 1850, and sect. 33 of the Conveyancing and Law of Property Act, 1881. The former section provided that the new trustee should have the same rights and powers as he "would have had if appointed by decree in a suit duly instituted."

As to who are trustees within the Act, *v. sup.*, pp. 1218, 1219.

Letters of admon were granted to a new trustee appointed by the Court: *Woodfall v. Arbuthnot*, L. R. 3 P. & M. 108; *Re Mundel*, 8 W. R. 683; 6 Jur. N. S. 880; 2 L. T. 653; *Re Morris*, 4 N. R. 480; *Re Carson*, W. N. (67) 32; *Re Clay*, W. N. (73) 129; *Re Driver*, 19 Eq. 352.

APPOINTMENT WHEN MADE BY COURT.

Formerly in some cases, where trustees had already been appointed under a power, the Court has appointed them again for the purpose of making a vesting order, but these cases must now be treated as overruled, and the Court now declines to reappoint trustees, the validity of whose appointment is not in doubt: *Re Vicat*, 33 Ch. D. 103, C. A.; *Re Dewhirst*, 33 Ch. D. 416, C. A.; and see *Re Gardiner*, 33 Ch. D. 590; and see Lewin, 801.

A new trustee may be appointed in the place of one incapable of acting through age or infirmity: *Re Lemann's Trusts*, 22 Ch. D. 633; *Re Phelps' Settlement Trusts*, 31 Ch. D. 351, C. A.; and see *Re Barber*, 39 Ch. D. 187, C. A.; or permanent residence abroad: *Bignold's Trusts*, L. R. 7 Ch. 223.

Where there was a dispute as to where the legal estate was, new trustees were appointed, though there was a decree for admon and a receiver: *Reeves v. Neville*, 10 W. R. 335. So also where the trusteeship was a mere office with a power of sale attached: *Re Boyce*, 4 D. J. & S. 205.

The Court refused to appoint where there was a power to appoint, and the donee was willing to execute it, although it was alleged he intended to act corruptly: *Re Hodson*, 9 Ha. 118; and so, where the sole existing trustee is desirous of exercising his statutory power under sect. 31 of the Conveyancing Act, 1881, the Court has no jurisdiction to make an appoint-

ment against his will, though he has no beneficial interest, and the majority of the *es. q. t.* desire the appointment: *Re Higginbottom*, (1892) 3 Ch. 132; but where two trustees were desirous of retiring, and it was doubtful whether the power of appointing new trustees in the settlement applied to the case, it was deemed expedient to appoint new trustees: *Re Woodgate's Settlement*, 5 W. R. 448; *Re Armstrong's Settlement*, *Id.*

But the Court appointed where the donees of a power to appoint trustees were in India: *Re Humphry*, 1 Jur. N. S. 921. And where the power of appointment was vested in husband and wife jointly, and the wife had obtained a judicial separation, and the husband was resident abroad: *Re Somerset*, W. N. (87) 122. Where there is a power of appointing, which the donees are unwilling to exercise, the petition should so state: *Re Sutton*, W. N. (85) 122.

Where a vesting order also is required (as where one trustee had become a lunatic, though there was a power to appoint on the incapacity of a trustee), the Court, to save expense, has appointed new trustees, and made a vesting order: *Re Davies*, 3 Mac. & G. 278; *Re Cooper*, 4 W. R. 729; *Re Chauncey*, 14 W. R. 849; *Re Manning, Kay*, xxviii., and cases, *inf.* p. 1227.

As to the appointment of new trustees in the place of lunatics, *v. inf.* p. 1228.

The mere fact that the person whose consent to the appointment of trustees is requisite, is lunatic, is not a ground for application in Lunacy to appoint them; the application should be for an order authorizing the committee to consent to an appointment: *Re Garrod*, 31 Ch. D. 164, C. A.

The fact that a sole trustee who was qualified to act desired to be discharged, and proposed to lodge the fund in Court unless new trustees were appointed, was held not a sufficient case of expediency: *Re Nesbitt*, 19 L. R. Ir. 509.

The provision empowering the Court to appoint, "although there is no existing trustee," was inserted in sect. 9 of the Act of 1852, in order to remove a doubt which had been entertained under the Act of 1850: see *Re Tyler's Trust*, 5 De G. & Sm. 56; *Re Hazeldine*, 16 Jur. 853; *Re Frost's Settlement*, 15 Jur. 644.

Where the three trustees appointed by a testator died in his lifetime, the Court appointed new trustees: *Re Smirthwaite's Trusts*, 11 L. R. Eq. 251; but as the power is only to appoint a "new" trustee or trustees, the Court would appear to have no jurisdiction under the statute (though it may have inherent jurisdiction) to make an appointment where no trustees have been appointed by the testator, unless the circumstances are such that the exor or heir may be deemed a constructive trustee: *Re Davis' Trusts*, 12 L. R. Eq. 214; *Re Moore*, 21 Ch. D. 778; and see *Re Gillett's Trusts*, 25 W. R. 23. As to inherent jurisdiction independently of the Act, see *Dodkin v. Brunt*, 6 L. R. Eq. 580.

In *Re Williams*, 38 Ch. D. 231, the legal estate devolved on the heiress, who died after the Conveyancing Act, 1881, and the Court, without requiring representation to be taken out to her, made an order vesting the property for all such estate as was vested in her at the time of her death.

In *Davis v. Chanter*, 4 Jur. N. S. 272; 6 W. R. 416; 27 L. J. Ch. 577; the Court appointed a trustee of a term, the last trustee of which had died in 1799, to save the expense of procuring representation; and in *Re Matthews*, 2 W. R. 85, where no admon had been taken out; and see *Re Herbert*, 8 W. R. 272.

The Court appointed a new trustee, though there had been a breach of trust by an unauthorized investment; but it would not transfer the property: *Re Harrison*, 22 L. J. Ch. 69.

The Lords Justices in Lunacy have power to appoint new trustees of the will of a deceased lunatic when the trustees named in the will have died in the lifetime of the lunatic, such appointment being necessary in order to get rid of funds lying in Court to the credit of the account of the real estate of the lunatic: *Re Orde*, 24 Ch. D. 271, C. A.

Where in an action judgment was given removing a trustee who was of unsound mind, the Court declined to make a vesting order under sect. 34, as application ought to be made in Lunacy: *Re Martin, Land Improvement Co.* v. *M.*, 34 Ch. D. 618; *Re Barber*, 39 Ch. D. 187, C. A.

As to mode of application, and who may apply, *v. inf.* pp. 1254, 1255.

Where one of two trustees for sale was an infant, a new trustee was appointed, and the estate was vested in him jointly with the adult trustee: *Re Porter*, 2 Jur. N. S. 349; 4 W. R. 417; 25 L. J. Ch. 482; *Re Gartside*, 1 W. R. 196, where the infant trustee had a beneficial interest. But the order should be without prejudice to any application by the infant, on coming of age, to be restored to the trusteeship: *Re Shelmerdine*, 33 L. J. Ch. 474; *Re Brunt*, W. N. (83) p. 220; *Re Tallatire*, W. N. (85) p. 191.

In *Re Mais*, 16 Jur. 608, V.-C. K., after conferring with the other Judges, refused to appoint a new trustee in the place of one who had gone to Jamaica; nor will the Court appoint a new trustee in place of one willing to continue, but of advanced age: *Re Hodson*, 9 Ha. 118; 15 Jur. 552. "Depart the United Kingdom" did not mean a temporary absence: *Re The Moravian Society*, 26 Beav. 101, 103, n.; and see *Re Walker*; *Dummers v. Barrow*, (1901) 1 Ch. 259, *sup.* p. 1206. But a trustee, who was of unsound mind, though not found a lunatic, was "unable to act": *Re East*, 8 Ch. 735; and see *Re Dawson*, 3 N. R. 397; *Re Drysdale*, 30 L. J. Ch. 612; 7 Jur. N. S. 667; 4 L. T. 454; 9 W. R. 428; and one who had been for twenty years living abroad in business was held "incapable" to act: *Mennard v. Welford*, 1 S. & G. 426; but not one who had gone to China: *Withington v. W.*, 16 Sim. 104. Where, however, a trustee is permanently residing abroad, and the case is not within the words of the power, a new trustee may be appointed by the Court: *Re Bignold*, 7 Ch. 223.

Trustees were appointed of a fund standing in the name of a corporate body which had ceased to exist: *K. of Hanover v. Bank of E.*, 8 Eq. 350, *sup.* p. 1217; and new trustees of a composition deed: *Re Price*, 6 Eq. 460; and in place of one appointed under the Bankruptcy Act, 1861, s. 110: *Re Raphael*, 9 Eq. 233.

As to the statutory power to appoint new trustees under the Trustee Act, 1893, s. 10, *v. sup.* p. 1205.

There is no jurisdiction under the Trustee Acts to remove a trustee for misconduct: *Re Blanchard*, 3 D. F. & J. 131; *Re Hodson*, *sup.*; *Re Combs*, 51 L. T. 45; Lewin, 801; and where it was alleged that a trustee was of unsound mind, but the insanity was disputed, the Court refused to make an order removing him against his will: *Re Combs*, *sup.*

BANKRUPT OR CONVICT TRUSTER.

Sect. 25 of the Act of 1893 (*v. sup.* p. 1222) expressly empowers the Court to make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony or is a bankrupt, but does not, as regards a bankrupt trustee, introduce the words "whether voluntarily resigning or not," which were contained in the repealed sect. 147 of the Bankruptcy Act, 1883. It is apprehended, however, that the words of the section are sufficient to confer jurisdiction on the Court to remove a bankrupt trustee against his will: see *Coombes v. Brookes*, 12 L. R. Eq. 61; *Re Adams' Trusts*, 12 Ch. D. 634. In *Re Foster's Trusts*, 55 L. T. 479, a bankrupt trustee who had obtained his discharge was removed on the application of his co-trustee, who was also a beneficiary, although the application was opposed by beneficiaries entitled to larger shares than the Petr.

It is the duty of the Court to remove the bankrupt, although not charged with misconduct, except under special circumstances: *Re Barker*, 1 Ch. D. 43; and this rule applies to a debtor liquidating by arrangement: *Adams' Trusts*, 12 Ch. D. 634.

And the fact that the bankruptcy is recent is a ground for such removal: *S. C.*; *Re Foster*, 55 L. T. 479, *v. sup.*

The Court has jurisdiction either upon summons or petition to appoint a new trustee in substitution for one convicted of felony or bankrupt, but the exercise of the jurisdiction depends on the circumstances of each particular case: *Re Dawson's Trusts*, W. N. (99) p. 134.

The 15 & 16 V. c. 55, s. 8, authorized the appointment of a new trustee in place of a trustee convicted of felony; and see 33 & 34 V. c. 23, abolishing forfeiture for felony, and enabling the Crown to appoint an admor in whom a convict's property shall vest, and revert to him on the completion of his sentence.

PERFORMANCE OF DUTIES OF EXECUTOR.

The concluding sub-sect. of sect. 25 (of the Trustee Act, 1893), providing that nothing contained in the section shall give power to appoint an exor or admor, is a new enactment. It must be read in connection with the definition, and so read, the effect of it appears to be that the Court cannot appoint a trustee to perform duties which belong not to the office of a trustee, but only to that of an exor, but that when the estate is cleared by payment of debts and the exor assumes the character of trustee, a new trustee may, in a fit case, be appointed in his place: see *Eaton v. Daines*, W. N. (94) p. 32. Under the former Acts it had been held by Kay, J., in *Re Moore*, 21 Ch. D. 778, that the Court had jurisdiction to appoint a trustee to perform executorial duties, but this decision was doubted by Cotton, L. J., in *Re Willey*, W. N. (90) p. 1.

As to removal of exor and appointment of judicial trustee, *v. inf.* p. 1278.

NUMBER OF TRUSTEES TO BE APPOINTED.

The Court, on an allegation that the trust was almost wound up, appointed two in place of three: *Re Marriott*, W. N. (68) 215; and one trustee only in place of one originally appointed by a will: *Re Reynault*, 16 Jur. 233.

But generally the Court will not leave the admon to a sole trustee, though there was only one originally: *Re Tunstall*, 4 Dr. & S. 421; *Re Dickinson*, 1 Jur. N. S. 724; and where the will only appointed one, reversioners were entitled to have another added, but at their own cost: *Re Brackenbury*, 10 Eq. 45.

The Court appointed two in place of three: *Bulkeley v. E. Eglinton*, 1 Jur. N. S. 994; and where one of three wished to retire, and a successor could not be found, and there was power to reduce the number, the other two were appointed sole trustees in place of the three: *Re Stokes*, 13 Eq. 333; and this decision was followed in subsequent cases: *Re Harford*, 13 Ch. D. 135; *Re Shepperdson*, 49 L. J. Ch. 619; *Re Northorp*, 29 W. R. 134; and see *Re Fowler's Trusts*, 55 L. T. 546. This practice of the Court was arrested by the case of *Re Colyer*, 50 L. J. Ch. 479, in which the Court, on a Lunacy petition, declined to follow it, and thenceforth the whole number of trustees was required to be filled up: *Re Aston*, 23 Ch. D. 217, C. A. (where Jessel, M. B., while adhering to his decision in *Re Harford*, declined to follow it in order to avoid a conflict of decisions); *Re Lamb*, 28 Ch. D. 77; *Re Gardiner*, 33 Ch. D. 590; except in cases where the whole fund was immediately divisible: *Re Martyn*; *Re Tout's Will*, 26 Ch. D. 745, C. A.; *Re Lamb, sup.*; but since the Trustee Act, 1893, orders have been made both in Chancery and in Lunacy vesting trust property in three continuing trustees where four were originally appointed: *Re Leon*, (1892) 1 Ch. 348, C. A.; *Re Lees' Settlement*, (1896) 2 Ch. 508; and see *Dugmore v. Sufield*, W. N. (96) p. 50; *Re Price*, W. N. (94) p. 169; and in two where there were originally three: *Re Fitzherbert's Settlement*, W. N. (98) 58; and *quere* whether now two trustees are not a sufficient number in all ordinary cases: Lewin, 803, n.

Where an action was pending to execute the trusts, and no new trustee could be found, the Court accepted an undertaking from the continuing trustees to bring the trust funds immediately into Court in the action: *Davies v. Hodgson*, 32 Ch. D. 225.

WHO MAY BE APPOINTED TRUSTEES.

Relations of the *cs. q. t.* are objectionable: *Wilding v. Bolder*, 21 Beav. 222; and see *Re Peake's Settled Estates*, (1894) 3 Ch. 520 (where the Court was reluctant to repose powers in two trustees, widow and spinster); and women, though unmarried, are not generally appointed: Lewin, 40, 41; but in *Re Berkely, B. v. B.*, 9 Ch. 720, a married woman, a relation of the *cs. q. t.*, was appointed in the absence of any other suitable person: and see *Barnes v. Addy*, 9 Ch. 244; and under the Settled Land Acts the Court has declined to appoint two brothers trustees: *Re Knowle's Settled Estates*, 27 Ch. D. 707; *v. inf.* Chap. XLV., "SETTLEMENT."

Under special circumstances *cs. q. t.* have been appointed: *Re Conybeare*, 1 W. R. 458; Lewin, 41; so in *Re Roskell*, 28 April, 1860, a *c. q. t.* was

appointed trustee with two others at the request of several of the adult *cs. q. t.*: *Re Custis*, Ir. R. 5 Eq. 429; and the appointment out of Court of successive tenants for life as trustees was held good: *Forster v. Abraham*, 17 Eq. 351.

The tenant for life was appointed a trustee where the trusts were onerous, and no other person could be induced to act: *Exp. Clutton*, 17 Jur. 988.

The solr of the tenant for life will not in general be appointed by the Court: *Re E. of Stamford, Payne v. S.*, (1896) 1 Ch. 288; *Lewin*, 802.

And the Court refused to appoint a person entitled in remainder after an infant's estate tail to be a trustee of the estate and money held therewith, on the ground that his interest was adverse to the infant: *Re Paine's Trusts*, 33 W. R. 564.

In *Re Hattatt*, W. N. (70) 14; 21 L. T. 781; 18 W. R. 416; followed in *Re Lightbody*, 52 L. T. 40; *Re Burgess*, W. N. (77) 87, the husband of a *c. q. t.* was appointed on his undertaking, if he became sole trustee, to take steps immediately for the appointment of a co-trustee (but see *Lewin*, 802, n., for a reference to a case in which such undertaking was not required); and, under special circumstances, the solr to the Petrs was appointed: *Re Brentnall*, W. N. (72) 77.

Where there are two distinct trust estates under the same will, but only one set of trustees, the Court, with the consent of the represve of the surviving trustee, will appoint new trustees of one estate without dealing with the other estate: *Re Dennis*, 12 W. R. 575; and generally the Court has assumed the like power of appointing separate trustees of separate shares: *Re Cotterill's Trusts*, W. N. (69) 183; *Re Cunard's Trusts*, 48 L. J. Ch. 129; 27 W. R. 52; *Re Paine's Trusts*, 28 Ch. D. 725; *Re Moss's Trusts*, 37 Ch. D. 513.

Persons living abroad cannot in general be appointed; and the Court refused to appoint three Frenchmen, resident in Paris, trustees of a fund settled on the wife of a Frenchman, with power to invest in the French funds: *Re Guibert*, 16 Jur. 852; *Re Long*, 17 W. R. 218; but English trustees were appointed of an Irish estate: *Re Custis*, Ir. R. 5 Eq. 429.

And, under special circumstances rendering it advisable so to do, trustees resident out of the jurisdiction have been appointed: *Re Freeman*, 37 Ch. D. 148; *Re Liddiard*, 14 Ch. D. 310; *Re Austin*, 38 L. T. 601; *Re Cunard*, 48 L. J. Ch. 192; 27 W. R. 52; *Re Hill*, W. N. (74) 228; but an undertaking has been required from them not to exercise the power of appointing new trustees without the sanction of the Court: *Re Freeman*, *sup.*

And where all the *cs. q. t.* were of age and absolutely entitled (including married women entitled in reversion for their separate use), and all living in Australia, the Court appointed Australian trustees: *Re Drewe*, W. N. (76) 168; and so where all the parties were resident in Australia, and it was intended to invest the trust funds in Australian securities: *Re Liddiard*, 14 Ch. D. 310; and an appointment by the husband and wife, on going to live in America, of American trustees was held valid: *Meinertzhagen v. Davis*, 1 Coll. 335.

EVIDENCE.

On applications under the Act for the appointment of new trustees, the Court requires evidence to show who are the parties interested under the trust, and requires them to be served.

And evidence of the death, or disability, &c., of trustees in whose place a new trustee is to be appointed, and of the fitness of the proposed trustee, must also be produced, together with his consent to act.

Now, by O. XXXVIII, 19a, a written consent, signed by the trustee and verified by the signature of his solr, is sufficient evidence. This rule did not apply in lunacy: *Re Wilson*, 31 Ch. D. 522, C. A.; but did to proceedings in lunacy and chancery: *Re Hume*, 35 Ch. D. 457, C. A.; but now under the Lunacy Rules, 1892, the practice in lunacy is the same.

An affidavit of the willingness of the proposed new trustee was not enough, but a letter was sufficient, or his appearance and consent by counsel: *Re Parke*, 21 L. T. 218; *Re Battersby*, 16 Jur. 900.

Affidavits of two persons as to fitness have been required or accepted: *Re Morris*, 11 Feb. 1870, V.-C. M.; *Re Shephard*, 2 Jan. 1871, V.-C. M.; but

in *Re Sudbury*, 7 Nov. 1871, V.-C. Wickens only required the affidavit of one; and now in ordinary cases an affidavit by one is sufficient: *Re Hartley*, W. N. (79) 187; and the costs of a second affidavit may be disallowed: *Re Arden*, W. N. (87) 166; but where the estate is large, a second affidavit may be required: *Re Hartley*, *sup.*

If the deponent is described vaguely as "gentleman," the costs of the affidavit may be disallowed as useless: *Re Harwood*, 55 L. T. 373; *Re Orde*, 24 Ch. D. 271, C. A.; but this is not applicable to affidavits generally: *Re Dodsworth*, (1891) 1 Ch. 657.

As to the form of the affidavit, see *Re Castle Sterry*, W. N. (88) 179; *Dan.* 869.

A statement that proposed trustees were "persons in good credit in the neighbourhood in which they respectively carried on business" was held a sufficient statement of their pecuniary means: *Re Smith's Policy Trust, S. v. S.*, W. N. (94) 68.

The new trustee should not appear: *Re Draper*, 2 W. R. 440; but may for consenting: *Re Parke*, 21 L. T. 218; and for the forms, see D. C. F. 628.

The affidavit of fitness should not be made by the solr: *Grundy v. Buckenridge*, 17 Jur. 731; 22 L. J. Ch. 1007. The affidavit of the solr for the Petrs verifying the statements in the petition has been received as sufficient evidence of the persons constituting classes of *es. q. t.*, without production of certificates and affidavits of identity: *Re Hoskins*, 4 D. & J. 436; but the affidavit of some member of the family is preferred.

Though strict proof is not required as to the parties interested beneficially, the deaths or disability of trustees should be regularly proved.

Where it afterwards appeared that the appointment was improper the case was reheard and the order discharged: *Re Giraud*, 32 Beav. 385.

In *Foster v. Dawber*, 1 Dr. & S. 172, a new trustee was appointed in place of a trustee disclaiming at the bar; and see *Lewin*, 211, 212; in *Re Ellison*, 2 Jur. N. S. 62, a disclaimer by deed was thought necessary, but it is not now always insisted on.

VESTING ORDER ON APPOINTMENT OF NEW TRUSTEES.

Upon a petition for appointment of new trustees and a vesting order, an order was made vesting the trust estates in the new trustees "for all the estate and interest which the deceased trustee had in him immediately before (or at the time of) his death": *Re Rackstraw*, 52 L. T. 612; 33 W. R. 559. But this form is only to be adopted in exceptional cases, where it is difficult or impossible to identify the heir; or where the Court is satisfied that the estate has not been dealt with since the death of the last surviving trustee in such a manner that parties not before the Court might be prejudiced by an order in that form: *Re Bishop of Sarum*, W. N. (86) 140; 55 L. T. 313. Where the order was made vesting the property in the new trustees "for the estate therein now vested in the heir-at-law of the deceased trustee," and letters of admon were subsequently taken out to the estate of the deceased trustee, the question arose whether the vesting order had any effect, having regard to the 30th section of the Conv. Act, and the Court, upon motion, directed that, "notwithstanding the previous order, the land should vest in the new trustees for all the estate therein vested in the legal pers. represve": *Re Pilling*, 26 Ch. D. 432. Where the sole heiress-at-law of a testator had died intestate subsequently to the Act, and it was desired to appoint new trustees of the will on a petition served only on the heir-at-law, an order was made vesting the property in the new trustees for all such estate as was vested in the heiress at the time of her death: *Re Williams's Trusts*, 36 Ch. D. 231.

And as to declaring parties to suits trustees, *v. inf.* pp. 1271 *et seq.*

A vesting order should contain a general description of the property: *Re Ord*, 3 W. R. 386; and see Form 1, p. 1210. Vesting orders forming links in title ought to be framed with scrupulous care: *Lewin*, 809.

Leaseholds vested in a retiring trustee did not pass by general words in a deed of assignment to new trustees: *Hopkinson v. Lusk*, 12 W. R. 392.

The Court has jurisdiction to vest the estate, though it has escheated to the Crown, provided the Crown consent: *Re Martinez*, W. N. (70) 70; 22 L. T. 403.

Where part of the property was inadvertently omitted, a further order was made on a new petition vesting the omitted property: *Re Hopper*, W.N. (86) 41; 54 L. T. 267.

An order vesting land in several persons creates a good joint tenancy: *v. inf.* p. 1249.

UNDER LUNACY ACT, 1890.

Under sects. 128 and 129 of the Lunacy Act, 1890 (53 V. c. 5), the Judge in Lunacy can empower the committee of a lunatic to exercise in the name and on behalf of the lunatic a power of appointing new trustees vested in the lunatic, and any person appointed is to have all the same rights and powers as he would have had if the order had been made by the High Court.

Under these sections, where a lunatic is donee of a power of appointing new trustees of a settlement the Judge has jurisdiction to authorize the committee of the lunatic to exercise the power on his behalf by appointing persons named in the order to be new trustees of the settlement, and, where the settlement comprises bank anns, to authorize the persons so named, upon their appointment as trustees, to call for a transfer of the bank anns into their own names, to receive the dividends until transfer, and to hold the stock, when transferred, upon the trusts of the settlement: *Re Shortridge*, (1895) 1 Ch. 278, C. A. (In this case, a deed reciting the order and appointing the trustees having been duly executed, the Bank of England objected to the order as casting upon them the duty of ascertaining whether the deed of appointment was genuine, and the Court intimated that in future the Bank ought in such a case to be supplied with something in the nature of a certificate by the Master in Lunacy identifying the deed on which the Bank have to act.)

The Master in Lunacy has jurisdiction to make the order appointing new trustees and vesting the trust property: *Re Fuller*, (1900) 2 Ch. 551, C. A.; *secus*, a mere vesting order not being by way of admon of the lunatic's estate: *Re Langdale*, (1901) 1 Ch. 3, C. A.

By sect. 141 of the Lunacy Act, 1890, "in every case in which the Judge in Lunacy has jurisdiction to order a conveyance or transfer of land or stock, or to make a vesting order, he may also make an order appointing a new trustee or new trustees."

As to vesting orders of estates of lunatics independently of the appointment of new trustees, *v. inf.* p. 1258.

SECTION XI.—VESTING CONVEYANCE AND TRANSFER OF TRUST PROPERTY INDEPENDENTLY OF THE APPOINTMENT OF TRUSTEES—TRUSTEE ACT, 1893.—O. LV, 13A.

1. *Infant Trustee—Vesting Land*—56 & 57 V. c. 53, s. 26 (ii) (A), and ss. 32 and 50.

LET the land &c. [see sect. 50; take appropriate words from the will or other instrument creating the trust] now subject to the trusts of the will of &c., or of the indenture dated &c., and which A. [infant trustee] is solely or jointly with C. and D. entitled to or possessed of upon trust, as in the petition or summons mentioned, vest in B. [i.e., any such person or in any such manner as the Court may direct] for the estate of the said A., C. and D. therein [i.e., any such estate as the Court may direct].

2. *Releasing Contingent Right of Infant Trustee in Lands*—Sects. 26 (ii) (A)—32 and 50.

LET the land &c. now subject &c. [Form 1] be released from the contingent right therein, to which A. [infant trustee] is solely or jointly with C. and D. entitled upon trust as in the petition or summons mentioned.

3. *Disposing of Contingent Right of Infant Trustee in Land—*
Sects. 26 (ii) (A), and sects. 32 and 50.

LET the contingent right to which A. [*infant trustee*] is solely or jointly with C. and D. entitled in the land now subject &c. [Form 1], upon trust, as in the petition or summons mentioned, be, and the same is hereby disposed of to and vested in B. [*i.e., such person as the Court may direct*].

For form of application, see D. C. F. 1073.

4. *Releasing or Discharging Contingent Right of unborn Persons in*
Land—Sects. 27, 32, and 50.

LET the land &c. now subject &c. [Form 1], be released and discharged from the contingent right to which the same is subject of any unborn child or children [*or issue*] of &c. who upon coming into existence would in respect thereof become entitled to or possessed of such land &c., upon trust as in the petition or summons mentioned.

See note to Form 5A, *inf.*

5. *Vesting for the Estate of unborn Persons in Land—Sects. 27, 32,*
and 50.

LET the land &c. now subject &c. [Form 1], vest in A. or in A. and B. [*i.e., any person*] for the estate or estates therein of which any unborn child or children [*or issue*] of A. would upon coming into existence be entitled to or possessed of, upon trust, as in the petition or summons mentioned.

See note to Form 5A, *inf.*

5A. *Order vesting in Purchasers under a Judgment the Estates of*
Infants and the contingent Estates of unborn Infants—Sects. 27,
32 and 50.

LET the land &c. subject to &c. [Form 1, p. 1228] in the petition [*or summons*] and order dated &c. mentioned (being Lots 2, 3, 4 and 5 in the said petition or summons mentioned) vest in the respective purchasers thereof for all the estate of or to which the infant *Petr* or applicants R. W., C. N. W., J. W., M. H. W., E. H., J. H., and H. H., or any of them are or is, or if they, he, or she had attained the age of twenty-one years would be possessed or entitled, or for all the estate or respective estates of or to which any unborn child or children of the *Petr* or applicants R. W., J. W., and H. H. respectively would on coming into existence be possessed or entitled in the said land &c. comprised in the said Lots 2, 3, 4, and 5 respectively, or any part thereof respectively if this order had not been made, that is to say, Let Lots 2 and 3 vest as aforesaid in the *Petr* or applicant J. C. E. ;

And Let Lots 4 and 5 vest as aforesaid in the Petr or applicant J. C.—
See *Wake v. Wake*, Stuart, V.-C., 18 April, 1853, 1852 B. 813; 17 Jur.
545; 1 W. R. 283.

This was an order made under sect. 16 of the Trustee Act, 1850 (now replaced by sect. 27 of the Trustee Act, 1893). In this case Stuart, V.-C., considered that a vesting order, as above, rather than a release of the land from the contingent rights of the unborn children, was the better course.

6. *Infant Mortgagee—Vesting Land—Sects. 28, 32, and 50.*

LET the land &c. now subject &c. [Form 1], and which A. [*infant mortgagee*] is entitled to or possessed of by way of security for money, as in the petition or summons mentioned, vest in B. [*i.e., any such person in any such manner as the Court may direct*] for the estate of the said A. therein [*i.e., any such estate as the Court may direct*].

7. *Releasing Contingent Right of Infant Mortgagee in Land—Sects. 28, 32, and 50.*

LET the land &c. now subject &c. [Form 1], be released from the contingent right therein to which A. [*infant mortgagee*] is entitled by way of security for money, as in the petition or summons mentioned.

8. *Disposing of Contingent Right of Infant Mortgagee in Land—Sects. 28, 32, and 50.*

LET the contingent right to which A. [*infant mortgagee*] is entitled in the land now subject &c. [Form 1], by way of security for money, as in the [petition or summons] mentioned, be, and the same is hereby disposed of to and vested in B. [*i.e. such person as the Court may direct*].

9. *Sole Trustee out of the Jurisdiction, or not found—Vesting Lands—Sects. 26 (ii), (B), (C), 32, and 50.*

LET the land &c. now subject to &c. [Form 1, p. 1228], which A. [*Trustee who is out of the jurisdiction of the Court, or cannot be found, and if not found add if now living*] is solely entitled to or possessed of upon trust, as in the [petition or summons] mentioned, vest in B. [*i.e., any such person in any such manner as the Court may direct*] for the estate of A. therein [*i.e., any such estate as the Court may direct*].

For an order vesting land of which a person has, by the Judge of the Lancaster Palatine Court, been declared a trustee, see *Re Meadowcroft*, V.-C. B., 21 Nov. 1885, B. 1494.

For form of application, see D. C. F. 1070.

10. *Joint Trustee out of the Jurisdiction, or not found—Vesting Lands—Sects. 26 (ii), (b), (c), 32, and 50.*

LET the land &c. now subject to &c. [Form 1, p. 1228] which A. and B. are entitled to or possessed of jointly with C. [*Trustee who is out of the jurisdiction or cannot be found and if not found add, if now living*] upon trust, as in the [petition or summons] mentioned, vest in the said A. and B. [*And if so, and in D., of &c., i.e., in any such person in any such manner as the Court shall direct*] for the estate therein of C. [*i.e., any such estate as the Court may direct*].

See *Re M. of Bute*, Joh. 15.

11. *Sole Trustee out of the Jurisdiction, or not found—Releasing Contingent Right in Lands—Sects. 26 (ii), (b), (c), 32, and 50.*

LET the land &c. now subject to &c. [Form 1, p. 1228] be released from the contingent right therein to which A. [*Trustee who is out of the jurisdiction, or cannot be found, and if not found add if now living*] is solely entitled upon trust, as in the [petition or summons] mentioned [*If he cannot be found add or (if the said A. be dead) from the contingent right therein to which he would now be solely entitled if now living*].

12. *Joint Trustee not found—Vesting Mortgage—Sects. 26 (ii), (b), (c), 32 and 50.*

LET the land, messuages, hereditaments, and premises comprised in the four indentures next hereinafter mentioned, viz., the indenture of mortgage &c., vest in the Petrs, the Rt. Hon. C. Baron S., R. G. H. S., and R. T. L. [*the remaining trustees*] alone for all the estate and interest therein which is now vested in the Petrs jointly with the said L. M. W. [*the joint trustee who cannot be found*], but subject to any equities of redemption subsisting therein under the said mortgages respectively, And Let the right to sue for and to recover, and to prove for principal and interest, and other moneys secured by the said mortgages, and any moneys in the hands of the said L. M. W. or his firm as, in the petition mentioned, and also the right to sue for and recover any other chose in action subject to the trusts of the said indenture of settlement, and any interest in respect thereof, vest in the Petrs alone.—*Dugmore v. Suffield*, North, J., 25 April, 1896, A. 2120; W. N. (96) 50.

13. *The like—Vesting Property in Settlement—Number of Trustees diminished—Sects. 26 (ii), (b), (c), 32, and 50.*

LET the right to sue for and recover the sum of £—, secured by the first above-mentioned indenture [*the settlement*], and the interest from time to time to become due in respect thereof, and the benefit of all

securities for the same, including the charge created by the said indenture in the share and interest of the Petr J. A. L. [*the husband*] in the hereditaments and premises known as the A. estate, vest in the Petrs J. C. L., F. L. and W. J. O. H. [*the remaining trustees*] for the estate therein now vested in the above-named P. L. [*the absconding trustee*] who cannot be found, to be held by the said J. C. L., F. L. and W. J. O. H. as trustees of the said firstly mentioned indenture.—*Re Lees' Settlement Trusts*, North, J., 18 July, 1896, B. 2975; (1896) 2 Ch. 508.

14. *Sole Trustee out of the Jurisdiction, or not found—Disposing of Contingent Right in Lands—Sects. 26 (ii), (b), (c), 32, and 50.*

LET the contingent right to which A. [*Trustee who is out of the jurisdiction, or cannot be found, and if not found add if now living*] is solely entitled in the land &c. subject to &c. [Form 1, p. 1228] upon trust, as in the petition [*or summons*] mentioned, be, and the same is hereby, disposed of to and vested in B. [*or B. and C., i.e. such person as the Court may direct, and if A. cannot be found add or (if he be dead) to which he would now be solely entitled if now living*].

15. *Joint Trustee out of the Jurisdiction, or not found—Disposing of Contingent Right in Lands—Sects. 26 (ii), (b), (c), 32, and 50.*

LET the contingent right to which A. [*Trustee who is out of the jurisdiction, or cannot be found, and if not found add if now living*] is entitled jointly with C. and D. in the petition [*or summons*] named, in the land, subject to &c. [Form 1, p. 1228], as in the petition [*or summons*] mentioned, be, and the same is hereby, disposed of to and vested in the said C. and D. [*And if so, together with E. in the petition [or summons] named [i.e., in the person entitled jointly, or in him or some other person as the Court may direct]*].

See *Re M. of Bute*, Joh. 15, *et inf.* p. 1249.

16. *Vesting Lands, where uncertain which of several Trustees survived—Sects. 26 (iii), 32, and 50.*

LET the land &c. [Form 1, p. 1228], which A. and B., both deceased [*Trustees as to whom it is uncertain which of them was the survivor*], were jointly entitled to [*or possessed of*] upon trust, as in the petition [*or summons*] mentioned, vest in C. or in C. and D. [*i.e., any such person in any such manner as the Court may direct*], for the estate therein which would now be vested in the survivor of them the said A. and B. if such survivor were now living [*i.e., for any such estate as the Court may direct*].

For form of application, see D. C. F. 1071.

17. *Vesting Lands where uncertain whether the last-known Trustee be living or dead—Sects. 26 (iv), 32, and 50.*

LET the land &c., now subject &c. [Form 1, p. 1228], which A. [*Trustee last known to have been entitled to or possessed of, but as to whom it is uncertain whether he is living or dead*] is, if living, entitled to or possessed of upon trust, as in the petition [*or summons*] mentioned, vest in B. [*or in B. and C., i.e., any such person in any such manner as the Court may direct*], for the estate of the said A. therein or (if the said A. be dead) for the estate therein which would now be vested in him if now living [*i.e., for any such estate as the Court may direct*].

18. *Vesting Lands where Trustee has died Intestate without an Heir or Personal Representative, or where it is uncertain who is his Heir or Personal Representative or Devisee—Sects. 26 (v), 32, and 50.*

LET the land &c. now subject &c. [Form 1, p. 1228], which A. [*Trustee who has died intestate as to such land without an heir or personal representative, or who has died and it is uncertain who is his heir, or personal representative, or devisee*] was entitled to or possessed of upon trust, as in the petition [*or summons*] mentioned, vest in B. [*or in B. and C. &c., i.e. (any such person in any such manner as the Court shall direct)*], for the estate therein which would now be vested in the said A. if now living [*i.e., for any such estate as the Court may direct*].

As to devolution of land where a trustee has died intestate or subsequently to the Conv. Act, 1881, s. 30, *v. sup.* p. 1220.

19. *Vesting Estate of Person presumed to have died after Order for Sale.*

UPON the application of W., the person by the Master's certificate dated &c., certified to be the purchaser at the sum of £— of the freehold hereditaments at &c., being part of the estates sold pursuant to the order dated &c., and upon hearing counsel for the applicant, and for the Plt and for the Deft, and for the following persons attending the proceedings for whom appearances have been entered, that is to say, K. &c.: And upon reading &c.; And it appearing by the affidavit of A. that there is reason to believe that G., who attended the proceedings and appeared upon the application for the said order for sale, and is named in the Master's said certificate, has died since the said order for sale, but no sufficient evidence has been produced of such death or to show whether the said G. died testate or intestate; And the Judge being of opinion that the Plt and the Deft, and the following persons attending, viz., K. &c., and the said G. if he be still living (or his heirs, or co-heiresses, devisee or devisees), if he be dead, are to be deemed to be entitled to or possessed of the said freehold hereditaments upon a trust within the meaning of the Trustee Act, 1893, and that it is expedient for the purpose of carrying such sale into effect that an order vesting the said freehold hereditaments in the purchaser should be made; Let the said freehold hereditaments vest in the said

W. for the estate of the Plt and the Deft, and of the said K. &c., and of the said G. if he be living, or his heirs or co-heiresses, devisee or devisees, if he be dead.—Following *Galwey v. Carleton*, North, J., at Chambers, 4 Feb. 1892, A. 131.

This order was made after the publication, by order of the Court, of advertisements for G.

20. *Releasing Land from Contingent Right of Unborn Persons—Sect. 27.*

[See Forms 4, 5 and 5A, p. 1229.]

21. *Vesting for the Estates of Unborn Persons in Lands—Sect. 27.*

[See Forms 4, 5 and 5A, p. 1229.]

22. *Vesting Order in place of Conveyance by Heir or Devisee of Heir, &c., or Personal Representative of Mortgagee of Land—Sects. 29 (a), (b), (c), (d), (e), 32, and 50.*

LET the land now subject to &c. [Form 1, p. 1228] comprised in the indenture of mortgage dated &c. in the petition or summons mentioned, whereof A., deceased, was mortgagee [*The mortgagee (a) whose heir, or pers. represve, or devisee is out of the jurisdiction of the Court, or cannot be found; or (b) whose heir, or pers. represve, or devisee, upon demand made by or on behalf of the person entitled to require a conveyance of the land, has stated in writing that he will not convey, or does not convey, the same, for the space of twenty-eight days after a proper deed for conveying the land has been tendered to him by or on behalf of the person so entitled; or (c) where it is uncertain which of several devisees of the mortgagee was the survivor; or (d) where it is uncertain as to the survivor of several devisees of the mortgagees, or as to the heir or pers. represve of the mortgagee whether he is living or dead; or (e) where there is no heir or pers. represve to a mortgagee who has died intestate as to the land, or where the mortgagee has died and it is uncertain who is his heir, or pers. represve, or devisee*], vest in E. [or in E. and F. &c., i.e., in such person or persons in such manner as the Court may direct] for the estate therein which would now be vested in the said A. [or C., or C. and D., the last person or persons known to have been mortgagee or mortgagees, describing him or them as the heir, pers. represve or represves, devisee, or devisees, &c., as the case may be] if now living [or for the estate of &c., i.e., for such estate as the Court may direct].

By sect. 29, it is to be shown that the money due in respect of the mortgage has been paid to the person entitled thereto, or that the order is made by his consent, and that the mortgagee has not entered into possession; but see notes on this section, *inf.* p. 1250; and the Vend. and P. Act, 1874, s. 4, *et sup.* p. 1219.

Where the mortgagee has died since 31st December, 1881, freehold lands on mortgage will devolve, under sect. 30 of the Conveyancing Act, 1881

(*v. sup.* p. 1220), on his legal pers. represve or represves as if such lands were chattels; but copyholds, vested in any tenant on the court rolls, are, by sect. 88 of the Copyhold Act, 1894 (57 & 58 V. c. 46), excepted from the operation of sect. 30 of the Act of 1881; and where the death has occurred subsequently to 1st January, 1898, the provisions of the Land Transfer Act, 1897 (60 & 61 V. c. 65), *v. sup.* p. 1220, are applicable.

23. *Vesting—Representation taken out after date of Order appointing Trustees—Conveyancing Act, s. 30.*

UPON motion &c., by counsel for A. B. and C. D., the trustees of the will of E. F., appointed by an order dated &c.; Let, notwithstanding the said order, the land now subject to the trusts of the said will vest in the said A. B. and C. D., as such new trustees as aforesaid, for the estate therein now vested in G. H. as pers. represve of M. N.; And Let, notwithstanding the said order, the land comprised in the mortgage in the petition on which the said order was made mentioned, being a mortgage from &c. to &c., dated &c., vest in the said A. B. and C. D. as such new trustees as aforesaid for the estate therein now vested in the said G. H. as pers. represve of M. N., but subject to any equity of redemption subsisting therein under the said mortgage.—*Re Pilling*, Pearson J., 9 April, 1884, B. 468; *S. C.*, 26 Ch. D. 432.

24. *Vesting in Trustee by way of Mortgage.*

UPON the petition or application of C. D.; Tax costs of Petr or applicant and respondents as between solr and client; Declare that A. B. is a trustee of the hereditaments and premises comprised in the indenture dated &c., for the Petr within the meaning of the Trustee Act, 1893, subject to the right of the said A. B., his heirs, exors, or admors, to redeem such hereditaments and premises upon payment to the Petr or applicant of £—, together with interest &c., and of the said costs; Let the said hereditaments and premises comprised in the said indenture dated &c., vest in the Petr or applicant by way of security for money for all the estate of the said A. B. therein subject to the right of the said A. B., his heirs, exors, or admors, to redeem such hereditaments and premises upon payment to the Petr or applicant of the said £— interest and costs.—Following *Re Jones' Mortgage*, North, J., 12 Nov. 1888, A. 1615; *S. C.*, 59 L. T. 859.

25. *Vesting in Executors of Mortgagee Legal Estate in Copyholds outstanding in Infant Heir—50 & 51 V. c. 73, s. 45, and Trustee Act, 1893, s. 29.*

UPON the petition or application of A., B., and C., an infant &c., And it appearing that the Petrs or applicants A. and B., as exors of the will of G. H. [*tenant admitted on the court rolls*], are beneficially interested in the moneys secured by the mortgages, dated &c., and that

the Petr C. is an infant, and, as the heir-at-law of the said G. H., is, under and by virtue of the mortgages hereinafter mentioned, a mortgagee of the land comprised therein; Let the copyhold lands and hereditaments comprised in the said several mortgages by conditional surrenders dated &c., vest in the Petrs A. and B. for all the estate of the infant Petr C. therein.—Following *Re Franklyn*, Stirling, J., 17 Nov. 1888, A. 1620; *S. C.*, W. N. (88) 217, modified by Trustee Act, 1893, s. 29.

The testatrix in this case died on the 28th of October, 1887, leaving a will devising all her property, but not devising estates vested in her as mortgagee. There was no custom of descent in the manor.

26. *Persons appointed to convey Land, or release Contingent Right therein—Sect. 33.*

THIS Court or the Judge doth appoint A., of &c., to convey the land subject to &c. [Form 1, p. 1228], and which &c., for the estate &c. [Forms 1, 5, 5A, 6, 9, 10, 11, 14, 16, 17, 18 and 19] [*or to release or dispose of the contingent right of &c.*, Forms 2, 3, 4, 7, 8, 14, 15, *sup.*]; And Let the said A. convey [*or release, or dispose of*] the same accordingly. And see Forms in Section XII., *inf.* pp. 1261 *et seq.*, and note, p. 1254.

For forms of application, see D. C. F. 665, 1072, 1074.

27. *Vesting Copyhold or Customary Lands—Sect. 34.*

AND A., in the petition or summons named, the lord of the manor of &c., whereof the land subject to &c. [Form 1, p. 1228] hereinafter mentioned [*or such parts of the land &c.*, hereinafter mentioned as is of copyhold or customary tenure] are holden, having in writing consented [*or by his counsel consenting*] to this order [*If so*, appoint new trustee, Form 1, *inf.* p. 1210], Let the said copyhold [*or customary*] hereditaments vest in the said B. [*new trustee*] for all the estate therein which would now be vested in the said C. and D. [*disclaiming trustees*] if they had accepted the trusts of the said will.—And see *Rowley v. Adams*, *inf.* p. 1269, and note to sect. 34, *inf.* p. 1251.

For orders vesting copyholds, see *Re Sanders*, V.-C. W., 3 Aug. 1853, B. 1274; *Exp. Carter*, V.-C. W., 22 July, 1853, A. 1552; *Re Hey*, 9 Ha. 221; *Re Boyce*, 4 D. J. & S. 210.

For order appointing new trustees, one of the trustees named in the will having died without having acted, and the other two having disclaimed, and that copyholds vest, without consent of the lord, for the estate which would have vested in the trustees named in the will had they accepted the trusts, see *Re Hurst*, V.-C. W., 20 Dec. 1855, A. 403; and see *Re Filitcroft*, 1 Jur. N. S. 418; *Paterson v. P.*, 2 Eq. 31. And see the order as varied on appeal, *S. C.*, *sub nom. Bristow v. Booth*, L. R. 5 C. P. 80.

For form of consent of lord of manor, see D. C. F. 1080.

28. *Vesting Copyholds Covenanted to be surrendered to Uses of Settlement—Death of Covenantor.*

UPON the petition or application of A. B., an infant, and C. &c., Let the copyhold hereditaments comprised in and covenanted to be

surrendered by the above-mentioned indenture of settlement, dated &c., vest in the Petr or applicant C. upon the trusts of the said indenture for all the estate of the Petr or applicant A. B., as customary heir of G. H. as aforesaid.—*Re Bradley's Settlement*, Chitty, J., 28 Nov. 1885, A. 1670; *S. C.*, 54 L. T. 43; 34 W. R. 148.

29. *Vesting Copyholds for Estate of the Customary Heir of the Devise of Trust Estates, the Devisees in Trust of such Devisee having disclaimed.*

APPOINT F. H. sole trustee of the will of C. H. [*the original testator*] in substitution for W., deceased, who as devisee of trust estates of F., who survived S., his co-trustee under the will of the said C. H., became sole trustee under the said will of C. H.; And Let the copyhold lands subject to the trusts of the said will of the said C. H. vest in the said F. H. for the estate which, by reason of the disclaimer of the devisees in trust of the said W., has become vested in his customary heir.—*Re Hudson*, V.-C. H., 20 Dec. 1876, A. 2168, penned by the V.-C.

The right of the lord of the manor to one or more fines in cases of vesting copyholds under the Trustee Acts has been held to depend on the estate selected by the Court to be vested in the new trustee, so that an order vesting the lands for all the estate and interest of a deceased trustee would only entitle the lord to one fine as upon a conveyance by the deceased trustee in his lifetime: see *Bristow v. Booth*, L. R. 5 C. P. 80; *Lewin*, 811. In order that the rights of the lord may not be prejudiced in his absence, the proper form of order will be, as above, to vest the copyholds in the new trustee for the estate of the customary heir or other person entitled to claim admission at the date of the order.

If the sole surviving trustee died after the 31st December, 1881, the above form will require modification; and if he was not tenant on the court rolls (Copyhold Act, 1894, s. 88, *v. sup.* note to Form No. 22), the form will be inapplicable, as sect. 30 of the Conveyancing Act, 1881, will then apply.

30. *Vesting Lands, or Contingent Right in Land, where Trustee refuses or neglects to convey for Twenty-eight Days after Requirement—Trustee Act, 1893, ss. 26 (vi), and 32 and 50.*

LET the land [Form 1, p. 1228], which A. [*The trustee, who has wilfully refused or neglected to convey the said land, or to release the contingent right to which he is entitled in the said land for the space of twenty-eight days after having been required so to do by or on behalf of the person entitled to require a conveyance or a release*] is solely [or jointly with B. and C. entitled to or possessed of, or entitled to a contingent right in], upon trust as in the petition or summons mentioned, vest in D. [or in the said B. and C., alone, or together with D.], [*i.e.*, in any such person in any such manner as the Court may direct] for the estate of the said A. [*i.e.*, any such estate as the Court may direct] [or released from the contingent right to which the said A. is so entitled] therein.

See note, *inf.* p. 1249.

31. *Where Bank Officer is appointed to transfer Stock—Sect. 35 (2) and sect. 50.*

RECITALS as in orders vesting the right to transfer stock—[Forms 32, 33, 34, 35, 36, 39, 40, 42—46, inclusive, *inf.*]; And Let the Secretary or Deputy Secretary, or Accountant-General for the time being of the Governor and Co. of the Bank of England, transfer the said [New Consols] into the name [or names] of the said B. [or B. and C., *If as trustees*, to be held by them upon the trusts of the said indenture or will; *If so*, And Let the right to receive any dividends now due, or to accrue due, on the said (New Consols) until the transfer thereof, vest in the said B., or B. and C.].—And see p. 1254.

For order under sects. 20 and 23 of the Trustee Act, 1852 (now represented by sect. 35 (1), (i), (ii), (a), (b), (c), (d), (e), (iii) and (2) of the Trustee Act, 1893), for Bank officer to transfer stock and pay dividends into Court pursuant to decree, the Deft neglecting to obey it, and being out of the jurisdiction, see *Keedwell v. Cooke*, V.-C. K. B., 28 March, 1851, A. 713.

For order under same sections directing the Bank officer to transfer into Court, in the matter of the trusts of a testator's will, stock standing in the name of a sole trustee out of the jurisdiction, and that an annual allowance be raised thereout for infants' maintenance, see *Re Jackson*, V.-C. S., 24 March, 1861, A. 1064.

For form of application, see D. C. F. 1075.

32. *Vesting Right to transfer Stock, Joint Trustee being out of the Jurisdiction, or not found, or it being uncertain whether he is alive or dead, or where he is an Infant—Sect. 35 (1) (ii) (a), (b), (c), (iii), (3), (4), (5) and sect. 50.*

AND it appearing to the satisfaction of the Court or Judge that under the indenture dated &c. [or the will of &c.], A. and B. are jointly entitled with C., who is out of the jurisdiction of this Court [or cannot be found, or concerning whom it is uncertain whether he be living or dead, or who is an infant], to the New Consols standing in their names in the books of the Bank of England, upon trust, as in the petition or summons mentioned, and that the Petrs are beneficially interested in [or have been duly appointed trustees of] the said (New Consols), Let the right to transfer the said (£— Consols) [or to, or and to receive any dividends now due and to accrue due on the said New Consols] vest in the said A. and B. [or in the said A. and B. together with D., *i.e.*, in the person or persons jointly entitled, or in him or them together with any other person the Court may appoint]; And Let them transfer the said (New Consols) into their own names, to be held by them upon the trusts of the said indenture [or will].

For forms of application, see D. C. F. 1074.

33. *Vesting Right to transfer Stock—Joint Trustee not found—Sect. 35 (ii) (c), (iii) (b), (5).*

UPON the petition of the Defts, the Rt. Hon. C. Baron S., R. G. H. S., and R. T. L. [the remaining trustees], And upon hearing counsel for the

Plt, the Defts F. L. I. D., L. R. S. A., and A. E. W. D., and for Sir G. C. A., Bart., F. A. W. W., H. D. C., the Hon. A. G. H., and E. T. W., And upon reading &c.; And it appearing to the satisfaction of this Court or Judge that under the said indenture of settlement dated &c., the Petrs are jointly entitled with the Deft L. M. W. [*trustee who cannot be found*], as trustees to the trust funds in the petition mentioned, and that the Plt and the Defts F. L. I. D. and L. R. S. A. are beneficially interested in the said trust funds, and that the Deft L. M. W. cannot be found; Let the right [*to call for a transfer of and*] to transfer the £— India 3½ p. c. stock standing in the names of C. Baron S., R. G. H. S., R. T. L. and L. M. W. in the books of the Governor and Co. of the Bank of England, and to receive the dividends and income thereof, do vest in the Petrs, the Rt. Hon. C. Baron S., R. G. H. S., and R. T. L. [*the remaining trustees*] alone; And Let the Petrs transfer the said stock into their own names accordingly, to be held by them upon the trusts of the said indenture of settlement dated &c.—*Dugmore v. Suffield*, North, J., 25 April, 1896, A. 2120; W. N. (96) 50.

The words in italics are now omitted as unnecessary.

The direction that the trustees transfer stock into their own names (see Trustee Act, 1893, s. 35 (5)) should be added wherever the right to transfer is vested in trustees, to be held in trust. As to the form of the Bank orders, and the order in which the allegations should be introduced, *v. inf.* p. 1248.

For order vesting freehold and leasehold lands and chief rents and the right to transfer stock and various railway, banking, and waterworks companies' shares in two trustees (the third being of unsound mind), and that they exercise it by transferring the shares into the names of themselves and a third trustee who had been appointed, see *Re Edeltan*, C. A., 27 July, 1876, A. 1572.

Where the fund was invested in securities not authorized by the deed, the direction under sect. 26 of the Trustee Act, 1850 (now sect. 35 (3) and (4) of Trustee Act, 1893), for the new trustees to transfer the securities into their own names was omitted: *Re Peacock*, 14 Ch. D. 212, C. A.; 50 L. J. Ch. 280. Form 3, p. 1212.

34. *The like—Stock in the Names of two Trustees and a Cestui que Trust (a Woman since married)—Sect. 35 (ii) (b).*

AFTER reciting that the Petr C. is a trustee jointly with L. of stock standing in their names and in the name of the Petr J., now the wife of the Petr R., and that the said L. is out of the jurisdiction; and that the Petrs J., R., and E. are entitled to the said New Consols, as trustees of the settlement made on the marriage of the Petrs J. and R.—Let the right to transfer the said £— New Consols vest in the said C. and the said J. and R.; And Let them transfer the same into the names of the said J., R., and E., upon the trusts of the said indenture of settlement &c.—*Re Lonsdale*, V.-C. S., 12 Dec. 1853, B. 226.

N.B.—This form was settled with the Bank of England solrs.

For decree declaring the trust in the settlement in favour of Plt's children void, as too remote, and Plt, in the events which had happened, absolutely entitled to the stock comprised in the trust; and, one of the trustees being abroad, vesting the right to transfer it in the co-trustee, and directing him

to transfer it to the Plt, see *Simpson v. Spraggett*, V.-C. W., 2 May, 1857, B. 1164.

For order vesting the right to transfer stock standing in the names of two trustees, one of whom was out of the jurisdiction, in the other alone, and directing him to raise thereout a sum paid for legacy duty, and to transfer the residue into Court, without prejudice to any question, see *Tollemache v. T.*, V.-C. W., 16 Feb. 1861, B. 277.

35. *Vesting Order—Securities—Executors having proved the Will in Scotland refusing to prove here—One resident in Scotland, the other resident in England, but refusing to transfer after Request—Sect. 35 (ii) (b), (d), (5).*

UPON the petition or application of W. S. and F. M. &c., And it appearing to the satisfaction of the Court or Judge that the Debenture No. 928 of the Investment Co., Limited, for £— is standing in the name of X. as survivor in a joint account with B., deceased, and that £— stock of the &c. Railway Co. is standing in the names of the said B. and X. as exors of H. in the books of the respective cos., and that E. and G., the persons entitled to take out representation in England to the estate of the said X., have refused to take out such representation, and that the said E. is resident in Scotland out of the jurisdiction of this Court, and that the said G. has refused to transfer the said debenture stock, according to the direction of the persons [absolutely] entitled thereto for the space of twenty-eight days next after a request in writing for that purpose has been made to him by the Petrs or applicants, and that the Petrs or applicants have been appointed trustees of the will of the said H., Let the right to transfer the —, secured by the said debenture No. &c. of the Investment Co., Limited, standing in the name of X. as survivor, in a joint account with B. in the books of the said co., and £— stock of the &c. Railway Co., standing in the names of the said B. and X., as executors of H., in the books of the said co., and to receive the dividends now due, and to accrue due thereon, vest in the Petrs or applicants W. S. and F. M.; And Let the Petrs or applicants W. S. and F. M. transfer the said debenture and stock into their own names accordingly.—Petrs or applicants to be at liberty to raise and pay costs out of estate of H. —*Re Trubee*, North, J., 19 May, 1892, B. B. 684; (1892) 3 Ch. 55.

36. *Vesting Right to transfer Stock where Sole Trustee is out of the Jurisdiction, or not found, or it is uncertain whether he be alive or dead, or where an Infant—Sect. 35 (1) (ii) (a), (b), (c), (iii) (5).*

AND it appearing to the satisfaction of the Court or Judge that under the indenture dated &c. [or the will of, &c.], A., in the petition or summons named, who is out of the jurisdiction of this Court [or cannot be found, or concerning whom it is uncertain whether he be alive or dead, or who is an infant], is entitled to the £— (New Consols) standing in his name in the books of the Bank of England by the description of

&c., as sole trustee thereof, as in the petition or summons mentioned, and that the Petrs or applicants are beneficially interested in the said New Consols, Let the right to transfer the said (New Consols) [or to, or and to receive any dividends now due or to accrue due on the said (New Consols)] vest in B. [or in B. and C., i.e., any person or persons the Court may appoint; *And if as trustees add*]; And Let them transfer the said New Consols into their own names to be held by them upon the trusts of the said indenture [or will].

For order under sect. 35 (1) (ii) (a), where stock is standing in names of an infant and deceased trustees in special circumstances, see *inf.*, Forms 43 and 44, p. 1243.

37. *Vesting Chose in Action, where Joint Trustee is out of Jurisdiction, or not found, or it is uncertain whether he be alive or dead—Sect. 35 (1) (ii) (b), (c), (iii) (b).*

LET the right to sue for or recover the sum [or any interest in respect of the sum] of £— secured by &c., to which A. and B. are under the indenture dated &c. [or the will of &c.], jointly entitled with C. [*The trustee who is out of the jurisdiction of this Court, or cannot be found, or concerning whom it is uncertain whether he is alive or dead*], upon trust, as in the petition or summons mentioned [and any interest in respect thereof], vest in the said A. and B. alone [or, if so, and in D., i.e., in the person or persons jointly entitled, or in him or them, jointly with any other person the Court may appoint].

For form of application, see D. C. F. 1075.

38. *Same—where Sole Trustee is out of Jurisdiction &c. as in last Form—Sect. 35 (1) (ii) (b), (c), (iii).*

LET the right to sue for, or recover, the sum [or any interest in respect of the sum] of £— secured by &c., to which A. [*The trustee out of the jurisdiction &c., Form 37, sup.*] is under the indenture dated &c. [or the will of &c.] entitled, as sole trustee thereof, as in the petition or summons mentioned [and any interest in respect thereof], vest in B. [or B. and C. &c., i.e., in any such person as the Court may appoint].

39. *Vesting Right to transfer Stock where Sole Trustee neglects or refuses to transfer after request—Sect. 35 (1) (ii) (d), (3), (4), (5), and sect. 50, "Transfer."*

AND it appearing to the satisfaction of the Court or Judge that A., who, under the said indenture, dated &c. [or the will of &c.], is sole trustee of the £— (New Consols) standing in his name in the books of the Bank of England, by the description of &c., has neglected [or refused] to transfer the said New Consols [or to, or and to receive the dividends or income thereof] according to the direction of &c., the person [or persons] absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose has been made to him by the said person [or persons], and that the Petrs or

applicants are beneficially interested in [or have been duly appointed trustees of] the said New Consols; Let the sole right to transfer the said New Consols [or to, or and to receive any dividends now due or to accrue due on the said New Consols] vest in B. [or in B. and C., i.e., in such person as the Court may appoint: And if to a new trustee or trustees add]; And Let him [or them] transfer the said (New Consols) into his [or their] own name [or names], to be held by him [or them] upon the trusts of the said indenture [or will].—See note to Form 33, *sup.*

40. *Vesting Right to transfer Stock where Joint Trustee neglects or refuses to transfer after request—Sect. 35 (1) (ii) (d), (3), (4), (5), and sect. 50, "Transfer."*

AND it appearing to the satisfaction of the Court or Judge that A. and B. in the petition named are, under the indenture dated &c. [or the will of &c.], trustees of the £— (New Consols) standing in the name of &c., in the books of the Bank of England, and that the said A. has neglected &c. [Form 38, *sup.*], Let the right to transfer the said (New Consols) [or to, or and to receive any dividends now due or to accrue due on the said (New Consols)] vest in the said B. alone [or in the said B., and in C. &c., i.e., in the other trustee or trustees, or in him or them and any person whom the Court may appoint jointly with him or them]; And Let him [or them] transfer the said New Consols into his [or their] own name [or names], to be held by him [or them] upon the trusts of the said indenture [or will].

41. *Vesting Chose in Action, where sole Trustee, or one of the Trustees, neglects or refuses to sue after request—Sect. 35 (1) (ii) (d), (3), (4), (5), and sect. 50.*

LET the right to sue for or recover the sum [or any interest in respect of the sum] of £—, secured by &c., of which A. [the trustee who has neglected or refused to sue for or recover such chose in action, or any interest in respect thereof, according to the direction of the person absolutely entitled thereto for the space of twenty-eight days next after a request in writing has been made to him for that purpose by such person] is under the indenture dated &c. [or the will of &c.], sole trustee [or trustee jointly with B. and C.], as in the petition mentioned, [and any interest in respect thereof], vest in D. [or in the said B. and C. alone, or in the said B. and C. and in E., i.e., in such person or persons as the Court may appoint; And if so, to be held by him [or them] upon the trusts of the said indenture [or will].

42. *Vesting Right to transfer Stock standing in the Name of a Deceased Person—Sect. 35 (1) (ii) (b), (c), (d), (e), (3), and (4), and sect. 50, "Transfer," "Trust," and "Trustee."*

AND it appearing to the satisfaction of the Court or Judge that £— (New Consols) are standing in the sole name of A., deceased, in the books

of the Bank of England, by the description of &c., and that B., the pers. represve of the said A., is out of the jurisdiction of this Court [*or cannot be found, or that it is uncertain whether B., the pers. represve of &c., is living or dead, or that B. &c. has neglected, or refused to transfer such stock, or to, or and to receive the dividend or income thereof, according to the direction of &c., the person [or persons] absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose has been made to him by the said &c., or, under sect. 35 (1) (ii) (e), after an order of this Court for that purpose has been served on him*], and that the Petrs *or* applicants are beneficially interested in [*or have been duly appointed trustees of*] the said New Consols; Let the right to transfer the said (New Consols) *or* to, *or* and to receive any dividends now due *or* to accrue due on the said New Consols vest in C. [*or C. and D., i.e., in any such person as the Court may appoint*].

43. *Vesting Right to transfer Stock standing in the Name of Infant and Deceased Trustee—Sect. 35 (1) (ii) (a), sect. 50, "Trust" and "Trustee."*

AND it appearing to (the satisfaction of) this Court *or* the Judge that E. H. and S., as the executrix and exor of H., deceased, are jointly entitled *or* interested, with the infant Plt Mary S., to *or* in the sum of £— New Consols standing in the books &c. in the names of John H., deceased, and Mary S., a minor, and that the said Plt Mary S. is an infant, and is so entitled to the said New Consols upon a trust within the meaning of the Trustee Act, 1893; Let the right to transfer the said New Consols, and to receive the dividends &c. vest in the Defts E. H. and S.—such right to vest only for the purpose of enabling the Defts to transfer the stock and pay the dividends into Court.—[*Add Lodgment Schedule directing lodgment in Court to the account of the infant and A., deceased.*].—See *Sanders v. Homer*, M. R., 26 April, 1858, B. 959; S. C., 25 Beav. 467.—See note, *inf.* p. 1252.

44. *Like Order for Vesting Right to transfer Stock standing in Names of an Infant, and of Deceased Trustees (the Stock having been so placed by mistake, though still subject to the Trusts of the Testator's Will) in the Legal Personal Representative, and for transfer into Court—Sect. 35 (1) (ii) (a), (3), (4), (5), and sect. 50, "Trust" and "Trustee."*

UPON the petition *or* application &c., and it appearing to the satisfaction of this Court, *or* the Judge, that the Petr *or* applicant, the Plt A. G., is, under the will of the testator, W. G., beneficially interested in the following sums of New Consols standing in the books of the Bank of England in the following names, that is to say, £— in the names of M. G. and W. C., deceased, and A. G., £— in the names of M. S. [*wife of O. S.*], W. C., and A. G.,

and £— in the names of A. G., a minor, and W. C., making together £— New Consols; but that such several sums of stock have by mistake been transferred into the name of the said infant, and still remain subject to the trusts of the will of the testator, W. G., as to her maintenance, and are also subject to the costs of this action. And it also appearing that the said M. G., afterwards M. S., the wife of C. S., and the said C. S. and W. C. are all dead, and that the said W. C. was the surviving trustee and exor of the will of the said W. G., and that the Deft C. C. is his executrix and the legal pers. represse of the testator W. G., and that the said Plt is an infant and is now solely entitled to the said several sums of like New Consols, making together £— like Consols, upon a trust within the meaning of the Trustee Act, 1893.

Let the right to transfer the said several sums of like Consols, making together £— New Consols, and to receive the dividends which have already accrued due, and remain unreceived, and also the dividends which may hereafter accrue due on such New Consols prior to the transfer thereof hereinafter directed, vest in the said Deft C. C., the executrix of the said W. C., and the legal pers. represse of the said testator.

And Let the said Deft C. C., widow, transfer the said £— New Consols, and pay any dividends to be received in respect thereof into Court as directed in the Schedule hereto, And Let the funds in Court be dealt with as directed in the said schedule.—[*Add Lodgment and Payment Schedule directing lodgment in Court to the credit of "The share of the infant Plt. A. G., a pecuniary and residuary legatee, subject to the liability to contribute to the costs of action," with directions for payment out of interest of the allowances for the maintenance and education of the infant, for investment of residue of such interest.*]—See *Gardner v. Cowles*, V.-C. H., 14 July, 1876, A. 2314; *S. C.*, 3 Ch. D. 304; see also *Re Harwood*, 20 Ch. D. 536.

45. *Vesting right to transfer Stock where Person neglects to transfer Twenty-eight Days after Order served—Sect. 35 (1) (ii) (e), (3), (4) and sect. 50 "Transfer."*

[*Enter evidence of service.*] AND it appearing to the satisfaction of the Court or Judge that A. has neglected [*or refused*] to transfer [*or to, or and to receive the dividends or income of*] the £— (New Consols) standing in the name of &c. in the books of the Bank of England, for the space of twenty-eight days next after an order of the Court for that purpose has been served on him, and that the Petrs or applicants are beneficially interested in [*or have been duly appointed trustees of*] the said (New Consols); Let the right of the said A. to transfer the said (New Consols) [*or to, or and to receive any dividends now due and to accrue due on the said New Consols*], vest in B. [*or in B. and C., i.e., in such person or persons as the Court shall appoint; Or, if by the Bank officer, see Form 31, p. 1238.*].—And see Note to Form 33, p. 1239.

46. *The like—on Motion of Co-trustee—Sect. 35 (1) (ii), (e),
(iii) (b), (5).*

AND it appearing by the evidence aforesaid that the Deft M. has neglected or refused to transfer, jointly with the said Deft R., the £— New Consols standing in the names of the Defts M. and R. in the books of the Bank of England (by the names and descriptions of &c.), for the space of twenty-eight days next after an order of this Court for that purpose has been served on him, Let the right to transfer the said £— New Consols vest in the said Deft R.; And Let the said Deft R., on or before the — day of —, transfer the said £— New Consols into Court, to the credit of &c., pursuant to the order dated &c.; And Let the said New Consols, when so transferred, be subject to the directions in the said order contained respecting the same.—*Mackenzie v. M.*, V.-C. S., 2 Nov. 1853, B. 88; for the previous orders, see *S. C.*, 5 De G. & Sm. 338.

For order directing the Bank officer to transfer into Court stock which Deft had neglected so to transfer for twenty-eight days after service, and, Deft being out of the jurisdiction, vesting in such officer the right to receive the dividends, and directing him to pay them into Court, see *Bowen v. Price*, M. R., 6 June, 1860, A. 1362.

For order by the Court of Appeal, under 13 & 14 V. c. 60, s. 20, and 15 & 16 V. c. 55, s. 4 (now under sect. 35 (1), (2)), directing Bank officer to join with one trustee in transfer of Consols into Court in the place of another, who had refused to sell part, and transfer the residue, for twenty-eight days after service of an order for that purpose, see *Henderson v. Eason*, 20 July, 1853, A. 1446; but see notes, *inf.* pp. 1252, 1254.

47. *Vesting Right to sue for Chose in Action, where Person refuses
Twenty-eight Days after Order served—Sect. 35 (1), (ii) (e).*

[*Enter evidence of service.*] LET the right of &c. to sue for or recover the sum of £— secured by &c. [or in the hands of &c., and any interest in respect thereof] vest in B. [or in B. and C. &c., i.e., in such person or persons as the Court may appoint].

48. *Payment of Costs and Expenses—Sect. 38.*

LET the costs and expenses of the Petrs [or applicants] and respondents of and incident to this application and consequent thereon [or if so, any conveyance or transfer in pursuance of this order] be paid by the said &c. [trustees] out of the trust estate [or funds, or out of the income thereof] such costs and expenses to be taxed by the Taxing Master.

.. See also Form 13, p. 1217, as to costs and expenses being made a charge.

49. *Vesting Stock in new Liquidator.*

UPON motion &c., by counsel for B., the official liquidator of the C. Co. &c.; And it appearing that F., formerly of &c., late the official liquidator of the said co. is absent beyond seas, and is out of the jurisdiction of this Court, and that the said F. is a trustee of the £— New Consols, hereinafter mentioned upon a trust within the meaning of the Trustee Act, 1893, and that the said B., as such official liquidator as aforesaid, is trustee of the said sum of New Consols which forms part of the assets of the C. Co., Limited.—Let the right to transfer the £— New Consols, standing in the books of the Bank of England in the name of F., of &c., as such official liquidator of the C. Co., Limited, as aforesaid, and to receive any dividends now due and to accrue due on the said £— New Consols, vest in the said B.; And Let the said B. transfer the said £— New Consols into his own name as official liquidator of the C. Co., Limited, upon a request signed by the Master, and countersigned by the said B.—*Re The Crown Co-operative Society, Limited*, Chitty, J., 30 Nov. 1881, A. 2318.

NOTES.

VESTING ORDERS AS TO LAND.—SECT. 26.

By the Trustee Act, 1893 (56 & 57 V. c. 53), s. 26, “in any of the following cases, namely:—

- (i) Where the High Court appoints or has appointed a new trustee; and
- (ii) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person,—
 - (a) is an infant, or
 - (b) is out of the jurisdiction of the High Court, or
 - (c) cannot be found; and
- (iii) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land; and
- (iv) Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead; and
- (v) Where there is no heir or pers. repesve to a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or pers. repesve or devisee of a trustee who was entitled to or possessed of land and is dead; and
- (vi) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement;

the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner, and for any such estate as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.

“Provided that—

- (a) Where the order is consequential on the appointment of a new trustee,

the land shall be vested for such estate as the Court may direct in the persons who on the appointment are the trustees; and

- (b) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of the jurisdiction of the High Court, or cannot be found, the land or right shall be vested in such other person, either alone or with some other person."

Sub-sect. i. Under the corresponding provisions in the previous Acts the Court would act, when expense might be thereby saved, even though there was no impediment to a conveyance: see *Re Manning*, Kay, xxviii; *Re Mundel*, 8 W. R. 683; 6 Jur. N. S. 880; *Davis v. Chanter*, 4 Jur. N. S. 272; 6 W. R. 416; *Paterson v. P.*, 2 Eq. 31; but see *Langhorn v. L.*, 21 L. J. Ch. 860, *et v. sup.* p. 1223. The new trustee might be appointed in a suit and an order made subsequently: see *Re Hughes' Settlement*, 2 H. & M. 695.

Where it was doubtful whether a sole trustee, who was a lunatic, had the legal estate or a mere power, the Court appointed new trustees, and vested in them such estate, if any, as was in the lunatic: *Re Boyce*, 4 D. J. & S. 205.

Where a trustee died before the completion of an order appointing new trustees and vesting the estate, a new order was made, the petition being amended: *Re Havelock*, 14 W. R. 26, 174; 11 Jur. N. S. 906; 35 L. J. Ch. 228.

Sub-sect. ii. The word "jointly" is not limited to a legal joint tenancy but is used in a wide sense, and applies to the case of lands descending to the co-heiress and the surviving heir, or (if the case fall within sect. 30 of the Conveyancing Act, 1881, the pers. represve) of a deceased co-heiress of the deceased trustee: *Re Greenwood's Trusts*, 27 Ch. D. 359; *Re Templer's Trusts*, 4 N. R. 494; but see *M'Murray v. Spicer*, 5 L. R. Eq. 527.

Sub-sect. ii (a). By sect. 143 of the Lunacy Act, 1890 (53 & 54 V. c. 5), it is expressly enacted that the provisions of that Act as to vesting orders shall not affect the jurisdiction of the High Court as to any lunatic trustee or mortgagee who is an infant, and it seems, therefore, that where an infant trustee is of unsound mind, the case does not fall under the lunacy jurisdiction, but under that of the High Court: see *Re Arrowsmith's Trusts*, 4 Jur. N. S. 1123. In sect. 2 of the Trustee Act, 1850, the definition of person of unsound mind expressly excluded an infant. But the expression "infant" *prima facie* includes an infant who is of unsound mind, and the form of vesting order adopted by sects. 134-136 of the Lunacy Act, 1890, is not adapted to the case of an infant.

Sub-sect. ii (b). A temporary absence, as where the captain of a merchantman was abroad on a voyage, is not within the Act: *Hutchinson v. Stephens*, 5 Sim. 499 (a case under the old Act, 11 G. IV. & 1 W. IV. c. 65). A trustee may be treated as out of the jurisdiction, although he appears by counsel: *Stillwell v. Ashley*, 2 Set. on Judgt. 5th ed. 1048. The enactment applies where the trustee out of the jurisdiction is of unsound mind: *Re Gardner's Trusts*, 10 Ch. D. 29.

Sub-sect. vi. A married woman was held capable of refusing: *Rowley v. Adams*, 14 Beav. 130.

A refusal is not wilful if the title of the person requiring the conveyance is disputed, and the trustee entertains a *bona fide* doubt as to it: *Re Mills' Trusts*, 40 Ch. D. 14, O. A., where Cotton, L. J., observed that the corresponding enactment in sect. 2 of the Act of 1852 was only intended to apply in clear cases, as, for instance, where a conveyance to a new trustee, as to whose title there is no doubt, is asked for. *Quære*, whether the refusal must be by the person who is trustee at the date of the order: see *Re Mills' Trusts*, *ubi sup.*

Where a mortgagor covenanted to surrender copyholds to the mortgagee, and refused to surrender for twenty-eight days, the Court made a vesting order and service on the mortgagor, who could not be found, was dispensed with: *Re Crowe's Mortgage*, 13 L. R. Eq. 26; and see *Re Mills' Trusts*, 37 Ch. D. 312, at p. 316.

As to the instrument to be tendered in the case of copyholds, see *Rowley v. Adams*, 14 Beav. 132; and as to the form of order, *v. sup.* p. 1237.

FORM AND EFFECT OF ORDER.

By the Trustee Act, 1893 (56 & 57 V. c. 53), s. 32, "a vesting order under any of the foregoing provisions shall in the case of a vesting order consequential on the appointment of a new trustee, have the same effect as if the persons who before the appointment were the trustees (if any) had duly executed all proper conveyances of the land for such estate as the High Court directs, or if there is no such person, or no such person of full capacity, then as if such person had existed and been of full capacity and had duly executed all proper conveyances of the land for such estate as the Court directs, and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order."

Recitals are now usually omitted, except in orders to be acted upon by the Bank, or in orders made in Chambers; in the latter case, as there is no formal statement of the facts, as in a petition, it is convenient, and in the former case the Bank require the following facts to be stated, viz. :—

1st. That the persons in whose names the stock stands are trustees.

2ndly. That one of the cases provided for by the Act has occurred.

3rdly. That the Petrs are beneficially interested, or otherwise come within sect. 37; and the Court has approved of these facts being set forth: see *Re Ellis*, 24 Beav. 426; *Re Mainwaring*, 26 Beav. 172.

In other cases, if for any particular reason a recital of the facts is thought expedient, the proper allegations may be incorporated in the order.

Where one trustee was insane, and the others refused to act, to avoid circuitry one order was made vesting stock in the persons entitled, instead of one vesting it in the same trustees, and another vesting it (on their refusal to transfer) in the persons entitled: *Re White*, 5 Ch. 698.

And where a mortgage debt was vested in two trustees, one of whom was lunatic and the other out of the jurisdiction, and new trustees of the settlement had been appointed, the Court made an order vesting the debt in the trustee resident out of the jurisdiction, and then, it appearing that he was out of the jurisdiction, in the new trustees: *Re Batho*, 39 Ch. D. 189, C. A.

In making vesting orders as to land the nature of the estate vested has in some instances been expressed in the order, but the form usually adopted is to vest the lands, &c. for the estate of the trustee under disability, or the person or persons who before the order was or were the trustee or trustees (if any); as the vesting order is to have the same effect as if the trustee under disability, or the person or persons who before the order was or were trustee or trustees (if any), had duly executed a conveyance or assignment. In case of separate trusts, or if any exchange, or sale and reinvestment in land, has taken place since the creation of the trust, care must be taken so to express the order that the exchanged or purchased estates may be included.

In vesting land, the Court expresses the estate which the new trustee, &c. is to take, but as regards stock and choses in action the vesting order is absolute. This is on account of the wording of the Act.

The vesting order being a conveyance, should be so worded as to make it clear by the description what property passes: *Re Ord's Trust*, 3 W. R. 386, *sup.* p. 1227. The estate vests from the date of the order: *Woodfall v. Arbuthnot*, 3 L. R. P. & D. 108.

In settling the form of order, the Court has had regard to its effect prospectively: Thus, where the exor and executrix (a married woman) of a mortgagee applied for a vesting order, the Court, instead of vesting the property in the exor and executrix, when the *feme covert* in order to part with it would have to acknowledge the deed, vested it in such person or persons

as the exor and executrix should appoint, and in default thereof, in the exor and executrix: *Re Powell*, 4 K. & J. 338; Lewin, 810.

Easements may be vested: *Re Taylor*, W. N. (66) 5; and rent-charges: *Re Harrison*, *sup.* p. 1218; or mere powers: *Re Boyce*, 4 D. J. & S. 205, but see *Re Franklin*, *Re Porter*, 3 Eq. Rep. 719; 3 W. R. 583; 25 L. T. 262.

But under an order appointing a person to grant a lease where the lessor has become of unsound mind, the benefit of a covenant for quiet enjoyment cannot be given: *Cowper v. Harmer*, 57 L. T. 714; 57 L. J. Ch. 460.

Two orders may be made where desirable: *Brader v. Kerby*, W. N. (72) 174; but where there are many persons to whom shares are to be conveyed, it would seem to be the proper course to appoint a person to convey under s. 33, *q. v. inf.* p. 1254.

Where an infant is tenant in tail in possession the order should simply vest the land for such estate as the infant, if of full age, could convey, and should not refer to the Fines and Recoveries Act (see Form 17, *post*, p. 1270): *Re Montagu, Faber v. M.*, (1896) 1 Ch. 549. Such an order, or its equivalent (an order appointing a person to convey), *per se* bars the estate tail and remainders: *Ibid.*; *Powell v. Matthews*, 1 Jur. N. S. 973.

An order was made vesting the legal estate, subject to a charge by will: *Re Ellerthorpe*, 18 Jur. 669; 2 Eq. R. 1146; and see *Re Winteringham*, 3 W. R. 578; and in a person absolutely entitled: *Re Godfrey's Trusts*, 23 Ch. D. 205.

Where part of the property was inadvertently omitted from a vesting order appointing new trustees, a further order was made on a second petition vesting the property so omitted: *Re Hopper's Trusts*, 54 L. T. 267; W. N. (86) 41; 34 W. R. 392.

An order vesting trust estates in a continuing trustee, and a new trustee appointed in place of one out of the jurisdiction, creates a good joint tenancy, whether the new trustee be appointed in or out of Court: *Smith v. S.*, 3 Drew. 72; *Re M. of Bute*, Joh. 15; overruling *Re Watts*, 9 Ha. 106; and *Re Plyer*, *lb.* 220; see also *sup.* p. 1247.

By 54 & 55 V. c. 39 (Stamp Act, 1891), s. 62, every decree or order, whereby any property on any occasion, except a sale or mortgage, is transferred or vested in any person, is chargeable with duty as a conveyance or transfer of property. And as to stamps where trustees are appointed also, *v. sup.* p. 1208.

NEGLECT OR REFUSAL TO CONVEY LAND—SECT. 26 (VI.).

An order was made where a mortgagee of copyholds had neglected to surrender according to his covenant: *Re Crowe*, 13 Eq. 26.

A refusal to convey is not wilful within the section if the trustee entertains a *bonâ fide* doubt as to a disputed title: *Re Mill*, 40 Ch. D. 14, O. A.

The recusant trustee need not be served with the petition: *S. C., et v. inf.* p. 1256.

After an order on a trustee to assign leaseholds, an order was made on motion that if he did not execute the deed within four days a vesting order should be made, and the twenty-eight days having expired, the plaintiff was entitled to an order: *Knight v. K.*, 14 L. T. 161.

CONTINGENT RIGHTS OF UNBORN PERSONS.

By sect. 27, "where any land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence would, in respect thereof, become entitled or possessed of the land on any trust, the High Court may make an order releasing the land from the contingent right, or may make an order vesting in any person the estate to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land."

Where copyholds devised to an infant for life, with remainder to his first son in tail, were decreed to be sold for payment of debts, and the infant's guardian had been ordered to surrender to the purchaser in place of the

infant, the purchaser was entitled to an order releasing the contingent rights of the unborn issue of the infant: *Wood v. Beetlestone*, 1 K. & J. 213.

INFANT MORTGAGEES—SECT. 28.

By sect. 28, "where any person entitled to or possessed of land, or entitled to a contingent right in land, by way of security for money is an infant, the High Court may make an order vesting or releasing or disposing of the land or right in like manner as in the case of an infant trustee."

Where a decree for sale was made, in a foreclosure suit, against the infant devisee of a mortgagor, a vesting order was unnecessary, equitable estates being bound by the decree: *Re Williams*, 5 D. & S. 515.

The Court refused on petition without suit to declare an infant a trustee of a legal estate in partnership realty vested in him: *Re Burt*, 9 Ha. 289.

Where an equitable mortgagor died intestate, an order was made vesting the legal estate of his heir in the mortgagees, subject to the heir's right to redeem: *Re Jones*, 59 L. T. 859; W. N. (88) 217; and the legal estate in copyholds (see sect. 88 of the Copyhold Act, 1894, *sup.* p. 1235) outstanding in the infant heir of a deceased mortgagee was vested in the mortgagee's exors: *Re Franklyn*, W. N. (88) 217; Form 25, *sup.* p. 1235.

As to service on the infant being unnecessary, see *Re Tweedy*, 9 W. R. 398; *Re Willan*, 9 W. R. 398; *contra*, *Re Adam*, 35 W. R. 770; 57 L. T. 337; W. N. (87) 175 (requiring service on guardian *ad litem*).

ESTATE OF DECEASED MORTGAGEE.

Vesting Order in place of Conveyance by Heir, or Devisee of Heir &c., or Personal Representative of Mortgagee.—By sect. 29, "where a mortgagee of land has died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of the mortgage has been paid to a person entitled to receive the same, or that last-mentioned person consents to any order for the reconveyance of the land, then the High Court may make an order vesting the land in such person or persons in such manner and for such estate as the Court may direct in any of the following cases, namely:—

- (a) Where an heir or pers. reprieve or devisee of the mortgagee is out of the jurisdiction of the High Court or cannot be found; and
- (b) Where an heir or pers. reprieve or devisee of the mortgagee on demand made by or on behalf of a person entitled to require a conveyance of the land has stated in writing that he will not convey the same or does not convey the same for the space of twenty-eight days next after a proper deed for conveying the land has been tendered to him by or on behalf of the person so entitled; and
- (c) Where it is uncertain which of several devisees of the mortgagee was the survivor; and
- (d) Where it is uncertain as to the survivor of several devisees of the mortgagee or as to the heir or pers. reprieve of the mortgagee whether he is living or dead; and
- (e) Where there is no heir or pers. reprieve to a mortgagee who has died intestate as to the land, or where the mortgagee has died and it is uncertain who is his heir or pers. reprieve or devisee."

A case of uncertainty within the section arises if the will of the mortgagee appointing exors is the subject of dispute in the Probate Division: *Re Cook's Mortgage*, (1895) 1 Ch. 700.

If one co-heir of a mortgagee is out of the jurisdiction, he is a trustee for the persons entitled to the mortgage money, and the entirety, on their petition, may be vested in the other co-heir: *Re Templer*, 4 N. R. 494; and see *Re Hughes*, 2 H. & M. 695.

As by sect. 50 (*sup.* p. 1218), the word "trust" does not include a mortgage, an order appointing mortgagor and mortgagee within the jurisdiction as the persons to convey to a purchaser the estate of a mortgagee out of the jurisdiction who has not received his share of the mortgage money cannot be made: *Re Osborn's Mortgage*, 12 Eq. 392; Lewin, 796.

COPYHOLDS.

By the Trustee Act, 1893, s. 34, "(1) Where an order vesting copyhold land in any person is made under this Act with the consent of the lord or lady of the manor, the land shall vest accordingly without surrender or admittance. (2) Where an order is made under this Act appointing any person to convey any copyhold land, that person shall execute and do all assurances and things for completing the assurance of the land; and the lord and lady of the manor and every other person shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done these assurances and things."

It is not necessary that the lord should appear; a verified certificate of his consent will be sufficient; and, if he appear, he will not be allowed costs: *Ayles v. Cox*, 17 Beav. 584.

As the word "lands" includes copyholds (*Bristow v. Booth*, L. R. 5 C. P. 80, 91), orders vesting copyholds may be made without the lord's consent (*Re Flitcroft*, 1 Jur. N. S. 418; *Re Hurst*, *sup.* p. 1236), and without service on him: *Paterson v. P.*, 2 Eq. 31, *contra*, *Re Howard*, 3 W. R. 605; 3 Eq. B. 846; but an order without the lord's consent will not have the effect of surrender and admittance, nor affect the lord's right to fines: *Cooper v. Jones*, 2 Jur. N. S. 59; *Paterson v. P.*, 2 Eq. 31; *S. C.*, on appeal; see *Bristow v. Booth*, L. R. 5 C. P. 86.

Where devisees in trust had disclaimed, the Court, in appointing new trustees, made an order vesting in the new trustees "all the estate which would have vested in the originally-named trustees had they accepted the trusts" without the lord's consent: *Re Flitcroft*, 1 Jur. N. S. 418; and see *Re Hurst*, *sup.* p. 1236.

And where a trustee for A. had been admitted and died without heirs, the Court, under the jurisdiction conferred by sects. 15 and 28 of the Act of 1850, made an order vesting the land in A.: *Re Godfrey's Trusts*, 23 Ch. D. 205.

As to what fines are payable, see *Paterson v. P.*, 2 Eq. 31; *Bristow v. Booth*, L. R. 5 C. P. 80; *Reg. v. Garland*, L. R. 5 Q. B. 269; *Garland v. Mead*, L. R. 6 Q. B. 441; *Hall v. Bromley*, 35 Ch. D. 642, C. A.

The costs of the order are, in general, to be borne by the vendor: *Bradley v. Munton*, 16 Beav. 294; *Ayles v. Cox*, 17 Beav. 584.

A person was appointed to do all necessary acts to vest copyholds in a new trustee: *Re Hey*, 9 Ha. 221.

VESTING STOCK OR CHoses IN ACTION—SECT. 35.

By the Trustee Act, 1893, s. 35, "(1) In any of the following cases, namely:—

- (i) Where the High Court appoints or has appointed a new trustee; and
 - (ii) Where a trustee entitled alone or jointly with another person to stock or to a chose in action—
 - (a) is an infant, or
 - (b) is out of the jurisdiction of the High Court, or
 - (c) cannot be found, or
 - (d) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action, according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing has been made to him by the person so entitled, or
 - (e) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action for twenty-eight days next after an order of the High Court for that purpose has been served on him; or
 - (iii) Where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a chose in action is alive or dead,
- the High Court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue

for or recover a chose in action, in any such person as the Court may appoint:

"Provided that—

- (a) Where the order is consequential on the appointment by the Court of a new trustee, the right shall be vested in the persons who, on the appointment, are the trustees; and
- (b) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last mentioned person either alone or jointly with any other person whom the Court may appoint.

"(2) In all cases where a vesting order can be made under this section, the Court may, if it is more convenient, appoint some proper person to make or join in making the transfer.

"(3) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the Court under this Act, may transfer the stock to himself or any other person, according to the order, and the Banks of England and Ireland and all other companies shall obey every order under this section according to its tenor.

"(4) After notice in writing of an order under this section it shall not be lawful for the Bank of England or of Ireland or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

"(5) The High Court may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act is to be exercised.

"(6) The provisions of this Act as to vesting orders shall apply to shares in ships registered under the Acts relating to merchant shipping as if they were stock."

By the National Debt (Stockholders' Relief) Act, 1892, s. 4, where by virtue of any provision in an Act of Parliament the right to stock is vested in any person, he shall by virtue of the same provision be deemed to be entitled to make a valid transfer of the stock, and (or) to receive and give a valid receipt for any accrued or accruing dividends.

Infant.—In *Sanders v. Homer*, 25 Beav. 467, where stock belonging to an infant stood in the joint names of the infant and a person deceased, the Court vested the right to call for a transfer in the deceased trustee's exors: *S. C.*; *Gardner v. Coules*, 3 Ch. D. 304; Form 44, *sup.* p. 1243; and see *Re Findlay*, 32 Ch. D. 221, 641; *Re Kemp*, 59 L. T. 209.

Where an investment by exors in Consols had been, by mistake, made in the names of infants, they were declared trustees for the exors: *Rives v. R.*, 14 L. T. 351; *W. N.* (86) 144, *et v. sup.* p. 1219.

Person out of Jurisdiction.—Where the husband of the executrix of a deceased trustee was out of the jurisdiction, the right to stock was transferred to the *c. q. t.*: *Re Dennison*, 2 D. M. & G. 900.

Where a new trustee had been appointed by deed in the place of a trustee out of the jurisdiction, the Court vested the right to transfer in the continuing trustee and the new trustee: *Re Blaine*, *W. N.* (86) 203.

Neglect or Refusal to Transfer.—One of several trustees of a sum of stock is not "the person absolutely entitled"; nor is a *c. q. t.*, who has only a life interest, where the application is to transfer the stock: *Mackenzie v. M.*, 5 D. & S. 338.

Secus, on application as to dividends only: *S. C.*; and *Re Hartnall*, 5 D. & S. 111; *Re Peyton*, 2 D. & J. 290.

New trustees, duly appointed, can demand a transfer of the stock to them, as "the person absolutely entitled": *Exp. Russell*, 1 Sim. N. S. 404; *Re Ellis*, 24 Beav. 426.

Where a new trustee had been appointed in place of a retiring trustee who refused to join the continuing one in transferring shares, an order was made: *Re Baxter*, 2 Sm. & G. v.

The corresponding provisions in the former Acts were held applicable where the exor of a surviving trustee had not proved, and declined to say whether he intended doing so, and declined to transfer: *Re Ellis's Settlement*, 24 Beav. 426; *Re Price's Settlement*, *W. N.* (83) 202; *Re Trubee*, (1892) 3 Ch. 55; Form 35, *sup.* p. 1240; and Lewin, 814, note (a).

Until the twenty-eight days have expired the jurisdiction of the Court does not arise, and a petition is premature: *Re Knox's Trusts*, (1895) 1 Ch. 538, per Kekewich, J.

Where the refusal to transfer is wholly unjustifiable the recusant trustee may be ordered to pay costs: *Re Knox's Trusts*, (1895) 1 Ch. 538; (1895) 2 Ch. 383, C. A.

Uncertainty.—Where two of three trustees were dead and it was uncertain whether the other was alive or dead, he could not be treated as a sole trustee, it being uncertain whether he had survived: *Re Randall*, 1 Drew. 401.

Scope and general effect of sect. 35.—The Act contains no express provision (such as was contained in sect. 25 of the Act of 1850) for the making of a vesting order as to stock standing in the “sole name of a deceased trustee”; but in such a case the personal representative is a trustee within the Act: see *Re Ellis's Settlement*, 24 Beav. 426; and for form of order, see *Re Bradshaw*, V.-C. M., July 24, 1874, A. 2238.

Nor is there any special provision, as is made in the case of land by sect. 26, clause v. (*v. sup.* p. 1246), for the case where there is no pers. represve of a sole or last surviving trustee, and in such a case, *semble*, the Court has no jurisdiction to make a vesting order otherwise than consequentially on an appointment of new trustees, and the proper course, therefore, is to apply to the Court for such an appointment and a vesting order: see *Re Cune's Trusts* (1895), 1 I. R. 172; *Re Herbert's Will*, 8 W. R. 272; *Re Crowe's Trusts*, 14 Ch. D. 304, 610; Lewin, 814; and where the exor of the exor of the last surviving trustee refused to prove, see *Re Price*, W. N. (83) 202; and see *Re Trubee*, (1892) 3 Ch. 55, *et sup.*; *Re Ewing*, 29 L. R. Ir. 449 (death of surviving trustee residing out of jurisdiction).

Form and effect of vesting order.—As respects all government stocks, and, in general, all stocks and shares which are fully paid up, the proper form of order is that the right to transfer the stock or shares and to receive the dividends thereon, should vest in the new trustees and that they should transfer the stock or shares into their own names. Where shares are being dealt with under which there is a liability to calls, the direction as to transfer is omitted: *Re Gregson*, (1893) 3 Ch. 233, C. A.; *Re Jolliffe*, W. N. (93) 84; *Re Price*, W. N. (94) 169; *Re Glanville's Trusts*, W. N. (77) 248; (78) 21; Lewin, 815.

The usual form will not be departed from except in special cases, but the Court has power to adopt another form, and an order vesting the right to transfer to “any purchaser or purchasers” has been made under peculiar circumstances: see *Re New Zealand Trust and Loan Co.*, (1893) 1 Ch. 403, C. A., where there was a liability on the shares for unpaid calls; and *Re Peacock*, 14 Ch. D. 212; 50 L. J. Ch. 280; Form 3, *sup.* p. 1212, where part of the trust funds had been invested in unauthorized securities, and it was desired to sell them and reinvest, and the order contained an undertaking by the trustees to hold the proceeds on the trusts of the settlement. As to objection to such a form of order, see Lewin, 815, note (b).

The Bank of England, it seems, objects to an order authorizing an unlimited severance of the dividends from the capital, and where one of four trustees was out of the jurisdiction, and an order had been made vesting the right to receive the dividends in the three trustees, on the objection of the Bank the order was limited to the dividends to accrue during the lives of the three trustees: *Re Peyton's Settlement*, 2 De G. & J. 290; 25 Beav. 317; and see *Re Hartnall*, 5 De G. & S. 111; and where a person of unsound mind was entitled to a sum of stock as trustee, and also entitled to another sum of the same stock beneficially, as the Bank would not apportion the past dividend between the trust estate and the beneficial estate, the Court, in appointing new trustees, vested the right to receive the whole dividend in the new trustees, upon their undertaking that they would invest in the name of the old trustee so much as belonged to him beneficially: *Re Stewart*, 2 De G. F. & J. 1; Lewin, 816; and see *Hodges v. Wheeler*, V.-C. W., Dec. 21, 1867, and May 11, 1867.

As to ordering funds into Court, see *Re Thornton*, 9 W. R. 475; *Re Parby*, 29 L. T. 72.

As to the case where only part of arrears of dividends, &c., belong to the trust, see *Skynner v. Pelichet*, 9 W. R. 191, *et sup.*

By the National Debt (Stockholders' Relief) Act, 1892 (55 & 56 V. c. 39), s. 4, "where by virtue of any provision in an Act of Parliament the right to stock is vested in any person, he shall by virtue of the same provision be deemed to be entitled to make a valid transfer of the stock, and to receive, and give a valid receipt for, any accrued or accruing dividends"; and where the right to transfer stock is similarly vested in him he is to be deemed entitled to receive dividends, &c. It is also provided that the Bank may allow holders of stock to have more than one account, but not more than four accounts can be required in the same names; and by sect. 5, stock may be transferred to and held in the names of an individual and a body corporate, or of two or more bodies corporate: see *Law Guarantee Soc. v. Hunter*, 24 Q. B. D. 406, 411; *sup.* Vol. I. p. 245.

APPOINTING PERSON TO CONVEY OR TRANSFER LAND OR STOCK—
SECTS. 33, 34, 35, SUB-SECT. 2.

By sect. 33, in all cases where a vesting order can be made the Court may, if it is more convenient, appoint a person to convey the land or release the contingent right, and the conveyance or release will have the same effect as an order under the appropriate provision, and by sect. 35 (2), in lieu of making a vesting order as to stock, the Court may, if it is more convenient, appoint some proper person to make or join in making the transfer; by sect. 34, a person may be appointed to surrender copyholds. The question whether a vesting order should be made, or a person appointed to convey, is one of expense and convenience: *Lewin*, 810.

In *Hancox v. Spittle*, 3 S. & G. 478 (on sale in numerous lots, the parties under disabilities being numerous), the latter course, and in *Shepherd v. Churchill*, 25 Beav. 21, the former course, was adopted, as the less expensive.

As to whether a person appointed to convey for a tenant for life can pass estates in remainder, see *Wood v. Beeston*, 1 K. & J. 213. As to the form of the conveyance, see *Lewin*, 810, n.

There is no objection to directing the officer of the Bank to make the transfer under sect. 35 (2), and this in many cases will be the most convenient order; but the enactment only enables the Court to appoint the bank officer to transfer stock to the person or persons in whom it might by order vest the right to transfer; therefore, where the order had directed the bank officer to transfer into Court stock standing in the names of two Defts, one out of the jurisdiction, it was necessary to add a direction for the Deft in the jurisdiction to join in the transfer: *Wade v. Hopkinson*, M. R., 2 Aug. 1856, B. 1842; *Hodgson v. H.*, M. R., 23 July, 1856, A. 1627; and in such a case there is no advantage in directing the bank officer to join. But in *Henderson v. Eason*, *sup.* p. 1245, he was joined.

The order is served on the Bank, and they may require the matter to be brought before the Court on their appearance: *Re Hartnall*, 5 D. & S. 114; *Mackenzie v. M.*, 5 D. & S. 340.

The Bank sustained an objection to an order which would have caused complication in the public accounts: *Skynner v. Pelichet*, 9 W. R. 191; and where the stock subject to the trust formed part of a larger sum standing in the deceased trustee's name, the Bank refused to allow the new trustees to receive the arrears of interest on part: *Hodges v. Wheeler*, V.-C. W., 21 Dec. 1867, and 11 May, 1867; but in *Re Stewart*, 8 W. R. 425; 2 De G. F. & J. 1, the trustees were to receive the whole arrears and retain only that which belonged to the trust.

WHO MAY APPLY, AND MODE OF APPLICATION.

By Trustee Act, 1893, s. 36, "(1) An order under this Act for the appointment of a new trustee or concerning any land, stock, or chose in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock, or chose in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.

“(2) An order under this Act concerning any land, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.”

By O. LIVB, r. 1:—“All proceedings in the High Court commenced under the Trustee Act, 1893, shall be assigned to the Ch. Div. of the Court,” and see Jud. Act, 1873, s. 34 (2) (3).

By O. LIVB, r. 2:—“All applications under the Act may be made by petition, except as otherwise provided under O. LV.”

By O. LV, r. 13A:—“Any of the following applications under the Trustee Act, 1893, may be made by summons:—

- (a) An application for the appointment of a new trustee with or without a vesting or other consequential order.
- (b) An application for a vesting order or other order consequential on the appointment of a new trustee, whether the appointment is made by the Court or a Judge, or out of Court.
- (c) An application for a vesting or other consequential order in any case where a judgment or order has been given or made for the sale, conveyance, or transfer of any land or stock, or the suing for or recovering any chose in action.
- (d) An application relating to a fund paid into Court, in any case [coming within the provisions of r. 2 of this order].” The concluding words were substituted by R. S. C., Feb. 1895, for the words “where the money or securities in Court does not, or do not exceed 1,000*l.*, or 1,000*l.* nominal value.” For the provisions of r. 2, *v. sup.* Vol. I., p. 319.

In a complicated case, a petition may be presented in lieu of a summons, and the costs allowed: *Re Morris*, 60 L. T. 96; 37 W. R. 317; W. N. (89) 31.

The petition (or summons) should indicate the particular sections of the Trustee Acts under which the order is asked for: *Re Moss*, 37 Ch. D. 513; *Re Hall*, 58 L. T. 76; O. LIVB, 4A.

In *Re Gill*, V.-C. M., 5 May, 1871, an order was made on the application of the legal pers. represes of two beneficiaries.

A person having a contingent interest is “beneficially interested”: *Re Sheppard*, 4 D. F. & J. 423; and, *semble*, so is a new trustee duly appointed: *Exp. Russell*, 1 Sim. N. S. 404; *secus*, the committee of a lunatic: *Re Bourke*, 2 D. J. & S. 426.

Where a purchaser under a judgment has paid his money into Court, he should make the application: *Ayles v. Cox*, 17 Beav. 584; but the Plt may be co-petr: *Rowley v. Adams*, 14 Beav. 130; and where an estate was sold in lots under a judgment, one petition as to such lots was held not to be multifarious: *S. C.*

Where land had been sold under a judgment in a creditor's action for admon, and the purchase-money paid into Court, a vesting order was made on the application of the Plt, the purchaser consenting: see *Re Wragg*, 1 D. J. & S. 356.

Equitable estates are bound by a judgment or order for sale, and no application is necessary: *Re Williams*, 5 D. & S. 515; *Basnett v. Mozon*, 20 Eq. 182; and see *Smith v. Boucher*, 1 Sm. & G. 72; *Cottrell v. C.*, 2 Eq. 330.

Where the Crown has become entitled to the whole of the trust estate of the testator, and also to a part of the beneficial interest therein, the Court cannot, upon an application under the Trustee Acts for the appointment of new trustees of the will and a vesting order, make a vesting order against the Crown, but an application must be made to the Court under sect. 5 of the Intestates' Estates Act, 1884: *Re Pratt's Trusts*, 34 W. R. 757; 65 L. T. 313; W. N. (86) 144.

An order may be made in an action, without petition, on motion, or on adjournment from Chambers: *Wood v. Beetlestone*, 1 K. & J. 213; so, after an order on petition, a further order was made on motion in the matter: *Re Holbrook*, 5 Jur. N. S. 1333; 8 W. R. 3; 29 L. J. Ch. 200; 1 L. T. 18; *Mackenzie v. M.*, *sup.* p. 1245; and see *S. C.*, 5 D. & S. 338; 16 Jur. 723.

If a petition is presented, and the order is one which the Court could not have made but for the Trustee Acts, it has been held that it should be intituled in the Trustee Acts as well as in the action: *Gough v. Bage*, 25

L. T. 738; *Huntley v. Clutterbuck*, W. N. (72) 81; if the order is made in a cause, it is unnecessary to entitle it in the Act.

As to mode of and evidence on applying for new trustees, *v. sect. 35, sup.* pp. 1226, 1227.

SERVICE.

All the *cs. q. t.* ought to be served with a petition or summons for the appointment of new trustees, or, if infants, be made *petrs* by their next friends, in which case the petition may be amended for that purpose without being re-answered: *Re Cartwright*, 8 W. R. 492; *Re Richards*, 5 D. & S. 636; *Jones v. James*, 9 Ha. lxxx.; *Re Fellows' Settlement*, 2 Jur. N. S. 62; but in special cases the Court relaxes the rule: see *Re Lightbody*, 52 L. T. 40; 33 W. R. 452; *Re Wilson*, 31 Ch. D. 522, C. A.; *Re Blanchard's Estate*, 2 N. R. 386; *Re Blanchard*, 3 D. F. & J. 137; *Re Smyth's Settlement*, 2 D. & Sm. 781; Practice note, W. N. (01) 85;

—and the retiring trustees also: *Re Sloper*, 18 Beav. 596; *Futvoye v. Kennard*, 3 L. T. 687;

—but not trustees who have refused or neglected to transfer for twenty-eight days: *sup.* p. 1249; nor a trustee who is permanently resident abroad: *Re Bignold*, 7 Ch. 223; *Re Martin Pye*, 42 L. T. 217; or has absconded and cannot be found: *Re Nicholson*, W. N. (84) 76; *Hyde v. Benbow*, W. N. (84) 117.

But on a petition or summons for appointment of new trustees of a settlement, the beneficial interests under which had been made the subject of settlements, it was held that the original *cs. q. t.*, their husbands and wives, and the trustees of their settlements, sufficiently represented all parties beneficially interested: *Re Smyth*, 2 D. & S. 781; and see O. XVI, 8.

A vesting order under sects. 26, 35 may be made, without service of the petition or summons on the trustee (*Re Baxter*, 2 S. & G. v.) or mortgagee (*Re Crowe's Mortgage*, 13 Eq. 26), who has refused to comply with the request in writing: *Re Russell*, 1 Sim. N. S. 409.

Neither the infant heir of a mortgagee or trustee, nor the heir's guardian, need be served with a petition or summons for appointment of a person to convey, or for a vesting order: *Re Wise*, 5 D. & S. 415; *Re Little*, 7 Eq. 323; *Re Willan*, 9 W. R. 689; *Re Tweedy*, 9 W. R. 398; but see *contra*, *Re Jones*, 22 W. R. 837; *Re Adams*, 57 L. T. 337; 35 W. R. 770.

In *Re Stanley*, W. N. (93) 30; 62 L. J. Ch. 469, the Court in 1892 dispensed with service on the heir (who went abroad in 1873) of a trustee who had died in 1870 intestate as to trust estates.

If of age he must be served: *Purvis v. Abraham*, W. N. (66) 126.

The heir of a testator whose trustees predeceased him was required to be served: *Re Smirthwaite*, 11 Eq. 251; *Gunson v. Simpson*, 5 Eq. 332; *Re Williams' Trusts*, 36 Ch. D. 231. But in *Re Gill*, 5 May, 1871, V.-C. M. made the order in the absence of the heir, who could not be found.

As to dispensing with service on *cs. q. t.* resident in Australia, see *Re Wilson*, 31 Ch. D. 522, C. A.

Orders appointing guardians to infants are not required (see O. XVI, 19), but for a lunatic respondent an order of course is still required.

The reversioner need not be served with a petition or summons for an order to vest leaseholds in a new trustee where the lessor's licence is not required for an assignment: *Re Matthew*, 2 W. R. 85; and see *Re Hazeldine*, 16 Jur. 853.

A petition or summons to vest the right to transfer stock in trustees, appointed under a power in place of a lunatic and another, should be served on the lunatic's committee: *Re Saumarez*, 25 L. J. Ch. 575; S. C., 8 D. M. & G. 390; *Re Parker*, 32 Beav. 580; and he is entitled to his costs: S. C.; *Re Wood*, 7 Jur. N. S. 323; 30 L. J. Ch. 453.

Such an order cannot be made in an action only without a petition in Lunacy: *Jeffryes v. Drysdale*, 7 Jur. N. S. 667; L. JJ., 9 W. R. 428. But see *Herring v. Clark*, 4 Ch. 167, *et inf.* p. 1260, which see also as to mode of application where a lunatic is interested.

As to serving on the lord of a manor a petition or summons for an order vesting copyholds, *v. sup.* p. 1251.

And further as to service of petitions, *sup.* Vol. I. p. 388.

EVIDENCE—SECTION 40.

By the Trustee Act (1893), sect. 40, "Where a vesting order is made as to any land under this Act or under the Lunacy Act, 1890, or under any Act relating to lunacy in Ireland, founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or personal representative or devisee of a mortgagee is out of the jurisdiction of the High Court or cannot be found, or that it is uncertain which of several trustees or which of several devisees of a mortgagee was the survivor, or whether the last trustee or the heir or pers. represve or last surviving devisee of a mortgagee is living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir or has died and it is not known who is his heir or pers. represve or devisee, the fact that the order has been so made shall be conclusive evidence of the matter so alleged in any Court upon any question as to the validity of the order; but this section shall not prevent the High Court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained."

Where the legal estate in mortgaged land had descended on an infant heir of the mortgagee, the Court required formal evidence of the heirship and infancy: *Re Powell*, V.-C. W., 12 Dec. 1857; *S. C.*, 4 K. & J. 338; 6 W. R. 136; see also *Re Wise*, 5 D. & S. 415.

In *Re Badcock*, 2 W. R. 386, V.-C. K. required an exor who had not proved to renounce probate before vesting the estate in the other.

As to reading affidavits made in another cause or matter, see O. XXXVII, 3.

Where an appointment of new trustees is made by deed, though not required to be so, on application for a vesting order there must be proof of the handwriting of the attesting witness, or of endeavour and failure to find a witness to his handwriting, and thereupon the order may be drawn up on proof of the handwriting of the appointor: *Re Rice*, 32 Ch. D. 35, C. A.

Extracts from parish registers are sufficient, if signed by the "curate" alone, and not verified: *Re Porter*, 4 W. R. 443; correcting the report (2 D. M. & G. 748) of *Re Hall*, *sup.* p. 155.

As to the admissibility of Scotch parish registers or certified extracts therefrom, see *Lyell v. Kennedy*, 14 App. Ca. 437.

CHARITIES.

Sect. 39 authorizes orders vesting in new trustees of charities any land, stock, or chose in action, *v. inf.* Chap. XLII., Sections I., II., and note, p. 1303.

CONVICT TRUSTEE OR MORTGAGEE.

By sect. 48, property vested in a trustee or mortgagee becoming a convict within the Forfeiture Act, 1870 (33 & 34 V. c. 23), is prevented from vesting in the admor under that Act, except as to any beneficial interest of the trustee or mortgagee in such property.

ABSENCE OF TRUSTEE.

By sect. 43 the Court may make, in the absence of a trustee who cannot be found, a decree binding him in the character of trustee: see *Westhead v. Sale*, 6 W. R. 52; 3 Jur. N. S. 1209.

COSTS.

By sect. 38 "the High Court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, to be paid or raised out of the land or personal estate in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the Court may seem just."

This provision appears to remove the doubt formerly entertained as to the

power of the Court to order a respondent to pay costs: see *Re Primrose*, 23 Beav. 590; *Re Sarah Knight's Will*, 26 Ch. D. 82, C. A.; Seton, 5th ed. p. 1056.

An order was made vesting the estate in a new trustee, and that by consent he might pay the costs of the proceedings, and that such costs, with interest, at 4l. p. c., might be a charge on the inheritance: *Exp. Davies*, 16 Jur. 882; *et v. sup.* pp. 1217, 1245.

The costs of a vesting order on a sale should be borne by the vendor: *Ayles v. Cox*, 17 Beav. 584; *Bradley v. Munton*, 16 Beav. 294; *Purser v. Darby*, 4 K. & J. 41; and not by a railway co. under the Lands Clauses Act, s. 82: *Re S. Wales Ry. Co.*, 14 Beav. 418.

In *Re Ellison*, 2 Jur. N. S. 62, a petition asking an inquiry, and for the costs "incidental to or consequent on the inquiry," the Court excluded the words quoted from the order as giving rise to uncertainty.

A person filing a bill, instead of proceeding under the Act of 1850, had to pay the extra costs: *Thomas v. Walker*, 18 Beav. 521.

Costs will not be allowed on the higher scale merely on the ground that the trust funds are large: *Re Spettigue*, 32 W. R. 385.

If the application be solely for the benefit of a tenant for life, he will pay the costs, but the costs of an application for the general benefit of the estate, such as the appointment of new trustees, should be defrayed out of *corpus*, as between solr and client: *Re Parby*, 29 L. T. 72; *Carter v. Sebright*, 26 Beav. 374; Lewin, 818.

As to costs of two petitions presented the same day for the same purpose, see *Re Pring*, 28 L. T. 467.

As to costs in cases of lunacy, *v. inf.* p. 1260.

LUNATIC TRUSTEES OR MORTGAGEES.

By sect. 116 of the Lunacy Act, 1890 (53 V. c. 5), the powers of that Act relating to management and administration extend not only to lunatics so found by inquisition and to every person lawfully detained as a lunatic, but also to "every person not so detained and not found a lunatic by inquisition, with regard to whom it is proved to the satisfaction of the Judge in Lunacy, that such person is, through mental infirmity arising from disease or age, incapable of managing his affairs."

The corresponding definition in the Trustee Act, 1850, only extended to infirmity of mind and not of body: *Re Barber*, 39 Ch. D. 187; and see *Re Martin*, 34 Ch. D. 618; overruling *Re Phelps' Settlement Trusts*, 31 Ch. D. 351.

Where any such person, not being an infant, or resident out of the jurisdiction, is a trustee, the jurisdiction of the Court in Lunacy, as defined by the Lunacy Acts of 1890 and 1891, arises: see *Re Gardner's Trusts*, 10 Ch. D. 29, where the existing trustee being of unsound mind, and out of the jurisdiction, new trustees were appointed in Chancery, and a vesting order made.

By the Lunacy Act, 1890, s. 135, the Judge in Lunacy may make orders vesting lands, of which a lunatic trustee or mortgagee is solely or jointly seised or possessed, "in such person or persons for such estate and in such manner as he directs"; and may release contingent rights in such lands. Any such order is to have "the same effect as if the trustee or mortgagee had been sane, and had executed a deed conveying the land for the estate named in the order, or releasing or disposing of the contingent right": Lunacy Act, 1890 (53 V. c. 5), s. 135, sub-s. 3. By sect. 136 (replacing sects. 5 and 6 of the Act of 1850) the Judge in Lunacy may in like manner vest the right to transfer stock or choses in action held by a lunatic as trustee or mortgagee (solely, or jointly with others); or as pers. represve; and by sub-sect. 4 the Judge may, if it is more convenient, appoint some proper person to make or join in making a transfer of stock.

Under sect. 135 the Court has power, on payment of purchase-money of leaseholds belonging to a lunatic, which he contracted to sell before he was found lunatic, to make a vesting order: *Re Pagani*, (1892) 1 Ch. 236, C. A.

By sect. 137, where a person is appointed to make or join in making a transfer of stock, such person shall be some proper officer of the Bank, or the co. or society whose stock is to be transferred. This section does not apply where an order vesting stock of a lunatic trustee is made in the ordinary form, *v. sup.* p. 1213, and not under sub-sect. 4 of sect. 136; and there-

fore in such a case the Bank of England cannot require that their officer should be appointed to make the transfer: *Re C. M. G.*, (1898) 2 Ch. 324, C. A.

By sect. 141 of the Act of 1890, in every case in which the Judge in Lunacy has jurisdiction to order a conveyance or transfer of land or stock, or to make a vesting order, he may also make an order appointing a new trustee or new trustees.

By sect. 143, the provisions of the Act as to vesting orders are not to affect the jurisdiction of the High Court as to any lunatic trustee or mortgagee who is an infant.

By sect. 341, "lunatic" means an idiot or person of unsound mind.

As to the jurisdiction of the Judge in Lunacy, *v. sup.* p. 1221; and see also Jud. Act, 1873, s. 17 (3); 1875, s. 7, by which the jurisdiction in Lunacy was transferred to the High Court of Justice, and to be exercised by such Judge or Judges of the High Court or Court of Appeal as should be intrusted, &c. By the Queen's sign manual (warrant dated 11 Nov. 1876), the jurisdiction was conferred on the L. C. and all the Justices of Appeal, and might be exercised by them, or any two of them sitting together, or by any one of them sitting alone. And by letter of request from the L. C. under Jud. Act, 1873, s. 51, to the Judges of the Court of Appeal, they could, when sitting in lunacy, make orders as Judges of the Ch. Div.; and now, by virtue of sect. 108 of the Lunacy Act, 1890, sect. 51 of the Jud. Act, 1873 (36 & 37 V. c. 68), and the request of the L. C. made pursuant to that section, the Judges of the Court of Appeal are enabled to act as additional Judges of the Ch. Div., not only in all applications under the Trustee Act, 1893, but in all applications in lunacy which require also the exercise of the jurisdiction of the Ch. Div.: *Re Platt*, 36 Ch. D. 410; *Re Blake*, W. N. (95) 51; 72 L. T. 280; but in lunacy matters this jurisdiction can only be exercised in aid of the jurisdiction in lunacy: *Re Barber*, 39 Ch. D. 187.

The procedure in Lunacy is now regulated by the Lunacy Rules, 1892, made under sect. 338 of the Act of 1890.

Application of Trustee Acts.—Where a sole surviving trustee is a lunatic not so found, the High Court (though empowered to appoint a new trustee in his place) has no jurisdiction to make a vesting order; but resort must be had to the Lunacy jurisdiction: *Re M.*, (1899) 1 Ch. 79.

Where one of three trustees became lunatic, and a new trustee had been appointed in his place, it was held that a petition for a vesting order must be entitled in Chancery as well as in Lunacy, as otherwise the vesting order would sever the joint tenancy: *Re Pearson*, 5 Ch. D. 982; *Re Chell*, 49 L. T. 196.

Where a mortgage debt and stock were vested in two trustees, one being lunatic and the other out of the jurisdiction, and new trustees had been appointed, an order was made vesting the mortgage debt and right to call for a transfer of the stock in the trustee out of the jurisdiction, and then, it appearing that he was out of the jurisdiction, in the new trustees: *Re Batho*, 39 Ch. D. 189, C. A.

New trustees having been appointed in the place of a lunatic and a deceased, to act jointly with a continuing trustee, the right to convey the mortgaged property for the estate of the continuing trustee and the lunatic was vested in the continuing trustee: *Re Vicat*, 33 Ch. D. 103, C. A.

Where it was alleged that a trustee was of unsound mind, but the trustee denied the allegation and was unwilling to be removed, the Court declined to make an order: *Re Combs*, 51 L. T. 45.

Where one of the exors of a surviving exor of a testator was lunatic, the right to transfer stock was vested in the other two, though the stock stood in the name of the testator: *Re Wachter*, 22 Ch. D. 535, C. A.; but where one of the three trustees was lunatic, Cotton, L. J., refused to vest the right to transfer until a new trustee was appointed: *Re Nash*, 16 Ch. D. 503, C. A.; but see *Re Watson*, 19 Ch. D. 384, C. A.; *Re Ray*, 47 L. T. 500.

As the Court in Lunacy does not administer a trust, it will not make an order vesting property in a person absolutely entitled, but will appoint a new

trustee, and leave the owner to take further steps to put an end to the trust: *Re Holland*, 16 Ch. D. 672, C. A.; but see *Re Currie*, 10 Ch. D. 93, C. A.

Sect. 137, *v. sup.* p. 1258, has no application where an order vesting stock standing in the name of a lunatic trustee is made according to the form in *Re Gregson*, (1893) 3 Ch. 233, C. A., and not under sub-sect. 4 of sect. 136, and, therefore, in such a case the Bank of England have no right to require that their officer shall be appointed to make the transfer: *Re C. M. G.*, (1898) 2 Ch. 324, C. A.

ORDER IN LUNACY OR CHANCERY.

Where the estate of a lunatic trustee or mortgagee is to be affected, the order must be made in Lunacy as well as in Chancery: *Re Ormerod*, 3 D. & J. 249; *Re Mason*, 10 Ch. 273; *Re White*, 5 Ch. 698; *Re Stewart*, 8 W. R. 297; *Re Boyce*, 4 D. J. & S. 205; *Re Cuming*, 5 Ch. 72; *Re M.*, (1899) 1 Ch. 79. But see *Re Lamotte*, 25 W. R. 149.

Where one of three trustees of a sum of stock becomes lunatic, a petition for a vesting order in the other trustees should be entitled in Lunacy only: *Re Watson*, 19 Ch. D. 384, C. A.; and see *Re Ray*, 47 L. T. 500; *Re Batho*, 39 Ch. D. 189, C. A.

Where one trustee was a lunatic, a petition for appointment of new trustees in place of the lunatic and others, and a vesting order, had to be entitled in Lunacy as well as Chancery, as otherwise the vesting order would sever the joint tenancy: *Re Pearson*, 5 Ch. D. 982, C. A.; *Re Cbell*, 49 L. T. 196.

In *Herring v. Clark*, 4 Ch. 167, after a judgment for sale of leaseholds belonging to A. and B. as partners, an order vesting the legal estate in the share of A., who was of unsound mind, was made in Chancery only.

By sect. 143 of the Lunacy Act, 1890 (53 & 54 V. c. 5), it is expressly enacted that the provisions of that Act as to vesting orders shall not affect the jurisdiction of the High Court as to any lunatic trustee or mortgagee who is an infant; and it seems, therefore, that where an infant trustee is of unsound mind, the case does not fall under the Lunacy jurisdiction but under that of the High Court, and the order may be made in Chancery only: see *Re Arrowsmith's Trusts*, 4 Jur. N. S. 1123; 27 L. J. Ch. 704; 6 W. R. 642; and so also if the existing trustee is not only lunatic but out of the jurisdiction: *Re Gardner's Trust*, 10 Ch. D. 29; see also *Re Duce's Trusts* (in Lunacy and in Chancery), 30 W. R. 759; or if only an appointment of a new trustee is required, and no order vesting the lunatic's estate: *Re Vickers*, 3 Ch. D. 112; *Re M.*, (1899) 1 Ch. 79; or if the only difficulty is that the person having power to appoint a new trustee is a lunatic, &c., and no vesting order is required: *Re Sparrow*, 5 Ch. 662; but in such a case it would seem that the application should in general be in lunacy: *Re Bowmer*, 3 D. & J. 658; Lunacy Act, 1890, ss. 128, 129.

But in *Re Bloomar*, 2 D. & J. 88, and *Re Sherard*, 1 D. J. & S. 421 (where the lunatic was tenant in tail), orders were made, in the matter of the Lunacy, of the Trustee Act, 1850, and of the Lunacy Regulation Act, 1853, and in the cause, declaring that the partition appeared for the benefit of the lunatic, and directing the committee to convey accordingly.

As to the jurisdiction of the Master in Lunacy to make the order, see *Re Fuller*, (1900) 2 Ch. 551, C. A.; *Re Langdale*, (1901) 1 Ch. 3, C. A., *sup.* p. 1228.

COSTS IN LUNACY.

By sect. 142 of the Lunacy Act, 1890, power as to costs is conferred on the Judge in Lunacy similar to that conferred on the High Court by sect. 38 of the Trustee Act, 1893, *v. sup.* p. 1257.

As to the jurisdiction under sect. 142 to order the Bank of England to pay costs, see *C. M. G.*, (1898) 2 Ch. 324, C. A., referring to *Re Shortridge*, (1895) 1 Ch. 278, C. A.

Costs of re-conveyance are in general borne by the mortgagor: *v. inf.* Chap. XLVII., "MORTGAGES"; but the extra costs of a petition for a vesting order made necessary by the mortgagee having become a lunatic may be ordered to be paid otherwise, *e.g.*, out of the mortgaged estate where he is beneficially entitled to the mortgage: *Exp. Richards*, 1 J. & W. 264; *Re*

Wheeler, 1 D. M. & G. 435, and cases there cited; *Re Townsend*, 2 Ph. 348; or, where he is only a trustee (*Re Townsend*, 1 Mac. & G. 686), out of the trust funds: *Re Jones*, 2 Ch. D. 70.

But not where the fact that the lunatic mortgagee was a trustee appears on the mortgage deed: *Re Lewes*, 1 Mac. & G. 23; nor where the legal estate had descended to the mortgagee's heir, a lunatic: *Re Stuart*, 4 D. & J. 317; *Re Jones*, 2 D. F. & J. 554; nor where the application was made by the mortgagor for leave to pay the debt into the Bank of England, and an order vesting the property in himself: *Re Sparks*, 6 Ch. D. 361, C. A.; and see *Lewin*, 823, and note.

SECTION XII.—PERSONS ENTITLED TO LANDS DIRECTED TO BE SOLD, CONVEYED, &C., DECLARED TRUSTEES—VESTING OR CONVEYING—TRUSTEE ACT, 1893, ss. 30, 31, 32 AND 33.

1. *Infant declared Trustee on Sale under Judgment—Sects. 30 and 31; Person appointed to Convey—Sect. 33.*

DIRECTION for sale to raise debts &c.—“And declare, that upon such sale the Deft W., the infant, the heir-at-law of the testator, will be a trustee of the real estate hereinbefore directed to be sold, or such parts thereof as shall be so sold, for the purchaser or purchasers thereof, within the meaning of the Trustee Act, 1893; And this Court doth order that the Plt J. be appointed to convey the said hereditaments for the estate of the said Deft therein, and that he do convey the same accordingly.”—*Jones v. Williams*, V.-C. S., 24 May, 1856, A. 1050; and see *inf.* p. 1271.

For decree for account of what was due to Plt on his equitable mortgage, and, in default, for a sale; with declaration that the mortgagor's infant heir would be a trustee under the Act for the purchaser, see *Losh v. Hayton*, V.-C. W., 9 Dec. 1854, B. 211; but compare *Smith v. Boucher*, 1 S. & G. 72.

For order under sects. 7, 20, and 29 of Trustee Act, 1850 (now under Trustee Act, 1893, ss. 26 (ii) (a), 30, 32, and 33), declaring infant devisee a trustee for the purchaser under order for sale to pay debts, and vesting infant's interest in a trustee of attendant term to convey, see *Edmunds v. Powell*, V.-C. K., 20 Feb. 1852, A. 366.

As to vesting of real estate in pers. represve under Land Transfer Act, 1897, *v. sup.* p. 1220.

For form of application, see D. C. F. 1080.

2. *Infant declared Trustee of Estates directed to be Mortgaged—Sect. 31; and Person appointed to execute Mortgage—Sect. 33.*

AFTER directing debts and costs to be borne by the estates respectively devised to the infant and another rateably, and apportioned amounts to be raised by mortgage, and all proper parties to join—“Declare, that the infant Deft is (to be deemed) a trustee of so much of the estates devised to him as shall be so mortgaged as aforesaid,

within the meaning of the Trustee Act, 1893; And Let W., of &c. (in the place of the infant Deft), execute such mortgage on the said estate as the Judge &c. shall approve and direct."—*Gunn v. Savill*, V.-C. S., 31 May, 1853, A. 1276; *Smith v. Lemaitre*, V.-C. W., 13 Jan. 1855, B. 300. See note, *inf.* p. 1273.

But the more proper form would be to appoint a person to convey, for the estate of the infant, by way of mortgage, and to order such person to execute such mortgage as the Judge shall approve: see Form 3, *inf.*

3. *Declaration that Persons not in esse would, on coming into esse, be Trustees—Sects. 30, 31; and appointing Person to convey to Purchaser or Mortgagee—Sect. 33.*

DIRECTION that debts &c., be raised by sale or mortgage—"And Declare, that the interests of any unborn sons and daughters of the Deft N. in the said hereditaments are the interests of persons who, upon coming into existence, would be trustees within the meaning of the Trustee Act, 1893; And Let H., of &c., be appointed to execute the conveyance or mortgage for the purpose of conveying the real estate to be so sold or mortgaged, for all such estate and interest as any unborn sons and daughters of the said Deft would, on coming into existence, be seised of in such real estates; And Let the said H. execute such conveyance or mortgage accordingly."—*Gilliland v. Newton*, V.-C. W., 12 July, 1856, A. 1569. See note, *inf.* p. 1272.

4. *Declaration that Parties are, or that Persons on coming into esse would be, Trustees, and directing Conveyance or Vesting—Sect. 31.*

DECLARE that the Plt (or Deft) A., who is an infant [or out of the jurisdiction of this Court &c.], is a trustee [or that the interests of any unborn child or children, or issue of (the Plt, or Deft) A., who might claim under the said A., or under the will of A., deceased &c., or under the indenture of settlement made by A., deceased, dated &c., in the pleadings mentioned, are the interests of persons who, on coming into existence, would be trustees] within the meaning of the Trustee Act, 1893, of the land &c. [*In judgment say, hereinbefore, In subsequent order say, by the judgment dated &c.*] directed to be conveyed &c. [*If ordered, add directions for vesting the estate, or discharging, releasing, or disposing of any contingent right.* See Forms, *sup.* pp. 1228, 1229].

5. *Specific Performance—Infant declared Trustee—Sect. 31; Person appointed to surrender Copyholds—Sect. 33.*

JUDGMENT for specific performance of agreement for sale, Deft admitting possession and acceptance of title—"And it appearing by

the evidence aforesaid that the Plt S. is the eldest son of O., deceased, in the pleadings named, and his heir according to the custom of the manor of —, whereof the said copyhold property is holden, And that the said Plt S. is an infant, Declare that the said Plt is a trustee, within the meaning of the Trustee Act, 1893, of the said copyhold property for the Deft the purchaser thereof."—Person appointed to surrender (and assure) the said copyholds for all the estate of the infant; And on proper surrender (assurance) by him, and all necessary parties, at the cost of the estate of the said O., deceased (to be settled by the Judge at the expense of the Deft), Deft to pay the Plt B., as the administratrix of the said O., deceased, the sum of £— agreed upon as the balance of his purchase-money for the said copyhold property.—No costs on either side.—*Baggott v. Blackham*, V.-C. K., 11 Feb. 1860, A. 266.

6. *Specific Performance—Releasing Contingent Rights of Persons not in esse—Sects. 28, 31; Person appointed to convey for Infants to Purchasers, on Payment—Sect. 33.*

JUDGMENT for specific performance of contracts for sale, and direction for the several Plts, the purchasers, to pay their purchase-moneys into Court—"Declare, that upon payment by the said Plts respectively of their respective purchase-moneys and interest as aforesaid, the interests of any unborn person or persons in the hereditaments comprised in such several contracts, who might claim under or by virtue of the limitations contained in the indenture dated &c., subject to, and in default of, the exercise of the joint power of appointment vested in &c., will be the interests &c. [Form 4]; And Let, upon such payment as aforesaid being made, the hereditaments comprised in the said contracts respectively, in respect of which such several payments shall be made, be released and discharged from the contingent rights of any such unborn person or persons therein; And it appearing by the affidavit of &c., that the Defts W. &c. are respectively infants, and necessary parties to the conveyances to be executed of the hereditaments comprised in the said several contracts in respect of which such payments are to be made, Declare that the said infant Defts (upon such payments being made by the respective Plts as aforesaid) will be trustees for the Plts respectively, within the meaning of the Trustee Act, 1893; And Let, upon such payments being made, all proper parties join in conveying the estates comprised in such several contracts (or such parts thereof as remain to be conveyed) to the respective purchasers thereof, or as they shall direct; And this Court doth hereby appoint W., of —, to join in conveying the said last-mentioned estates, upon such payments being made, for all the estate and interest therein of the said infants respectively."—Such conveyances to be settled by

the Judge.—[*Add Lodgment Schedule, Form No. 37.*—See *Hargreaves v. Wright*, V.-C. W., 6 June, 1853, A. 1364; 1 W. R. 408.

For decree for specific performance of contract for sale, and appointing person to surrender the outstanding legal estate in copyholds of the unknown heir of a paid-off mortgagee, and directing, upon payment of the purchase-money, such person to surrender accordingly, see *Re Edge, Bill v. Edge*, V.-C. S., 10 June, 1858, A. 1164, on petition under the Trustee Act, 1850; and in suit for specific performance, the V.-C. having required the Plt's right to be established in a suit.

For decree for specific performance against infant heir of vendor, and, it appearing that the purchase-money had been paid to the vendor, declaring the infant a trustee within the Act for the purchaser, and directing the estate to vest in the purchaser in fee, see *Barrett v. Godfrey*, V.-C. L. Cranworth, 13 March, 1851, A. 624; but see notes, *inf.* p. 1272.

7. Specific Performance—Infant and Persons not in esse declared Trustees for Purpose of granting Lease—Co-Defendant appointed to assign.

JUDGMENT for specific performance of contract for lease—"Declare, that the infant Deft B. is a trustee of the said messuage &c., for the purpose of granting such lease, within the meaning of the Trustee Act, 1893; And Declare, that the interests of all the (any) unborn issue of the Deft E. B. [*infant's father*] in the said messuage &c., are the interests &c. [Form 4, p. 1262], for the purpose of granting such lease thereof as aforesaid; And this Court doth order that the Deft E. B. be appointed to convey or assign, by way of demise, the said messuage &c., for the estate and interest of the said Deft B., the infant, and discharged from the contingent rights and interest of any such unborn issue to the extent of the term and interest intended to be granted by the said lease."—*Hodgson v. Bower*, V.-C. K., 21 Ap. 1859, A. 854.

8. Defendant declared Trustee for the Purpose of granting a Lease.

UPON motion &c., by counsel for the Plt, the Court being of opinion that the Deft is a trustee, within the meaning of the Trustee Act, 1893, of the messuage and premises comprised in the lease dated &c., for the purpose of granting such new lease of the said messuage and premises, as by the said order dated &c. was directed to be executed by the Deft; Let A. B. of &c., be appointed to convey or assign by way of demise the said messuage and premises for the estate therein of the Deft, to the extent of the term and interest intended to be granted by, and subject to the covenants and conditions contained in, the lease settled by the Master, and referred to in the Master's certificate, dated &c.—*Hall v. Hale*, Kay, J., 24 July, 1884, A. 1258; S. C., 51 L. T. 226.

In *Grace v. Baynton*, 25 W. R. 506, Romilly, M. R., expressed his opinion that the Court had no power either to appoint a person to convey in the

place of a party refusing to execute the lease, or to make a vesting order ; but see now, Jud. Act, 1884, s. 14, Vol. I. pp. 354, 428, 429.

For decree for specific performance of testator's contract for lease, and declaring infant Defts trustees for the Plt, and that persons not *in esse* who might claim under the will would, on coming into *esse*, be trustees within the Act ; and directing that the lands, for their estates and interests, vest in the trustees and exors of the will, to the intent that they may grant leases thereof, pursuant to the testator's contracts—costs of all parties out of the estate, see *Howell v. Palmer*, V.-C. S., 21 Dec. 1855, A. 294.

For decree declaring lands charged with a perpetual annuity, and the Plt and his heirs, &c., entitled thereto under a deed of appointment, subject to a charge thereby created, and to a power of revocation, and the Plt entitled to specific performance of a covenant to grant such annuity by settlement deed, and declaring the Plt and other parties trustees of the lands under the Acts so far as regards such annuity, and that persons not *in esse* would, on coming into *esse*, be trustees ; and appointing two of the parties to release and convey the interests of the persons not *in esse*, so as to vest the annuity in the trustees of the settlement and the persons appointed, and directing the adult parties to execute such deed of grant, and do such acts as might be necessary to vest the annuity—the costs to be taxed and be a charge upon it, see *Foster v. F.*, V.-C. K., 7 July, 1860, A. 1499.

For order on petition (after the donee of a power of jointuring had refused to obey a decree for specific performance of an agreement to jointure) declaring him a trustee for the Plt to the extent of the jointure, and appointing a person to execute the jointure deed, see *Wellesley v. W.*, *Exp. Mornington*, 4 D. M. & G. 537.

9. *Specific Performance of Agreement for Exchange of Lands—Re-leasing Contingent Rights—Appointing Person to Convey.*

JUDGMENT for specific performance of the agreement for exchange—And Declare that, upon such payment by the Plt as hereinafter is ordered being made, the Defts according to their several and respective estates and interests in the land comprised in or referred to by the said second schedule to the said agreement, are (will be) trustees, and that the Deft M. E. [*the first tenant in tail*] as to all the estates and interests in the same land which are represented by him as such tenant in tail as in the (pleadings) mentioned, is (will be) a trustee of the same land for the Plt, his heirs, exors, and admors respectively ; And that the interests of any unborn person or persons in the same land, who might claim under or by virtue of the limitations contained in the will of the testator, Sir W. E., prior to the said estate of the said Deft M. E. will be interests &c. [Form 4, p. 1262]. Appoint the Deft B. to convey to the Plt all such of the land comprised in or referred to by the said second schedule to the said agreement as is of freehold tenure for all the estate of the several Defts who are infants, and for all the estates and interests represented by the said Deft M. E. as such first tenant in tail as in the (pleadings) mentioned, and to release the contingent rights of all such Defts, and of all and every other persons or person, born or to be born, therein to the use of the Plt, his heirs and assigns ; And to release and dispose of to the Plt, his heirs, exors or admors, all the contingent rights of such Defts, and all and every the persons, born or unborn, in or to such of the land comprised in or referred to by the said second schedule to the

said agreement as is of leasehold and copyhold tenure, in and to such land respectively.—Directions for mutual conveyances.—*Eldon, Earl of v. Eden*, V.-C. H., 13 Jan. 1876, A. 175.

10. *Infant and Parties Abroad (Wife, and Husband in her Right) declared Trustees after Judgment for Partition—Persons appointed to Convey—Sects. 31, 33 and 35 (2).*

JUDGMENT for partition—"And Declare, that after such partition shall have been made and confirmed the infant Deft T. will be a trustee within &c., of such shares of the said manor, rectory, hereditaments &c., as shall be allotted to the said other parties; And this Court doth order that the Deft J. be appointed to convey such shares for such estate and interest as the said infant hath therein, to the said other parties; And Let the Deft J. convey the same accordingly; And Declare that the Deft H. and the Deft A., the wife of the Deft G., as heiress-at-law of W. in the pleadings named, or the said Defts G. and A., his wife, in right of the said A., are trustees of the said manor &c., for the Plt and the said other Defts, within the intent and meaning of the Trustee Act, 1893; And it appearing by the evidence aforesaid that the said Defts A. and G., her husband, are out of the jurisdiction of this Court, this Court doth order that the Deft H. be appointed to convey the said manor &c., for such estates as the said A. and G. have therein; And Let him convey the same to the said parties accordingly."—Conveyances to be settled by the Judge.—*Brooke v. Brown*, V.-C. W., 8 July, 1854, A. 1564.

For like declaration, see *Bowra v. Wright*, V.-C. L. Cranworth, 24 Jan. 1851, A. 647; and see *Wells v. Abraham*, V.-C. W., 9 July, 1853, B. 1362; *Langton v. Beeston*, V.-C. K., 27 April, 1854, B. 851; and further order, 2 Aug. 1856.

For subsequent order on petition, appointing person to convey the estate and interest of the infant Plts in the shares allotted to the other parties, see *Wells v. Abraham*, V.-C. W., 18 Feb. 1854, B. 93; but see Form 10, *sup.*, and notes Chap. XLVI. "PARTITION"; and see *Eaton v. Hanwell*, V.-C. S., 13 Mar. 1855, A. 785.

For order declaring that unborn persons would on their birth be trustees for the purposes of a decree for partition, and appointing a person to execute a proper assurance, by way of extinguishment or otherwise, of their contingent rights and interests, see *Beloe v. Brawre*, V.-C. S. in Chambers, 27 Nov. 1860, A. 2255.

For order on petition, after decree for partition, where the shares were minute and subdivided, declaring the several parties interested in a leasehold estate (except as to their own shares) trustees for the parties to whom shares had been allotted under the commission, and appointing one person sole trustee thereof, and vesting the property in him for the residue of the term, and directing him to assign the divided shares to the persons to whom the same had been allotted, see *Shepherd v. Churchill*, M. R., 4 Dec. 1857, B. 553; 25 Beav. 21.

11. *Declaration that Parties are, and that Persons not in esse will be, Trustees on Sale under the Partition Acts—Sect. 31.*

DIRECTION for sale by the trustees in lieu of partition—And Declare that upon such sale the Plts and the Deft P. as one of the co-heirs of

the testator &c., will be trustees of their respective estates and interests in the land hereinbefore directed to be sold for the purchaser or purchasers thereof, within the meaning of the Trustee Act, 1893, And Declare that the interests of the unborn children or issue of the Plt E. C. are the interests &c. [Form 4, p. 1262]; And pursuant to the said Trustee Act, 1893, Let the Defts L. &c., be appointed to convey the said land for the estates therein of the Plts and the Deft P. as such co-heirs as aforesaid who are (they being) out of the jurisdiction of this Court, and for all such estates and interests as any unborn children or issue of the Plt E. C. would, on coming into existence, be entitled to or possessed of in the said land.—*Chubb v. Pettipher*, V.-C. M., 25 June, 1870, A. 1778; and see also *Re Montagu, Faber v. M.*, (1896) 1 Ch. 549, *inf.* Form 17, where infants were tenants in tail in possession.

For declaration in a decree for sale, under the Partition Act, 1868, that the interests of the persons or person who upon the death of Plt will be and become his right heirs or right heir in the real estate, are interests of persons who, upon coming into existence, will be trustees within the meaning of the Trustee Act, 1850, s. 30 (now Trustee Act, 1893, s. 31), see *Basnett v. Mozon*, M. R., 31 May, 1875, A. 1145; 44 L. J. Ch. 557; *S. C.*, 20 Eq. 182.

12. *All Parties declared Trustees of Estates directed to be Sold under the Partition Act, and that Unborn Persons on coming into esse will be.*

USUAL judgment and directions for sale and payment of proceeds into Court—"And Declare that the several parties to the secondly-mentioned action are trustees within &c., of their respective shares and interests in the several estates hereby directed to be sold, and that the interests in such several estates of all unborn persons who might claim under the will of L., the father, in the (pleadings) named are the interests" &c. [Form 4, p. 1262].—Any directions for appointing new trustees and for vesting were postponed.—*Lees v. Coulton*, M. R., 11 March, 1875, B. 730; *S. C.*, 20 Eq. 20.

For subsequent order on petition appointing a person trustee of the estates directed to be sold in the place of the several parties to the action, for the purpose of giving effect to the judgment, and that the estates vest in him for the respective shares and interests of the several parties to the action, and releasing the contingent rights of all unborn persons who might claim, but the trustee not to take possession, and without prejudice to his receiving the rents as agent as theretofore, and to his remuneration as such agent, see *Lees v. Coulton*, M. R., 1 July, 1875, B. 1388.

13. *Infants declared Trustees for the Purpose of Sale under the Partition Act.*

DIRECTIONS for sale—"And Declare that in case of such sale the infant Plts H. and S. will be trustees within &c., of the hereditaments hereinbefore directed to be sold for the purchaser or purchasers

thereof for all the estate and interest of the said infants therein."—*Beardmore v. B.*, V.-C. W., 13 Jan. 1872, A. 100; and see *Higgs v. Dorkis*, V.-C. W., 8 March, 1872, 13 Eq. 280, where it was declared that on payment or set-off of the purchase-money the infant Deft would be trustee of all his estate and interest &c.

14. *Vesting Lands in, or appointing Person to convey to, Purchaser under Judgment—Sects. 30 and 32.*

UPON the application of A. &c., the person by the Master's certificate, dated &c., allowed the purchaser of the land &c. [Form 1, p. 1228], comprised in lot —, part of the estates sold pursuant to the judgment [or order], dated &c., and upon reading &c. the judgment [or order] for sale, dated &c., the conditions of sale, the Master's certificate [or order], dated &c., allowing the applicant, the purchaser of the land &c. comprised in lot —, part of the estates sold pursuant to the said judgment [or order] [*enter any other evidence*], and an office copy certificate, whereby it appears that on the — day of — the Petr A. paid the sum of £—, his purchase-money, for the said land &c. [*If so, with interest thereon, or the balance of his purchase-money for the said land &c., after deducting the sum of £—, the amount of the deposit paid by him in respect thereof, with interest on such balance*] into Court to the credit of &c., and the Judge being of opinion that (the Plt, or Deft) B. is to be deemed to be entitled to [or possessed of, or a contingent right in] the land &c., comprised in the said lot, upon a trust within the meaning of the Trustee Act, 1893; And it appearing by the evidence aforesaid [or taken in the action] that the said B. is an infant [or out of the jurisdiction of this Court, or cannot be found &c. *State the disability or circumstance which renders the order requisite, or if there be no disability* "that it is expedient, for the purpose of carrying such sale into effect, that a person should be appointed" &c., or "that an order should be made" vesting &c.], Let the said land &c. vest in the said A., for the estate of the said B. [or released from the contingent right of the said B.] therein [or this Court doth order that C. be appointed to convey the said land &c. to the said A., or as he shall direct, for the estate of the said B. therein; or to release, or dispose of, or discharged from the contingent right of the said B. in the said land; And Let the said C. convey, or assign, or release, or dispose of the same accordingly.—Form 26, p. 1236].

For order vesting infant's interest in land sold under decree in the purchaser, see *Thomas v. Heath*, V.-C. S., 25 April 1853, B. 747.

For order on petition by purchaser under decree, vesting land for the estate of infants, see *Edwards v. Gray*, V.-C. W., 16 July, 1853, A. 1359.

For order, on petition, discharging order vesting infant's interest in an estate in a purchaser under decree, and directing a conveyance instead, at the purchaser's instance, for the purpose of expressing reservations as to mines, see *Turner v. Speakman*, V.-C. P., 19 April, 1852, B. 633.

For order vesting copyholds in the purchaser under a decree, on his and Plt's petition, and, by consent of the lord, for all the estate and interest of

the Defts, husband and wife, who had neglected or refused to execute the necessary documents, see *Rowley v. Adams*, M. R., 18 Aug. 1852, B. 1195; S. C., 14 Beav. 130.

For order, on petition, that lands sold under decree be wholly discharged from the contingent rights of persons unborn, see *Beale v. Symonds*, V.-O. K., 19 March, 1852, A. 978, *et inf.* p. 1271.

For order for Plt to convey to a purchaser discharged from the contingent right of the Deft, see *Balderson v. Wood*, M. R. at Chambers, 29 Jan. 1879.

The order can be made where the person to convey is under no disability, *v. inf.* p. 1272.

For order, in Chambers, appointing person to convey to purchaser under decree the estate vested in infants, see *Lill v. L.*, M. R. in Chambers, 16 June, 1858, B. 1202.

For order vesting lands in purchaser to uses to bar dower, see *Davey v. Miller*, V.-C. S., 27 June, 1853, A. 1634; and Form 17, Seton, 4th ed. p. 535.

For similar order in favour of a person beneficially entitled in fee, the trustee of the legal estate being an infant, see *Re Lush*, reported 5 D. & S. 436; but this order is not found in Reg. Lib., nor is the petition filed.

For order, on the application of the purchaser, appointing Plt to assign leaseholds sold under decree to the purchaser for the estate of a trustee, as to whom it was uncertain whether he was living or dead, see *Smither v. Zetterquist*, M. R. in Chambers, 25 Nov. 1859, B. 263.

For order, by consent of the lady of the manor, vesting copyholds sold under decree in the purchaser, for the estate of one of the testator's co-heirs who was out of the jurisdiction, discharged from all right and title of the Deft, the testator's widow, to freebench, dower, or thirds, of or in the same, and from all claims and demands whatsoever in respect thereof, see *Tomson v. Rolph*, M. R. in Chambers, 13 Dec. 1858, B. 432.

15. *Sale in lieu of Vesting Order—Intestates' Estates Act, 1884.*

UPON the petition or application &c. of A. B., Let an inquiry be made what hereditaments and real estate were devised by the will of X. to his wife K. for her life, and after her death to C. D. and E. F., upon trust for sale as in the said will mentioned; Let the said hereditaments and real estate be sold with the approbation of the Judge. —Pay money to arise by sale into Court to the credit of Re trusts of will of X.; In the matter of the Intestates' Estates Act, 1884.—“Proceeds of sale &c.” subject to further order.—[Adjourn further hearing of petition to Chambers.]—*Re Pratt*, Chitty, J., 24 July, 1886, B. 1062; S. C., 55 L. T. 313; 34 W. R. 757; W. N. (86) 144.

16. *Foreclosure nisi of Equitable Mortgage against Infant Heir-at-Law—Mortgagor's Estate vested in latter by reason of disclaimer of Trustees of Mortgagor's Will—Infant declared a Trustee—Executrix of Mortgagor to Convey.*

THIS action coming on for trial &c., in the presence of counsel for the Plts and Defts; And it appearing that the title deeds &c., [Form 2, p. 2042, down to end of form]; And in that case declare that the infant Deft P. will be a trustee within the meaning of the Trustee Act, 1893, for the Plts of the hereditaments in the statement of claim mentioned; And thereupon Let the Deft O. (*executrix of deceased*

mortgagor and mother of infant) on her own behalf and on behalf of the infant Deft P. execute a conveyance thereof to the Plts, such conveyance to be settled by the Judge in case the parties differ.—Liberty to apply.—*Foster v. Parker*, M. R., 25 Jan. 1878, A. 147; 8 Ch. D. 147.

See note, *inf.* p. 1272.

17. *Barring Estate Tail and Remainders over by Order vesting, or appointing Person to Convey, Estate of Infant Tenant in Tail in Possession—Trustee Act, 1893, ss. 31, 32, and 50.*

DECLARE that it is for the benefit of the infant Deft F. J. O. M. to take in accordance with the will of the above-named A. M., And Declare that the manors, lands, and hereditaments in the county of Y. now subject to the uses of the indenture of re-settlement dated &c. in the statement of claim mentioned, and which manors, lands, and hereditaments are hereinafter referred to as "the M. Estate," ought in pursuance of the provision in that behalf in the said will of the said A. M. to be conveyed to the uses and upon the trusts and subject to the powers and provisions in such will contained concerning the manors and hereditaments thereby devised, which are therein referred to as "the secondly devised premises"; And that the said manors, lands, and hereditaments be conveyed accordingly; And it appearing that the Deft F. J. O. M. is tenant in tail male in possession under the said indenture of re-settlement of the said M. Estate, and that he is an infant; Declare that the said Deft F. J. O. M. is a trustee of the M. Estate within the meaning of the Trustee Act, 1893; And Let C. H. M. &c. be appointed to convey the said M. Estate for all such estate as the said infant F. J. O. M. could if of full age convey unto the Plts as the general trustees of the will of the said A. M. and their heirs discharged from the estate in tail male of the said Deft F. J. O. M. under the said indenture of re-settlement, and from all estates, rights, interests, and powers to take effect after the determination or in defeasance of such estate in tail male to the uses upon the trusts and subject to the powers and provisions in the said will declared contained or referred to concerning the said secondly devised premises; And Let the said C. H. M. convey the same accordingly, such conveyance to be settled by the Judge.—*Re Montagu, Faber v. Montagu*, Kekewich, J., 16 Jan. 1896; (1896) 1 Ch. 549.

This order was not entered.

18. *Order vesting Leaseholds in Equitable Mortgagee after Default under Judgment for Redemption, or for Mortgagor to assign.*

UPON motion &c. [*usual recital of judgment and certificate and affidavit of default &c., as in order for absolute foreclosure*].—This Court doth Declare that the Deft is a trustee for the Plt of the said mes-

suages and premises within &c.; And it appearing by the said affidavit of — filed &c., that the said Deft cannot be found; It is ordered that the messuages and premises comprised in the indenture of lease dated &c., do vest in the Plt R. for the estate of the Deft.—*Richards v. Robinson*, L. C. for M. R., 31 July, 1873, B. 2146.

For form of application, see D. C. F. 1079.

For decree in the case of an equitable mortgage declaring that in default of the mortgagor (an absconding Deft) paying what was certified to be due by the time appointed by the Master's certificate, Plt would be entitled to the mortgaged estate free from the equity of redemption, and that the Defts would be trustees thereof under the Trustee Act, 1850 (now under Trustee Act, 1893), and, it appearing that the Defts could not be found, directing the estate to vest in the Plt, see *Lechmere v. Clamp*, 9 W. R. 860; *S. C.*, 30 Beav. 218, and 31 Beav. 578, a further order being found necessary. See also *Smith v. Boucher*, 1 Sm. & Giff. 72.

And in *Richards v. Robinson*, *sup.*, the direction for a prospective vesting was disapproved, but on evidence of the default the order was made *de novo*.

On a sale in a foreclosure suit Plt was declared trustee of the mortgagor's (lunatic's) estate for the purchaser: *Harrison v. Smith*, 17 W. R. 646; and under foreclosure decree Deft, who could not be found, was declared a trustee, and his estate vested in the Plt: *Lechmere v. Clamp*, 30 Beav. 218; 31 Beav. 578. These orders were made at the hearing without a separate petition, as to which see also *Wood v. Beeltestone*, 1 K. & J. 213; but where a lunatic's estate was in question a separate petition was necessary: *sup.* p. 1259.

For forms of orders under 1 W. IV. c. 47, ss. 11, 12, for infant devisees and tenants for life to convey estates decreed to be sold to pay debts, &c., see Seton, 3rd ed. 825; *Yorke v. Pole*, V.-C. W., 15 Feb. 1848, B. 804; *Mitchell v. Reynolds*, V.-C. P., 21 Nov. 1851, B. 67; *Williams v. Roker*, V.-C., 26 Jan. 1838, B. 244; *Radcliffe v. Eccles*, M. R., 10 May, 1836, B. 568; 1 Keen, 130; *Penny v. Pretor*, V.-C., 26 Jan. 1838, B. 258; 9 Sim. 135; *Beale v. Symonds*, V.-C. K., 19 March, 1852, A. 978; and further order, *S. C.*, M. R., 21 Feb. 1857, A. 700. And see *S. C.*, 1 Drew. 65; *Blatchford v. Reed*, M. R., 14 May, 1832, A. 1727; *Arnold v. A.*, V.-C. P., 17 Jan. 1852, A. 1246. And for orders for tenant for life or infant devisee to convey estates by way of mortgage to raise testator's debts, pursuant to decree under 1 W. IV. c. 47, s. 12, and 2 & 3 V. c. 60, s. 1, see *Blacklock v. Harland*, V.-C. S., 27 March, 1855, A. 648; *Dickin v. D.*, V.-C. E., 5 May, 1849, A. 1225; *Powell v. Lewis*, V.-C. P., 3 Dec. 1851, B. 211; and *Finder v. Smith*, V.-C., 24 Jan. 1840, B. 402. And for cases under the statutes, 1 W. IV. c. 47, and 2 & 3 V. c. 60, see Barry, Stat. Jurisd. 215, n.

NOTES.

VESTING ORDER CONSEQUENTIAL ON JUDGMENT FOR SALE OR MORTGAGE OF LAND.

By the Trustee Act, 1893 (56 & 57 V. c. 53), sect. 30, as amended by sect. 1 of the Amendment Act of 1894 (57 V. c. 10): "Where any Court gives a judgment, or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of the land, or entitled to a contingent right therein, and is a party to the action or proceeding in which the judgment or order is given or made, or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this Act; and the High Court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate as that Court thinks fit in the purchaser or mortgagee or in any other person."

A purchaser of copyholds, devised to an infant for life, remainder to his unborn children, was entitled to an order discharging the contingent rights

of the infant's children, at the vendor's cost: *Wood v. Bettlesone*, 1 K. & J. 213; and see Forms 3, 6, *sup.* pp. 1262, 1263.

The Act applies where the person to convey is not under disability: *Re Lee, Kenyon v. L.*, 16 June, 1870, B. 1853 (per Bacon, V.-C., not following *Strong v. Padmore*, 18 Feb. 1869, Romilly, M. R.); in *Beckett v. Sutton*, 19 Ch. D. 646 (Chitty, J.); *Lewin* 807.

Where there was a direction to sell, but it was doubtful whether there was any person enabled to do so, and the heir-at-law was abroad, a sale was decreed and a vesting order made: *Hooper v. Strutton*, 12 W. R. 367; but see now the Land Transfer Act, 1897 (60 & 61 V. c. 65), s. 1, sub-sect. 1, *sup.* p. 1220.

VESTING ORDER CONSEQUENTIAL ON JUDGMENT FOR SPECIFIC PERFORMANCE, ETC., OR CONVEYANCE OF LAND.

By the Trustee Act, 1893, sect. 31: "Where a judgment is given for the specific performance of a contract concerning any land, or for the partition, or sale in lieu of partition, or exchange of any land, or generally where any judgment is given for the conveyance of any land, either in cases arising out of the doctrine of election or otherwise, the High Court may declare that any of the parties to the action are trustees of the land or any part thereof within the meaning of this Act, or may declare that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this Act, and thereupon the High Court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees."

In *Wellesley v. W.*, 4 D. M. & G. 537, a Deft. refusing to obey a decree for specific performance was declared a trustee, and a person appointed to convey in his stead; and in *Hall v. Hale*, 51 L. T. 226, to execute a lease to Plt: *v. sup.* p. 1264.

In *Re Bloomer*, 2 D. & J. 88, lands decreed to be partitioned, in which a lunatic was interested, were vested in the committee, who was to convey under 16 & 17 V. c. 70, s. 134 (repealed by the Lunacy Act, 1890); see *S. C.*, 2 D. F. & J. 154; but it was afterwards held that the Lords Justices had jurisdiction to make a vesting order under the Trustee Act: *Re Molyneux*, 4 D. F. & J. 365. In *Bowra v. Wright*, 4 De G. & S. 265, and *Shepherd v. Churchill*, 25 Beav. 21, *sup.* p. 1266, partition decrees were carried into effect under this section.

In *Warrender v. Foster*, V.-O. S., 31 Jan. 1854, B. 373, a vendor who refused to convey after tender of a deed settled by the Judge, or to receive the purchase-money, was declared a trustee, and on the purchaser paying his purchase-money into Court, his solr was to execute the conveyance for the vendor. But see now Jud. Act, 1884, s. 14, *sup.* Vol. I. p. 437.

A lessee will not get the benefit of a covenant for quiet enjoyment under a vesting order of the interest of the intending lessor who has become lunatic: *Cowper v. Harmer*, 57 L. J. Ch. 461; 57 L. T. 714.

The Court cannot treat the infant heir of a person who died after contracting to sell as a trustee, unless there has been a decree for specific performance, or the contract has been executed, or its validity otherwise ascertained: *Re Cuming*, 5 Ch. 72; *Re Carpenter*, Kay, 418; *Re Loury*, 15 Eq. 78; *Re Bradley's Settled Estates*, 54 L. T. 43; 34 W. R. 148; *Re Colling*, 32 Ch. D. 333, C. A.; but see *Re Weeding*, 4 Jur. N. S. 707, *et v. sup.* p. 1219.

In making decrees absolute for foreclosure and conveyance in a suit by an equitable mortgagee, the Court added a declaration that the mortgagor was a trustee for the mortgagee, and made a vesting order: *Lechmere v. Clamp*, 30 Beav. 218; 31 Beav. 578; and where an equitable mortgagee devised to trustees for sale, who disclaimed, and the legal estate descended to his infant heir, the Court inserted in the judgment a declaration that in case the Plts, the mortgagees, were not redeemed within six months, the infant should be a trustee for them within the Act, and that his mother, who was executrix of the mortgagor, should be ordered to convey in his behalf: *Foster v. Parker*, 8 Ch. D. 147; Form 16, p. 1269 (but now under the Land Transfer Act,

1897 (60 & 61 V. c. 65), s. 1, the mother in such a case would take the fee); and where the equitable mortgagor died intestate, the judgment directed his infant heir to convey on attaining twenty-one, and gave him a day to show cause: *Mellor v. Porter*, 25 Ch. D. 158, *v. sup.* p. 980.

In *Basnett v. Moxon*, 20 Eq. 182, Jessel, M. R., held that the persons who at the death of a tenant for life would be his right heirs could be treated as unborn persons, *v. sup.* p. 1267.

Decrees ordering lands to be mortgaged have been held to be within these sections: *Gunn v. Savill*, *Smith v. Lemaitre*, *Gilliland v. Newton*, Forms 2, 3, *sup.* pp. 1261, 1262. These cases are not reported, but they may be supported under sects. 30 and 31 as having been made, either on the principle that a mortgage is a sale *pro tanto*, or on the ground that a mortgage is a conveyance.

Sect. 31 applies to cases where there is judgment against an infant for an immediate conveyance, but as this is not the form of a judgment for foreclosure of an equitable mortgage, the section does not apply in such case: *Mellor v. Porter*, 25 Ch. D. 158.

The order may be made at the hearing without any separate application, *v. sup.* p. 1255.

SECTION XIII.—JUDICIAL TRUSTEES ACT, 1896.

1. Order for Appointment of Judicial Trustee—Rules 2, 3, 4, 5 and 6.

TITLE [*If not made in pending cause or matter*]. In the matter of the trust [*describing it*] and in the matter of the Judicial Trustees Act, 1896.

TITLE [*If made in pending cause or matter*]. Between A. B., Plt, and C. D., Deft, or In the matter of [*Title of particular pending matter*].

UPON the application [*if not made in pending cause or matter*] by originating summons dated &c., or [*if made in pending cause or matter*], by summons dated &c., of A. [*i.e., the person creating, or intending to create a trust, or the trustee, or beneficiary*]; And upon hearing the solrs for the applicant and for the respondents [*i.e., (a) the other trustee, where application made on behalf of a trustee; (b) the trustees where application made on behalf of a beneficiary, and in either case such beneficiaries as the Court directs.*—N.B. *Where application made by person creating, or intending to create a trust, no respondent necessary, subject to directions of Court under Judicial Trustee Rules, 1897, r. 3, sub-sect. (3)*]; And upon reading the statement in writing signed by the applicant [*statement under r. 4*], an affidavit of the applicant, filed &c., verifying the same [*if in place of all or any existing trustees*], and the Judge being of opinion that sufficient cause is shown within the meaning of sect. 1, sub-sect. 1 of the Judicial Trustees Act, 1896, and [*if vesting order required*] that the applicant is one of the trustees of the said will or beneficially interested in the property subject to the trusts thereof comprising the investments hereinafter mentioned; the Judge

doth appoint A. of &c., upon first giving security pursuant to r. 9 of Judicial Trustees Rules [*unless person to be appointed judicial trustee is an admor, and has given an admon bond, r. 25, sub-sect. (2)*], judicial trustee of [*describe the trust*], either jointly with D. [*any other person*] or as sole trustee, and [*if sufficient cause is shown*] in place of B. and C. [*all or any existing trustees*], and [*if vesting order required*]; It is ordered that the land &c. [*take the appropriate words from the will or other instrument creating the trust according to the tenure, or from the title above*], now subject to the trusts [*of the said will, or indenture of settlement, or mentioned in the title hereto*], vest in the said A. (*judicial trustee*), either jointly with the said D. (*any other person*), or as sole trustee for the estate therein now vested in the said B. and C. &c. [*name the person or persons in whom the legal estate is ascertained to be vested*] or [*if it is not known in whom the legal estate has become vested say*], for the estate therein which would now be vested in C. D. [*name the person or persons in whom the trust estate is known to have been vested*], if now living, such land &c. to be held by the said A. &c., upon the trusts [*of the said will or indenture of settlement, or mentioned in the title hereto*]; [*For other vesting orders which may be made under r. 6, see Forms 1 et seq. p. 1210, comprising land on mortgage, stock in Bank, and choses in action &c.*]; And it is ordered that [*here insert any other orders which may be made under r. 6, i.e., for acts to be done by existing trustee in order to properly vest the trust funds in the judicial trustee*].

For forms of application under the Act, see D. C. F. 1095 *et seq.*

2. *Order for Appointment of Official of Court to be Judicial Trustee*
— *Vesting order*—Rules 7, 29, 30 and 31.

UPON the application &c., and the Judge being of opinion that sufficient cause is shown &c. [*follow Form 1*], the Judge doth appoint the official solr of the Supreme Court [*or some other official of the Court*], judicial trustee of [*describe the trust*] as sole trustee, and in place of B. and C. [*all or any existing trustees*]; And it is ordered [*here follow Form 1 as to vesting and other orders, but in any direction for vesting or holding stocks or shares, add*, And it is ordered that the official solr (*or other official of the Court*) do transfer the said stocks or shares to himself under the title of "the official solr to the Supreme Court" (*or in case of some other official, insert his proper title*)]; to be held by him upon the trusts of the said [*describe trust*], see next Form.

3. *Order for Appointment of the Official Solicitor to the Supreme Court to be Judicial Trustee*—*Vesting Order*—Rules 7, 29, 30 and 31.

In the matter of the trusts of the will, dated &c., of J. P., deceased,
and In the matter of the Judicial Trustees Act, 1896.

UPON the application (by originating summons dated &c.) of T. A. R., and upon hearing counsel for the applicants and for the respondents,

C. C. W., M. J. W., L. M. C. W., E. C. W. (an infant, by R. F. W., his guardian *ad litem*), J. A. R., R. S. P. R., and F. A. A. J. R. (the two latter infants, by S. W. R., their guardian *ad litem*), F. L. R. and B. P. R., and G. D. R. (both infants, by C. A. B., their guardian *ad litem*), and upon reading &c.; And the Judge being of opinion that sufficient cause is shown within the meaning of sect. 1, sub-sect. 1, of the Judicial Trustees Act, 1896, and that the applicant is one of the trustees of the said will and beneficially interested in the property subject to the trusts thereof, comprising investments standing in the name of J. P. deceased, as follows, viz. [*description of investments*], and the following investments standing in the names of T. A. R. and C. C. W. as surviving exors of the will of the said J. P. [*describing them*], Doth hereby appoint the official solr to the Supreme Court to be judicial trustee of the said will of J. P. deceased, and as sole trustee thereof &c., in the place of T. A. R. and C. C. W., the existing trustees thereof; And It is ordered, pursuant to the Trustee Act, 1893, that the real and leasehold hereditaments, the particulars whereof are set forth in the schedule hereto, and all other, if any, the real and leasehold hereditaments now subject to the trusts of the said will, do vest in the said official solr as such judicial trustee for the estate and interest now vested in the said T. A. R. and C. C. W. as trustees of the said will; And that the right [*to call for a transfer of, and*] to transfer the following sums, that is to say, the £— Wolverhampton Corp. 3½ p. c. Stock, £— Birmingham 3½ p. c. Stock, and £— New Zealand Government 4 p. c. Inscribed Stock, in the books of the Governor and Co. of the Bank of England in the name of J. P., deceased, of &c., of whom T. A. R. and C. C. W. are the surviving exors; the £— Consols and the £— India 3 p. c. Stock standing in the books of the Governor and Co. of the Bank of England in the names of T. A. R., of &c., C. C. W., of &c., K. M. C., of &c., and J. C. L., of &c.; the £— 2½ p. c. Anna, £— Metropolitan 3 p. c. Stock, and £— New South Wales 3½ p. c. Inscribed Stock, 1924, standing in the books of the Co. of the Bank of England in the names of T. A. R., of &c., C. C. W., of &c., K. M. C., of &c., and J. C. L., of &c. [*here follows description of other stocks*], and to receive any dividends now due and to accrue due on the said stocks and shares, do vest in the said official solr; And it is ordered that the said official solr do transfer the said stocks and shares to himself under his official title of "the official solr to the Supreme Court," to be held by him upon the trusts of the said will; And It is ordered that it be referred to the taxing master to tax as between solr and client the costs of the applicant and of the respondents to this application and consequent thereon, including in the costs of the said T. A. R. and C. C. W. any charges and expenses properly incurred by them, and not already taxed or allowed, relating to the admon of the estate of the testatrix J. P., and the execution of the trusts of her will beyond their costs of this action; And It is ordered that the said T. A. R. and C. C. W. do retain and pay such costs when taxed out of the sum of £— cash in their hands on account of the capital of the

trust estate, subject to the trusts of the said will; And It is ordered that the said T. A. R. and C. C. W. do pay the balance, if any, of such cash to the said official solr as such judicial trustee, to be held by him upon the trusts of the said will.

The SCHEDULE above referred to.

PART I.

Freeholds.

[Describing them.]

PART II.

Leaseholds.

[Describing them.]

—*Re Pynsent's Trusts*, Kekewich, J., 25 April, 1898, B. 1896.

4. *Order to transfer inscribed or registered Stocks and Cash in Court to Official Accounts at the Bank of England.*

UPON the application of the Plts (*infants*) by the official solr their next friend by summons dated &c., and upon hearing the solrs for the applicants and for the Defts, and upon reading &c., Let the funds in Court be dealt with as directed in the schedule hereto.

PAYMENT SCHEDULE.

In the High Court of Justice,
Chancery Division.

20th February, 1901.

Creighton and Others v. Rogers and Others, 1899, C. 918.

Ledger Credit.—As above.

Funds in Court { £389 : 9s. 9d. New Consols.
£21 : 2s. 7d. Money on deposit.
£2 : 10s. 11d. Cash.

Particulars of Payments, Transfers or other Operations ordered.	Payees and Transferees or Separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Transfer New Consols....	"The joint account of His Majesty's Paymaster-General and the Official Solicitor"		389 9 9
Transfer money on deposit	"The account of His Majesty's Paymaster-General (Judicial Trustees Act, 1896)"	21 2 7	
Transfer cash	The same	2 10 11	
Transfer any interest	The same.		

—*Creighton v. Rogers*, Joyce, J., at Chambers, 20 Feb. 1901, A. 188.

By rules 3 and 4 of the Treasury Regulations, issued under the Judicial Trustee Rule (April, 1900) and dated 2nd July, 1900, when the Court has appointed the official solr to be the sole judicial trustee a public account is to be opened at the Law Courts Branch of the Bank of England intituled "The account of Her Majesty's Paymaster-General (Judicial Trustees Act, 1896)," and all lodgments of cash and any other securities than inscribed or registered stocks, shares, and securities are to be made to the credit of that account.

By rule 5 of the same Regulations, all inscribed or registered stocks, shares, and securities are to be inscribed or registered in the joint names of the Assistant Paymaster-General and the official solr; and the stock or share certificates, or other scrip relating thereto, are to be deposited at the Law Courts Branch of the Bank of England in their joint names. The Bank is to deliver the certificates or scrip to the Paymaster on the written request of the official solr.

5. *Similar Order*—*The existing Trustee ordered to Convey and Transfer Trust Property*—*Rules 7, 29, 30 and 31.*

IN the matter of the trusts created by two indentures made on the marriage of G. M. G. I. with his late wife A. V. B., who is now the wife of G. S., each dated 28th Aug. 1880, made between &c., and in the matter of the Judicial Trustees Act, 1896.

UPON the application [by originating summons dated &c.] of G. M. G. I., of &c., the tenant for life of the settled trust property comprised in the two above-mentioned indentures; And upon hearing counsel for the applicant and for the respondent, H. C. E. M., of &c.; The Judge doth hereby appoint the official solr to the Supreme Court to be judicial trustee of the above-mentioned indentures of settlement, and as sole trustee thereof, and in substitution for S. J. P., deceased, and the said H. C. E. M., the surviving and existing trustee thereof who desires to retire from the trust; And it is ordered that the said H. C. E. M. do convey the freehold hereditaments which are now vested in him as trustee of the said indentures, so as to vest the same in the said official solr upon the trusts applicable thereto under the said indentures, and that such conveyance be settled by the Judge in case the parties differ; And it is ordered that the said respondent, H. C. E. M., do deliver to the said official solr upon oath if required all deeds and writings in his custody or power relating to the said trust properties; [And it is ordered that the trust account be kept and the title deeds and documents relating to the trust be deposited with the Law Courts Branch of the Bank of England;] And it is ordered that the said official solr, as such judicial trustee, do on or before the — day of —, 1900, and the same day in each succeeding year, leave in the Chambers of the Judge his annual account up to the — day of — 1899, previously for audit; And it is ordered that it be referred to the taxing master to tax as between solr and client the costs of the applicant and of the respondent of and incident to this application and consequent thereon, including in the costs of the respondent, H. C. E. M., any charges and expenses properly incurred by him, and not already taxed or allowed relating to the execution of the trusts of the said indentures beyond his costs of this action; And it is ordered that the said official solr as such judicial trustee be at liberty to raise and pay the same when taxed out of the capital of the trust estate.

The SCHEDULE above referred to.

Freeholds.

[*Describing them.*]

Stocks and Bonds.

[*Describing them.*]

See *Re Gordon Ives' Trusts*, North, J., 9th Nov. 1899, A. 4091.

The words in brackets should not now be omitted, the practice being for the judicial trustee to obtain directions on a request.

APPOINTMENT OF JUDICIAL TRUSTEE.

By the Judicial Trustees Act, 1896 (59 & 60 V. c. 35), s. 1, it is enacted as follows:—

“(1) Where application is made to the Court by or on behalf of the person creating or intending to create a trust, or by or on behalf of a trustee or beneficiary, the Court may, in its discretion, appoint a person (in this Act called a judicial trustee) to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees.

“(2) The admon of the property of a deceased person, whether a testator or intestate, shall be a trust, and the exor or admor a trustee, within the meaning of this Act.

“(3) Any fit and proper person nominated for the purpose in the application may be appointed a judicial trustee, and, in the absence of such nomination, or if the Court is not satisfied of the fitness of the person so nominated, an official of the Court may be appointed, and in any case a judicial trustee shall be subject to the control and supervision of the Court as an officer thereof.”

By r. 2 of the Rules issued under the Act (see L. R. Current Index, 1897, pp. lxxiii to lxxviii), an application to the Court to appoint a judicial trustee is to be in the Ch. Div. by originating summons, or, if made in a pending cause or matter, either as part of the relief claimed, or by summons in the cause or matter. The mode of service is, subject to the special directions of the Court, regulated by r. 3.

Where an official of the Court is appointed judicial trustee, the official solr of the Court is to be so appointed, unless the Court, for special reasons, directs that some other official should be appointed, or unless the proceedings are taken in a district registry, palatine court or county court, in which cases the official to be appointed is not to be the official solr unless the Court, for special reasons, otherwise directs: see rr. 7, 29, 30, 31.

As under s. 1, sub-s. 2, the admon of the property of a deceased person is a “trust,” and the exor is a “trustee,” the Court can, in a proper case, remove the exor and appoint a judicial trustee in his place, to whom, under sub-s. 4, it can give directions as to the admon of the trust: *In re Ratcliff*, (1898) 2 Ch. 352.

A person interested in an estate is not entitled as of right to the appointment of a judicial trustee under the Act, but the appointment is, under sect. 1, sub-sect. 1, a matter entirely within the discretion of the Court. Thus, where the reversioner under a will applied for the appointment of a judicial trustee to act either alone or jointly with the testator's widow, who was sole executrix and also tenant for life (there being no trustee appointed by the will), the Court refused the application, as it was opposed to her wish, and the testator's manifest intention that she should have the sole control of his estate, there being, moreover, no ground of complaint against her; and the fact that the applicant offered that the remuneration of the judicial trustee, when appointed, should come out of capital and not out of income did not avail: *In re Ratcliff*, (1898) 2 Ch. 352.

The association of a judicial trustee and a private or gratuitous trustee is not regarded by the Court as desirable, and the Court declined to sanction such an appointment where the majority of the beneficiaries opposed the appointment as costly, but directed an adjournment to ascertain whether the appointment of an additional private trustee was practicable: *Re Martin*, W. N. (00) 129.

Under the general power contained in sub-sect. 1, the Court, if not satisfied with the nominee of the applicant, can appoint any fit person, and is not bound to appoint an official under sub-sect. 3: *Douglas v. Bolam*, (1900) 2 Ch. 749, C. A.

By sect. 1, sub-sect. 4, “The Court may, either on request or without request, give to a judicial trustee any general or special directions in regard to the trust or the admon thereof.”

Rule 12 provides that a judicial trustee may at any time request the Court to give him directions as to the trust or its admon. The request is to be accompanied by a statement of facts, and a fee of 2s. 6d. (see schedule); and the Court may require the trustee or any other person to attend at Chambers, where that course is necessary or convenient.

By sub-sect. 5, "There may be paid to a judicial trustee out of the trust property such remuneration, not exceeding the prescribed limits, as the Court may assign in each case, subject to any rules under this Act respecting the application of such remuneration where the judicial trustee is an official of the Court, and the remuneration so assigned to any judicial trustee shall, save as the Court may for special reasons otherwise order, cover all his work and personal outlay." See *post*, p. 1281.

By sub-sect. 6, "Once in every year the accounts of every trust of which a judicial trustee has been appointed shall be audited, and a report thereon made to the Court by the prescribed persons, and, in any case where the Court shall so direct, an enquiry into the admon by a judicial trustee of any trust, or into any dealing or transaction of a judicial trustee, shall be made in the prescribed manner."

By r. 14, the Court is to give directions as to the date to which the accounts are to be made up in each year, and the time within which they are to be delivered for audit. The audit is to be by the officer of the Court, but in cases of difficulty reference may be made to a professional accountant.

COURT TO EXERCISE JURISDICTION.

By sect. 2, "The jurisdiction of the Court under this Act may be exercised by the High Court, and as respects trusts within its jurisdiction by a Palatine Court, and (subject to the prescribed definition of the jurisdiction) by any County Court Judge to whom such jurisdiction may be assigned under this Act."

For sec. 3 of the Act, which has reference to the general jurisdiction of the Court in cases of breach of trust, *v. sup.* p. 1153.

RULES UNDER THE ACT.

By sect. 4 it is provided that rules may be made for carrying the Act into effect, and especially for the purposes enumerated below:—

(1) For requiring judicial trustees, who are not officials of the Court, to give security for the due application of any trust property under their control.

The provisions as to the security to be given are contained in r. 9. The procedure prescribed is similar to the procedure of the Court in the case of receivers. The Court has power to dispense with security.

(2) Respecting the safety of the trust property, and the custody thereof.

(3) Respecting the remuneration (*post*, pp. 1281, 1282) of judicial trustees and for fixing and regulating the fees to be taken under the Act so as to cover the expenses of the admon of the Act, and respecting the payment of such remuneration and fees out of the trust property, and, where the judicial trustee is an official of the Court, respecting the application of the remuneration and fees payable to him.

(4) For dispensing with formal proof of facts in proper cases.

By r. 13, the Court, if satisfied that there is no reasonable doubt of any fact which affects the administration of a trust by a judicial trustee, may give directions to him to act without formal proof of the fact.

(5) For facilitating the discharge by the Court of administrative duties under the Act without judicial proceedings, and otherwise regulating procedure under the Act and making it simple and inexpensive.

By the joint effect of rr. 27 and 33, the Chancery Masters are empowered to exercise the powers of the Court, including the power of making an order for the appointment of a judicial trustee, or making any vesting order, subject to the right of any party to bring any particular point before the Judge.

(6) For assigning jurisdiction under the Act to County Court Judges and defining such jurisdiction.

This subject is dealt with by r. 31, which provides that the jurisdiction of the County Court Judge shall extend to any trust in which the trust property does not exceed in value 500*l.*, as if that jurisdiction had been given under sect. 67 of the County Courts Act, 1888; but that jurisdiction is to be exercised only in a Metropolitan County Court, *i.e.*, one of the Courts mentioned in the third schedule to the Bankruptcy Act, 1883 (46 & 47 V. c. 52), or in a County Court for the time being having bankruptcy jurisdiction.

(7) Respecting the suspension or removal of any judicial trustee, and the

succession of another person to the office of any judicial trustee who may cease to hold office, and the vesting in such person of any trust property.

The provisions as to suspension and removal of judicial trustees by the Court are contained in rr. 20 and 21. The power of removal is only exercisable upon application to the Court or after notice to the trustee. Rule 22 provides for an inquiry into the conduct of a judicial trustee by a Chancery Master.

Provisions as to the resignation of judicial trustees are contained in r. 23, and, where it is expedient, an official of the Court may be appointed in the place of the trustee who desires to be discharged. Rule 24 provides for the discontinuance of a judicial trustee.

(8) Respecting the classes of trusts in which officials of the Court are not to be judicial trustees, or are to be so temporarily or conditionally, *v. inf.* p. 1282.

(9) Respecting the procedure to be followed where the judicial trustee is exor or admor.

(10) For preventing the employment by judicial trustees of other persons at the expense of the trust, except in cases of strict necessity.

There appear to be no rules specially addressed to this matter. As to the general rule of the Court on the subject, *v. sup.* p. 1131 *et seq.*

(11) For the filing and auditing of the accounts of any trust of which a judicial trustee has been appointed, *v. inf.* p. 1281.

PERSONS TO BE APPOINTED.

Rule 5 provides that the Court is not to be precluded by any existing practice as to the appointment of trustees from appointing any person to be a judicial trustee by reason of that person being a beneficiary, or relation, or husband or wife of a beneficiary, or a solr to the trust or to the trustee or to any beneficiary, or a married woman, or standing in any special position with regard to the trust, and that a person may be appointed to be a judicial trustee of a trust although he is already a trustee of the trust.

EXECUTORS AND ADMINISTRATORS.

By r. 25, any person who is an exor or admor may be appointed a judicial trustee for the purpose of the collection and distribution of the estate of a deceased person in the same manner and subject to the same provisions as a person may be appointed judicial trustee of a trust.

Where an admor has given an admon bond he is not to be required to give security as a judicial admor under the rules.

SECURITY.

By r. 9, cl. 8, unless the giving of security is dispensed with, the appointment of a person to be judicial trustee does not take effect until he has given the security required by the Court.

VESTING ORDERS.

On the appointment of any person to be judicial trustee, the Court is to make such vesting or other orders and exercise such other powers as may be necessary for vesting the trust property in the judicial trustee, either as sole trustee or jointly with other trustees, as the case requires: R. 6.

DUTIES OF TRUSTEE.

A judicial trustee must, unless in any case the Court considers that it is unnecessary, as soon as may be after his appointment, furnish the Court with a complete statement of the trust property, accompanied with an approximate estimate of the income and capital value of each item. It is also his duty to give such information to the Court as may be necessary for the purpose of keeping the statement of the property correct for the time being: R. 8.

When a judicial trustee is appointed, a separate account for receipts and payments on behalf of the trust is to be kept in the name of the trustees at some bank approved by the Court (r. 10, cl. 1); and the rules contain provisions requiring that title deeds and documents of title shall be deposited with that bank or in such other custody as the Court directs (see r. 10, cl. 2), and as to the mode of deposit (r. 10, cl. 3), as to depositing a list with the Court and giving information as to any variation of the list (r. 10, cl. 4), as to the giving of special orders to the bank (r. 10, cls. 5, 6), and special directions by the Court (r. 10, cl. 7).

Where an official of the Court is judicial trustee, the Court may direct that, instead of a separate account of the receipts and payments on behalf of the trust being kept at some bank approved by the Court, all receipts on behalf of the trust may be dealt with, and all payments on behalf of the trust may be made, in such manner, and subject to such regulations as to the accounts to be kept of the receipts and payments, and the procedure to be followed in dealing therewith, as the Treasury direct: R. 10, cl. 8.

Where an official of the Court is judicial trustee, the Bank of England and Bank of Ireland, and any other corp., co., or public body (all of which other bodies are included in the term "company"), may open and keep accounts of stocks, shares, anns, and securities (all of which are hereinafter included in the term "stock") in the name of such official under his official title without naming him, and the dividends on such stock may from time to time be received, and such stock, or any part thereof, may from time to time be transferred by the person for the time being holding such office without any order or direction of the Court as if the same stood in his own name. And without any order or direction of the Court such official may, by letter of attorney, authorize the Bank of England or the Bank of Ireland, or all or any of their proper officers, to sell and transfer all or any part of the stock from time to time standing in the books of the said banks on such account, and to receive the dividends due and to become due thereon. And where, according to the practice of any co. (other than the said banks), such stock is accustomed to be sold and transferred, or the dividends to be received by letter of attorney, such official may authorize such co., or the proper officer or officers thereof, or any other person, to sell and transfer all or any part of the stock from time to time standing in the books of such co. on such account, and to receive the dividends due and to become due thereon. And notwithstanding sect. 20 of 29 & 30 V. c. 39, no request of the Treasury shall be necessary to authorize any such account of Government stocks and anns to be opened, and no order in writing of the Treasury shall be necessary for the sale or transfer of any such Government stocks or anns. (Additional rule added in 1899.)

A judicial trustee must pay all money coming into his hands on account of his trust without delay to the trust account at the bank, and if he keeps any such money in his hands for a longer time than the Court considers necessary, he is liable to pay interest upon it, at such rate not exceeding 5 p. c. as the Court may fix, for the time during which the money remains in his hands.

WHERE OFFICIAL SOLICITOR APPOINTED.

By a Treasury Rule made pursuant to the Judicial Trustee Rule of May 21st, 1900, when the Court appoints the official solr to be sole judicial trustee, the Paymaster is to be furnished with a copy of the order, or of such parts thereof as are necessary, authenticated by the signature of the officer of the Court, and specifying the date of the order, and the title of the trust to which the trust funds are to be lodged. The Paymaster is also to be furnished with authenticated copies of any subsequent orders, or parts of orders, which are necessary to give effect to the directions of the Court.

Provision is made for the lodgment, &c. of funds, and a form of request is given, and trust funds lodged to the Paymaster's account are to be dealt with by the Paymaster under the authority of trustee's orders (i.e., the direction or authority given by the official solr to the Paymaster to make payment, or to sell or transfer securities) signed by the official solr: and it is provided that any order for a payment exceeding 500*l.* is to be countersigned by the officer of the Court. The trustee's orders are to be in certain forms, which

are given; and any request for a transfer of stocks, shares, or securities over a face value of 500*l.* is to be countersigned by the officer of the Court.

Provision is made for the deposit of documents of title at the Law Courts Branch of the Bank of England, and the Bank is not to deliver any deeds or documents so deposited to any person, except on a request signed by the official solr, and countersigned by the officer of the Court, but any person who is authorized thereto by the officer of the Court in writing is to be allowed to inspect the deeds or documents during business hours.

REMUNERATION OF TRUSTEE.

By r. 17, "(1) Where a judicial trustee is to be remunerated, the remuneration to be paid to him shall be fixed by the Court, and may be altered by the Court from time to time. (2) In fixing the remuneration, regard shall be had to the duties entailed upon the judicial trustee by the trust. (3) The Court may make, if it thinks fit, special allowances to judicial trustees for the following matters, to be paid out of the trust property—(a) for the statement of trust property prepared by a judicial trustee on his appointment, an allowance not exceeding ten guineas; (b) for realising and investing trust property, where the property is realised for the purpose of re-investment, an allowance not exceeding 1½ p. c. on the amount realised and re-invested; (c) for realising or investing trust property in any other case, an allowance not exceeding 1 p. c. on the amount realised or invested. (4) The Court may also in any year make a special allowance to a judicial trustee, if satisfied that in that year more trouble has been thrown upon the trustee by reason of exceptional circumstances than would ordinarily be involved in the administration of the trust. (5) Where a trustee is remunerated, any allowance under this rule may be paid in addition to his remuneration. (6) Any remuneration or allowance payable to a judicial trustee shall be paid or allowed to him at such times and in such manner as the Court directs."

By r. 18, where an official of the Court is appointed to be a judicial trustee, any remuneration, allowances, or other payments payable to him on account of his services as trustee are to be paid, accounted for, and applied in such manner as the Treasury direct.

PROCEDURE.

It is not necessary to take out a summons for any purpose under the Act or Rules, except in cases where a summons is required by the Rules, or where the Court directs a summons to be taken out; but where a judicial trustee desires to make any application or request to the Court, or to communicate with the Court as to the administration of the trust, he may do so by letter addressed to the officer of the Court without any further formality; and the Court may give any direction to a judicial trustee with regard to the administration of the trust by letter signed by the officer of the Court and addressed to the trustee, without drawing up any order or formal document: R. 28.

SPECIAL TRUSTS.

A judicial trustee is not to be appointed or act as trustee for any incorporated or unincorporated company, for any club, or for any debenture holders or other persons or class of persons in their capacity as members of or being in any other relation to such a company or club; and where the circumstances of any trust of which an official of the Court is a judicial trustee, or of which it is proposed to appoint an official of the Court to be a judicial trustee, involve the carrying on of any trade or business, special intimation of the fact is to be given to the Court either by the judicial trustee or by the person making the application for the appointment of the judicial trustee, as the case may be, and the Court will specially consider the facts of the case with a view to determining whether the official of the Court should continue or be appointed as judicial trustee, and whether any special conditions should be made or directions given with a view to ensuring the proper supervision of the trade or business.

CHAPTER XLII.

CHARITIES.

SECTION I.—ADMINISTRATION OF CHARITIES GENERALLY.

1. *Judgment for Scheme—New Trustees—Inquiries as to Value, Income, and Letting Property—Rents.*

1. LET a scheme for the regulation and management (admon) of the charity in &c., and the application of the present and future income thereof be settled by the Judge; 2. And Let new trustees be appointed for the management (admon) of the said charity, and of the estates (funds) and property thereof; And Let provision be made in the said scheme for the future appointment of trustees; And Let the following &c.; 3. An inquiry of what the property of the said charity consists and where the same is situate, and what is the income and annual value thereof, and how, and by whom, and under and upon what terms, rents, and conditions the same and every part thereof is let, and is now held; 4. An account of the rents and profits of the charity estates received by the Defts &c.; and of the application thereof from the — day of —, the date of the issue of the writ in this action.—Adjourn &c.—See *A. G. v. Corp. of Ilchester*, M. R., 19 July, 1855, A. 1435.

For order for application of funds *cy-près* until land should become available for the purposes of a bequest, see Form 4, *inf.* p. 1330.

2. *Directions for Scheme for regulating Charity.*

LET a scheme for the regulation and management (admon) of the charity in the pleadings (petition) mentioned [and of the estates (funds) and property thereof, *or* and for the application of the income and the selection of fit objects thereof, *or* and for filling up any vacancy in the number of the trustees] be settled by the Judge.—See *A. G. v. Harrison*, M. R., 18 Dec. 1852, A. 387; *Paine v. A. G.*, V.-C. W., 1 Aug. 1872, B. 2427.

For a similar order under the Charitable Trusts Acts, 1853, 1855, and 1860, see *Re Sion Hosp.*, M. R., in Chambers, 27 Nov. 1876, B. 1826.

3. *Same—Endowment of Churches—Other Charities.*

LET a scheme for the application of the charitable fund given by the testatrix's will for the endowment of district churches or chapels in populous parishes, having regard to the directions in the testatrix's will in that behalf contained, be settled by the Judge.—*Edwards v. Hall*, V.-C. W., 7 May, 1853, A. 1044; 6 D. M. & G. 74; 11 Ha. 22.

4. *Order directing Scheme to be Settled.*

THE application by originating summons &c. of the Plts, which, upon hearing counsel for the Defts, was adjourned to be heard in Court, and was on the 22 May, 1897, adjourned back to the Judge in Chambers, coming on this day to be heard in Chambers &c. The Judge doth declare that according to the true construction of the will of the testator, F. O. T. D., the gift of one-tenth part of the annual dividends and income of the legacy or fund therein referred to as the D. Charitable Trust to the P. A. (1851), or some one or more kindred institutions having for their object the maintenance and defence of the doctrines of the Reformation and the principles of civil and religious liberty against the advance of Popery, is a good and valid charitable bequest, and that such one-tenth part ought to be applied for the benefit of some one or more of the class of institutions of which the P. A. is the type; And the A. G. by his counsel asking that a scheme should be settled for the distribution of the income applicable upon the charitable trust aforesaid; And the Judge being of opinion that the part of the said D. Charitable Trust Fund whereof the annual dividends and income are bequeathed upon the charitable trust aforesaid ought to be transferred to the official trustees of charitable funds; It is ordered that the Plts, A. W. K. and H. V., and the Defts, E. A. R. and J. W. B., the trustees of the said will, do on or before the — day of — 1898, transfer stocks or other securities representing one-tenth part of the said legacy or fund to the account of the official trustees of charitable funds at the Bank of England upon the trusts of the aforesaid one-tenth of the said charitable legacy or fund; And it is ordered that a scheme for the regulation and management of the charity created by the legacy of the aforesaid one-tenth of the said charitable fund, and the application of the present and future income thereof, be settled by the Judge.—Costs of all parties to be paid by trustees of will out of accumulated income of the whole legacy or fund aforesaid.—Liberty to apply.—*Re Delmar's Charitable Trust*, Kerly v. Matheson, Stirling, J., 14 Feb. 1898, A. 988, (1897) 2 Ch. 163.

This order did not embody the scheme, although so directed by the reported judgment.

For inquiry for scheme for supplying the Episcopal Church in Scotland with duly qualified clergymen, see *A. G. v. Glasgow Coll.*, 2 Coll. 713.

For decree declaring the trusts of the meeting-houses for religious worship

of Methodists, and the mode of appointing preachers therein under the trusts, according to the rules and regulations of the society, and rectifying the deed of trust of a local branch society a century after its execution as defective and inconsistent with the government and discipline of the general body, and appointing new trustees of the trust premises, and vesting them in such trustees, the costs to be taxed and raised by mortgage thereof, without prejudice to any application by the existing trustees in respect of an alleged prior charge, see *A. G. v. Clapham*, 10 Ha. 617.

For declarations and inquiry as to school property, and schemes and qualifications as to admittance, see *A. G. v. E. Devon*, 15 Sim. 253; as to boarders, masters' residences, and powers and eligibility of trustees, *A. G. v. E. Stamford*, 16 Sim. 474, *et inf.* p. 1297; and as to admitting free scholars by competitive examination, and liberty to apply as to numbers if fund should increase or diminish, *Manchester Sch. Case*, 1 Eq. 64; 2 Ch. 497.

See clauses for a scheme for a school charity set out in *Berkhampstead Sch. Case*, 1 Eq. 102; and minutes of decree as to capitation fees for masters, *Ib.* 120.

For order of reference to Chambers to approve a scheme, with power to vary the proportions in which the income was to be apportioned among the objects of the charity, and other special directions, see *A. G. v. Caius Coll.*, 2 Keen, 150.

For inquiry as to clothing, educating, and apprenticing, advancing loans, increase to almsmen, and appointing managers, and for scheme, allowing sums for erecting, enlarging, and supporting various schools, apprenticing, donations to hospitals, &c., erecting almshouses, and increase to inmates, and allowance to parties eligible as such, see *A. G. v. Bovill*, 1 Ph. 768.

And for scheme for the poor of a parish, without inquiry, see *A. G. v. Brandreth*, 1 Y. & C. Ch. 202; and see further as to schemes, Forms 7, 9—13, *inf.*, and notes, pp. 1295 *et seq.*

5. *Attorney-General to have Notice.*

AND the A. G. is to have notice of and to be at liberty to attend the proceedings relating to such scheme separately from the relators.—*A. G. v. Greenhill*, V.-C. W., 7 Dec. 1863, A. 2477.

Where the action is by relators, and not *ex-officio*, the above direction is inserted if the Court desires the intervention of the A. G., but the A. G. has notice of the application, and is at liberty, by his counsel or solr, to attend the Judge thereon without any special directions to that effect: *Re Hanson*, 9 Ha. liv.; *A. G. v. Stamford*, 1 Ph. 749; Tudor, Char., 3rd ed. p. 341.

6. *Inquiry in whom Lands vested, and as to Past and Future Management.*

"AN inquiry (in whom the legal estate of the lands and tenements belonging to the charity in question (in the pleadings mentioned) is vested, and) what are the nature and particulars of the said charity, and in what way the same has hitherto been managed and conducted, and whether any and what alteration should take place for the future, and who are the proper objects of such charity."—Direction for scheme.—*A. G. v. Boddington*, 9 July, 1801; *A. G. v. Camelford*, 2 May, 1817, A. 2112.

If the legal estate is meant to be vested under the Charitable Trusts Acts, 1853 and 1855, 16 & 17 V. c. 137, ss. 47, 48, and 18 & 19 V. c. 124, s. 15, the inquiry as to it may not be necessary: see note, *inf.* p. 1316.

7. *Inquiry as to Property—Account of Rents and Fines—Inquiry as to Letting—Scheme—New Trustees.*

LET the following &c.—1. An inquiry what were the estates subject to the charitable uses created by the deeds, dated &c.; 2. An account of the rents and profits of such estates, and of the fines taken for the renewals of the leases thereof, come to the hands of the Defts &c.; 3. An inquiry at what times such fines were received, and in what manner the same, and the rents and profits, have been applied; 4. An inquiry whether the said estates have been properly let; 5. And if it shall appear that the same have not been properly let, an inquiry whether it will be proper to take any, and if any what, steps to set aside any leases improperly made; 6. And Let a scheme &c. be settled &c. [Forms 1, 2, 3, 4, *sup.* pp. 1283, 1284]; 7. And Let proper persons be appointed to be feoffees or trustees of the charity estates; (8. Inquiry in whom the legal estate is vested;) Tax the relator's costs to this time; Defts to pay them out of money in hand; Reserve the consideration in what manner the same shall ultimately be paid.—Adjourn &c.—*A. G. v. Corp. Exeter*, M. R., 22 March, 1813, A. 698; *aff.* 7 March, 1822, A. 1132.

For inquiry into the condition of the charity estate, and how much was proper to be laid out in repairs to render the same fit for the objects of the charity, and what expenses had been occasioned by inclosure of the charity lands, see *A. G. v. Rawworth*, L. C., 26 May, 1802, A. 199.

And as to the condition of the charity estate and of the new inclosures, and what money had been laid out on the estate, and how; and what was the usual course of election of wardens, and account of the produce of the estate received by the relator and the Defts, see *A. G. v. Foster*, L. C., 23 July, 1791.

8. *Inquiry as to Charities and their Apportionment, under the Church Building Act, 1845 (8 & 9 V. c. 70), and the Charities Procedure Act, 1812 (52 G. III. c. 101).*

AN inquiry whether there are any, and what, charitable devises, bequests, or gifts that have been made and given for the use of the poor of the parish of W. &c., and whether it is fit and proper, having regard to the state of the parish, that such devises, bequests, or gifts should be apportioned between the district of St. J. and the remaining part of the parish, under the Acts of Parliament &c.; And in that case—Direction to approve of a scheme for such apportionment.—*Re West Ham Char.*, 2 D. & S. 218; approved in *Exp. Incumb. of Brompton*, 5 D. & S. 626, 634.

For order under the Church Building Acts, 1845, 1851, and 1854, 8 & 9 V. c. 70, 14 & 15 V. c. 97, and 17 & 18 V. c. 32, on the petition of the minister of the parish and district parishes, directing apportionment of a charitable bequest between the several district parishes of the parish of St. Mary, Lambeth, and the remaining parts of such parish, and to settle a scheme or schemes for the admon of such respective apportionments in lieu of the former scheme; and

inquiry by whom the distribution of the income of the charity should be made in the districts, having regard to the 8 & 9 V. c. 70, and to tax and raise the costs by mortgage of the charity estate, to be paid off by instalments, and the interest to be kept down out of the income, see *Re Lambeth Char.*, V.-C. K., 8 Nov. 1850, B. 58.

For direction to tax the costs of two parishes, one of which had been formed out of the other, and the two to be allowed such costs only as they would have been entitled to if the parish of St. G. had not been created out of the parish of St. M., see *A. G. v. E. Craven*, 7 March, 1860, A. 508.

A charity held by the churchwardens for the repair of a particular church could not be apportioned: *Re Church Estate Char.*, *Wandsworth*, 6 Ch. 296.

Under the Charitable Trusts Act, 1855, 18 & 19 V. c. 124, ss. 10, 13, the Charity Commrs are empowered to apportion small parochial charities: *v. inf.* p. 1318; but the Commrs prefer to exercise the general power of establishing schemes under the Charitable Trusts Act, 1860, 23 & 24 V. c. 136; *Tudor, Char.* 539, 540.

9. *Order adopting Scheme filed.*

LET the scheme dated &c., which has been approved (and signed) by the Judge, and filed in the Central Office, be the scheme for the regulation and management (admon) of the charity &c., and the estates (funds or property), and for the application of the income (selection of the objects) thereof [*If required*, And Let the several persons in the said scheme named be appointed trustees of the said charity].—Directions to tax and pay costs and expenses.—See *Re Conyer's Gram. Sch.*, V.-C. W., 23 April, 1853, B. 1033; 10 Ha. v.; *Re Fowey, A. G. v. Gilbert, M. R.* in Chambers, 25 July, 1856, A. 1412; *Henshaw v. Atkinson*, V.-C. K., 17 April, 1858, A. 888.

10. *The like.*

LET the scheme dated &c. for the regulation and management &c. of the charity in question (and of the estates, funds, and property thereof), which has been approved by the Judge, and filed in the Central Office of this Court, be carried into effect.—See *Re Millington Char.*, V.-C. W., 21 Jan. 1853, B. 995; *A. G. v. Dalton, M. R.*, 30 July, 1853, A. 1608.

11. *The like—Scheme scheduled to Order.*

LET the scheme set forth in the schedule hereto for &c. [Form 9] be carried into effect.—*Re Crane's Char.*, M. R. in Chambers, 25 Nov. 1859, A. 237.

Though a scheme has sometimes been set out in a schedule to the order, the better course is to file it and refer to it, as in Forms 9, 10, *sup.*

And see Form 12, *inf.*, where the scheme was set forth in a schedule to the certificate.

The above forms apply under the Charitable Trusts Acts, 1853, 1855.

For forms of orders under those Acts removing and appointing trustees and vesting the trust estate, see Section II., *inf.* p. 1307.

And see school and general schemes in *A. G. v. Brickdale*, M. R., 25 Feb. and 17 March, 1845, A. 1140, 1874; *S. C.*, 1850, A. 142; *A. G. v. Hartlebury Sch.*, 8 Nov. 1849, A. 173; *S. C.*, 1840, A. 845; Tudor, Char. 816 *et seq.*

For order—the Court being of opinion that, in settling a scheme for the management of the charity funds, such funds ought not to be applied towards the establishment of an industrial school for the children of convicted persons—to refer it back to Chambers to consider a scheme or schemes in pursuance of the order dated, &c.; cost of all parties appearing to be costs in the matter, see *Re Prison Charities*, V.-C. B., 30 April, 1873, B. 1189; 16 Eq. 129, 152.

12. *Scheme scheduled to Certificate adopted, with consequent Directions—Costs.*

“AND this Court being of opinion that the scheme set forth in the schedule to the said certificate is a proper scheme for the future management of the charity in &c., having regard to the provisions of the will of B. the testator &c., Let the same be adopted and carried into effect, And Let G. Lord L. &c. be appointed the first trustees of the said charity; Tax the costs of all parties (except the Defts the Governors &c. of St. George's Hospital, against whom all further proceedings have been stayed) of these actions as between solr and client, including in the costs of the A. G. any costs, charges, and expenses properly incurred by him in relation to the said charitable bequest, not being costs in the secondly-mentioned action, and not already taxed or allowed.”—[*Add Payment Schedule containing directions to raise and pay costs out of fund in Court, and transfer residue to the trustees.*]—*Philpott v. St. George's Hosp.*, M. R., 26 March, 1859, B. 2738.

For scheme as to number and appointment of trustees, see *S. C.*

For orders for continuing trustees of different religious denominations and to appoint new trustees from time to time, see *A. G. v. Wilson*, 16 Sim. 222.

13. *Scheme and Mode of Letting superseded—New Scheme adopted—New Trustees—Lands vested in Official Trustee—Costs.*

“THIS Court being of opinion that it will be for the benefit of the charity &c. that the mode of appointing trustees should be varied, Let the same be henceforth discontinued; And Let the scheme for letting the charity lands be also put an end to (discontinued) and cease on this day; And Let the said lands be let according to the provisions contained in the scheme hereinafter mentioned; And Let the scheme set forth in the — schedule to the Master's certificate dated &c., for the appointment of new trustees, and for the future management and regulation of the said charity, and of the estates and property thereof, be carried into effect; And Let, pursuant to the Charitable Trusts Act, 1853, and the Charitable Trusts Amendment Act, 1855, the lands and buildings belonging to the said charity, set forth in the — schedule to the said certificate, vest in the official trustee of charity lands, to be held by him in trust for the said charity.”—Directions to discharge

some trustees and appoint new ; Tax all parties' costs, as between solr and client, including the Plt's costs, charges, and expenses properly incurred relating to the charity ; costs &c., when taxed, to be paid by the trustees to be appointed out of income.—*Liberty to apply.*—*A. G. v. L. Onslow*, M. R., 17 Nov. 1855, A. 193 ; and see note, *inf.* p. 1297.

As to paying interest of charity funds in Court to trustees, see Vol. I. p. 214.

14. *Leave to Enfranchise Copyholds.*

DIRECTION for vesting copyholds in the trustees of the charity—“ And the Judge being of opinion that it will be fit and proper and for the benefit of the said charity that the said copyhold lands should be enfranchised on the terms set forth in the conditional contract dated &c., and marked A. in the affidavit of &c., referred to, Let the trustees of the said charity be at liberty to effect such enfranchisement upon the said terms ” ; Tax costs of applicants and of A. G. as between solr and client ; Trustees to raise and pay costs, and the fines, fees, and expenses of enfranchisement, out of fund in their names.—*Re St. Margaret's Hosp.*, M. R. in Chambers, 3 July, 1860, B. 1613.

15. *Apportionment of Costs.*

AND Let the costs of this application and consequent thereon be apportioned rateably among the said several charities, according to the annual income thereof respectively ; And Let the amounts apportioned in respect of such costs be paid out of any funds in hand belonging to the said several charities, or out of the annual income thereof respectively.—See *Re Saffron Walden Char.*, V.-C. S. in Chambers, 16 Nov. 1857, B. 125.

16. *Relators' Extra Costs allowed—Inquiry.*

LET the Defts, the C. Co., reimburse to the Petrs, the relators, out of the charity funds, the costs and expenses incurred by the Petrs in this cause, over and beyond the costs which have been paid by the Defts, the C. Co., as between party and party ; And Let the taxing master inquire whether any costs and expenses have been properly incurred by the Petrs, other than the costs of this cause, relating to the matters in question, and tax and certify the same respectively ; And Let the Defts, the C. Co., pay the amount (if any) that the taxing master shall certify to have been so properly incurred, out of the said charity funds.—*A. G. v. Coopers' Co.*, V.-C., 29 March, 1819, A. 1322.

For decree on an information, without a relator, where a Deft paid the costs of his co-Deft, see *A. G. v. Corp. Chester*, 14 Beav. 341.

17. *Trustees' and Relators' Extra Costs, with Interest, to be raised by Mortgage.*

TAX the costs, charges, and expenses of the Petrs and the Defts B. &c., properly incurred in or relating to these actions or any of them, including the costs of this application and consequent thereon, and also any costs, charges, and expenses properly incurred by the Petrs and the Defts relating to the affairs of the hospital of St. O., &c. and certify the total amount of the costs, charges, and expenses of the Petrs and of the late Deft D. in each year, commencing on the — day of —, and compute interest at the rate of £4 p. c. per ann. on the amount of each year's costs of the said Petrs and the said D. &c., from &c. in each year, commencing &c., to the date of the taxing master's certificate. —Costs, charges, and expenses, with interest (to be raised by mortgage, &c.). See Chap. XLIV., "ADMINISTRATION."—*A. G. v. Bp. of St. Davids*, V.-C. E., 4 May, 1849, A. 2017.

For order to tax, as between solr and client, the costs of all parties to the suits, including certain costs of the A. G. of appearing separately from the relators, see *A. G. v. Wyggeston Hospital*, M. R., 2 June, 1855, A. 1024.

18. *Directions under the Crown Suits Act, 1855 (18 & 19 V. c. 90), s. 17, for payment of Costs to or by the Crown, in Suits on behalf of the Crown.*

1. *To the Crown*, s. 1, Let the costs of the Plt of this action be paid by the Deft A. into H. M.'s Exchequer, in the manner directed by the Crown Suits Act, 1855, such costs to be taxed &c. 2. *By the Crown*, s. 2, Let the costs of the Deft A. of this action be paid to him in the manner directed by the Crown Suits Act, 1855, such costs to be taxed &c.—Settled by V.-C. W., in *A. G. v. Matthias*, 23 Dec. 1858, and approved in *A. G. v. Hanmer*, 4 D. & J. 207; see note, *inf.* p. 1306.

NOTES.

GENERAL JURISDICTION.

The Court of Chancery had an inherent jurisdiction over charities generally: *Incorp. Soc. v. Richards*, 1 D. & War. 258, 308; and could enforce and execute trusts affecting ecclesiastical property as well as those affecting lay property: *A. G. v. St. John's Hospital, Bedford*, 2 D. J. & S. 621; *Tudor's Charitable Trusts*, p. 88 *et seq.*

And by the Jud. Act, 1873, s. 34 (3), all causes and matters for the execution of charitable trusts are now assigned to the Ch. Div.

Defect (want of attestation) in execution of a power was aided in favour of a charity: *Sayer v. S.*, *Innes v. S.*, 7 Ha. 377; 3 Mac. & G. 606.

It is against the policy of the Mortmain Acts, and the practice of the Court, to invest charity money in land: *A. G. v. Wilson*, 2 Keen, 680, 684, n., 685; and see the Mortmain and Charitable Uses Act, 1891, ss. 5, 6, *inf.* p. 1338.

The Court will not sell a charity estate, except in a very special case: *A. G. v. Corp. of Newark*, 1 Ha. 395, 400, where it would not even send an inquiry. An advowson was sold for the benefit of the charity: *A. G. v. Abp. of York*, 17 Beav. 495.

The A. G. is entitled to have a legacy to a foreign charity secured to be so

applied: *A. G. v. Sturge*, 19 Beav. 597; but see *New v. Bonaker*, 4 Eq. 655, *et inf.* p. 1293.

In an action at a relator's instance (who in general ought to be made a co-Plt, Dan. 56), the A. G. should not appear unless to support: *A. G. v. Ironmongers' Co.*, 10 Cl. & F. 908; 2 M. & K. 576; 2 Beav. 313; but the action is his, and he has control of it, and may stay the proceedings at any time: *Ib.* 328; *A. G. v. Corp. of Newark*, 1 Ha. 399; *A. G. v. Haberdashers' Co.*, 2 M. & K. 817; 15 Beav. 397.

As to when the A. G. should appear in charity cases, see *Ware v. Cumberlege*, 20 Beav. 503, 510, *et v. inf.* pp. 1297, 1306.

An action by freemen, on behalf of others, to establish that property belonging to a corporation was held on trust for the benefit of the freemen individually, was held rightly brought without the A. G.: *Prestney v. Corp. of Colchester*, 21 Ch. D. 111; *sed qu.*: *v. inf.* p. 1342.

The jurisdiction extends to charities supported by voluntary contributions, if there is property impressed with a charitable trust: see *Exp. Pearson*, 6 Price, 214; *A. G. v. Kell*, 2 Beav. 577; *A. G. v. Bp. of Manchester*, 3 Eq. 453; Tudor, Char. 97.

The members of a committee formed to receive voluntary subscriptions for charitable purposes are not trustees, but agents, and an action of account by some of them against the others cannot be maintained; even if all the subscribers were suing, the action could not be maintained in the absence of the A. G.: *Strickland v. Weldon*, 28 Ch. D. 426.

Where the income of residue is to be accumulated, and the capital and income paid to a charity at a future time, the charity (like a private individual: see *Saunders v. Vautier*, 4 Beav. 115; *Hilton v. H.*, 14 Eq. 468) can have the accumulation stopped, and the property handed over at once: *Wharton v. Masterman*, (1895) A. C. 186, H. L., affirming C. A. (1894) 2 Ch. 184 (*sub nom. Harbin v. Masterman*), and on this point overruling *Harbin v. Masterman*, 12 Eq. 559.

Informalities (unless prejudicial to a Deft, *A. G. v. Warren*, 2 Sw. 291, 310) were not allowed to defeat an information: *A. G. v. Brereton*, 2 Vez. 426; *A. G. v. Gardner*, Barn. Ch. 493, 490; *A. G. v. Gore*, *Ib.* 151; and see *A. G. v. Whiteley*, 11 Ves. 241, 247; *A. G. v. Coopers' Co.*, 19 Ves. 186, 194; and as to relief under a prayer for general relief, see *A. G. v. Brooke*, 18 Ves. 319, 324; *A. G. v. Rochester*, 5 D. M. & G. 797.

But an information filed on behalf of one charity could not be carried on for another, it appearing the first had no title: *A. G. v. Oglender*, 1 Ves. jun. 246.

A tenant for years of land subject to a rent-charge for charitable purposes is not liable in an action in the Ch. Div. at the instance of the A. G. or the Charity Commrs: *Re Herbage Rents, Greenwich*; *Charity Commrs v. Green*, (1896) 2 Ch. 811.

COMMENCEMENT OF ACTION.

By O. r. 1, all actions which, previously to the commencement of the principal Act, were commenced by bill or information in the High Court of Chancery shall be instituted in the High Court of Justice by a proceeding to be called an action.

CHARITABLE TRUSTS EXECUTED CY-PRÈS.

Where there is a general indefinite charitable purpose, not fixing itself upon any object, or if the object or means of carrying it out fail, the disposition is in the King by sign manual; but where the execution is to be by a trustee, with some or general objects pointed out, the Court will take the admon of the trust: *Moggridge v. Thackwell*, 7 Ves. 36, 67—83, 88; and see *Paice v. Abp. of Canterbury*, 14 Ves. 372; *Ommanney v. Butcher*, T. & R. 270; *Reeve v. A. G.*, 3 Ha. 191, and notes; *Cary v. Abbot*, 7 Ves. 490; *Re Richardson's Will*, 58 L. T. 45; *Re Lea*, L. v. Cooke, 34 Ch. D. 528, *inf.* p. 1296; but see *Martin v. Margham*, 14 Sim. 230.

Where the Crown is to have the disposal of money bequeathed for charity, the Court only declares that it ought to be disposed of in charity, and this is communicated by the A. G. to the King: *Da Costa v. De Pas*, Amb. 228; see

the order and course pursued: *Ib.*, n.; *A. G. v. Herrick*, *Ib.* 712; *Kane v. Cosgrave*, 1 R. 10 Eq. 211.

Uncertainty as to, or illegality or failure of, the precise objects will not defeat the gift if the general charitable intent is clear: and the Court will execute such general intent *cy-près*: *A. G. v. Rance*, Amb. 422; *Powerscourt v. P.*, 1 Moll. 616; *Baylis v. A. G.*, 2 Atk. 239; *Moggridge v. Thackwell*, 7 Ves. 36; *Mills v. Farmer*, 1 Mer. 55, 101; *Dolan v. Macdermot*, 3 Ch. 676; *Mayor of Lyons v. Adv. Gen. of Bengal*, 1 App. Ca. 91; 1 Jarm. W. 206; *Re Davis*, 61 L. T. 530; *Re Geary*, 25 L. R. Ir. 171; *secus*, if no charitable intent appears except in reference to a particular property: *Hoare v. H.*, 56 L. T. 147.

But uncertainty as to the amount intended to be given makes the gift void: *Chapman v. Brown*, and other cases *inf.* p. 1343; so also where testator left the amount of the legacy blank: *Hartshorne v. Nicholson*, 26 Beav. 58; *secus*, where the whole sum to be given to the charities was specified, but the proportions were left blank: *Pieschel v. Paris*, 2 S. & S. 384; and see *Salisbury v. Denton*, 3 K. & J. 529.

A gift for the establishment of a soup kitchen and cottage hospital for a parish was held to show a general charitable intention to benefit the poor of the parish, which might be executed *cy-près*: *Biscoe v. Jackson*, 35 Ch. D. 460, C. A.; and see *Re Buck*, *Bruty v. Mackey*, (1896) 2 Ch. 727, where a friendly society for the relief of persons in distressed circumstances by means of anns was held to be a "charity" within *Income Tax Commrs v. Pemsel*, (1891) A. C. 531, to which the doctrine of *cy-près* was applicable; but it is otherwise where the society is merely for the purpose of providing annuities for the widows of members: *Cunnack v. Edwards*, (1896) 2 Ch. 679, C. A.; (1895) 1 Ch. 489; *v. inf.* p. 1700; and so where a fund was given on trust to pay the income to the incumbent of a church, so long as he permitted sittings to be occupied free, there was no such general purpose of charity as to warrant an application *cy-près*: *Re Randell*, *R. v. Dixon*, 38 Ch. D. 213; and a legacy for the benefit of a particular institution or seminary which ceased in the donor's lifetime could not be applied *cy-près*, but lapsed: *In re Rymer*, *R. v. Stanfield*, (1895) 1 Ch. 19, C. A.

The *cy-près* doctrine is excluded by words showing an intention that if the particular charity fails, the bequest shall fall into the residue: *Mayor of Lyons v. Adv. Gen. of Bengal*, 1 App. Ca. 91. When there are no such words it cannot do so, although the residue is given to another charity, but it must be executed in the first instance *cy-près*, without regard to the rest of the will: *S. C.*

And where one of three charities amongst which the residue was divided failed, its share was applied *cy-près*, and not to the other charities: *Ironmongers' Co. v. A. G.*, 10 Cl. & F. 908.

But in constructing the scheme, the other parts of the will will be taken into consideration: *Mayor of Lyons v. Adv. Gen. of Bengal*, 1 App. Ca. 91.

Where it is doubtful whether the particular intention can ever be carried into effect, the fund may be kept in hand, with liberty to apply, or inquiries may be directed: *Chamberlayne v. Brockett*, 8 Ch. 206, 211; and see *Re White's Trusts*, 33 Ch. D. 449, where a gift of Consols to a co. to found almshouses, no site being obtainable, and the co. having no income available for endowment and maintenance, was held not to be applicable *cy-près*.

A bequest to a friendly society which was not a charity, and was afterwards dissolved, was not executed *cy-près*, but fell into the residue: *Re Clark*, 1 Ch. D. 497; but see *Pease v. Pattinson*, 32 Ch. D. 154, where a friendly society was held to be a charity.

If a testator clearly points out his intent, the Court carries it into effect; but if the property is merely devoted to charity generally, or there are accretions not specifically disposed of, or the particular charity fails or becomes excessive as to the prescribed recipients, then *cy-près*: *Philpott v. St. George's Hosp.*, *Re Ashton*, 27 Beav. 107, 111—4, 5, 8.

A long-continued unauthorized *cy-près* application by trustees is no ground of objection to a scheme of the Charity Commrs directing a different *cy-près* application: *Re Campden Charities*, 18 Ch. D. 310, C. A.

The particular charity being dissolved in the lifetime of the testator, the gift lapses, and cannot be applied *cy-près*: *Langford v. Gowland*, 9 Jur. N. S.

12; 10 W. R. 482; 3 Giff. 617; *Fisk v. A. G.*, 4 Eq. 521; *Clark v. Taylor*, 1 Drew. 642; *Russell v. Kellett*, 3 Sm. & G. 264; *Re Joy, Purday v. Johnson*, W. N. (88) 238; 60 L. T. 175, where the gift was by a testatrix to a particular society, which, in fact, only consisted of herself: *Re Ovey, Broadbent v. Barrow*, 29 Ch. D. 560, where the gift was to an ophthalmic hospital which had ceased to exist; and so where foreign trustees disclaimed, and the objects had become impracticable: *New v. Bonaker*, 4 Eq. 655. But see *A. G. v. Stephens*, 3 My. & K. 347, *et inf.* p. 1302; *v. Bp. Chester*, 1 Bro. C. C. 444. *Secus*, where the particular intention of charity can be equally well effected by an existing society, or there has been merely a failure of the trustee or medium for working out the charitable object: *Marsh v. A. G.*, 2 J. & H. 61; *Barclay v. Messenger*, 4 Jur. N. S. 1294; *Re Maguire*, 9 Eq. 632; *Re Geary's Trusts*, 25 L. R. Ir. 171; *Re Davis*, 61 L. T. 530; *A. G. v. Day*, (1900) 1 Ch. 31.

And where the charity fails after the death of the testator and before the legacy is paid, there is no lapse, and the legacy must be applied *cy-près*: *Re Slevin, S. v. Hepburn*, (1891) 2 Ch. 236, reversing *S. C.*, (1891) 1 Ch. 373; *Re Buck, Bruty v. Mackey*, (1896) 2 Ch. 727.

A charitable bequest, void as superstitious, was executed in favour of other charities: *Cary v. Abbot*, 7 Ves. 490; *Da Costa v. De Pas*, *cit.* 7 Ves. 76; *Amb.* 228.

Where it is doubtful which of two charities testator intended, the legacy may be divided between them: *Waller v. Childs*, *Amb.* 524; *Bennett v. Hayter*, 2 Beav. 81; *Simon v. Barber*, 5 Russ. 112; *Re Kilvert's Trusts*, 12 Eq. 185; *S. C.* on app., 7 Ch. 170; *Re Alchin's Trusts*, 14 Eq. 230; *Re Hyde*, 22 W. R. 69.

Where the gift was to build a synagogue and school, and the money was insufficient, the Court allowed it to be paid to the committee of a school without synagogue attached: *Re Davis*, 61 L. T. 530.

Hospital means a general hospital in priority to one for particular purposes: *Re Alchin's Trusts*, 14 Eq. 230.

When a fund has been applied *cy-près*, it will not afterwards be applied to the original purpose, unless shown to be equally beneficial: *A. G. v. Stewart*, 14 Eq. 17.

And as to the construction and validity of charitable gifts, *v. inf.* pp. 1340 *et seq.*

POWER OF THE COURT OVER VISITORS AND TRUSTEES.

In a Crown foundation, the King visits by the L. C. as visitor: Tudor, *Char.* 81; in a private one, where no visitor, though governors are appointed by royal charter, with power to make rules, the Court will see that the rules are proper, and may direct a scheme: *A. G. v. Dedham Sch.*, 23 Beav. 350; 22 L. J. Ch. 793; as to grants by the Crown, see *A. G. v. Evelme Hosp.*, 17 Beav. 366.

The visitatorial jurisdiction of the L. C. is not transferred to the High Court of Justice: *Jud. Act*, 1873, s. 17, sub-s. 5.

The Court enforces the trusts of a charity, though there is a visitor: *A. G. v. St. Cross Hosp.*, 17 Beav. 435; *Daugars v. Rivaz*, 28 Beav. 233.

But has no jurisdiction over ecclesiastical duties attached to a charity: *A. G. v. Smithies*, 1 Keen, 289; 2 My. & C. 135; nor as to internal regulations, which are the proper subject for the special visitor: *A. G. v. Dulwich Coll.*, 4 Beav. 255; unless there has been a breach of trust: *A. G. v. Dedham Sch.*, 23 Beav. 350; 22 L. J. Ch. 793.

For instances where the remedy was through the visitor, see *A. G. v. Magdalen Coll.*, 10 Beav. 402; where through the Court, *A. G. v. St. Cross Hosp.*, *sup.*

But the Court can control visitors as to management of estates: *A. G. v. Lock*, 3 Atk. 164; *A. G. v. Foundling Hosp.*, 2 Ves. jun. 42, 47.

If an officer, &c., be a *c. q. t.* the Court has jurisdiction; not if he be only a servant: *Whiston v. Rochester*, 7 Ha. 532; *Willis v. Childs*, 13 Beav. 117; and see *Hayman v. Rugby Sch.*, 18 Eq. 28.

The Court cannot control trustees' discretion while fairly and honestly exercised: *A. G. v. Harrow Sch.*, 2 Ves. S. 551; *Re Bedford Char.*, 5 Sim.

578; *Re Catherine Hall, Exp. Inge*, 2 Russ. & M. 590; *A. G. v. Mosely*, 2 D. & S. 398; *Re Wilkes*, 3 Mac. & G. 440; *Hayman v. Rugby Sch.*, 18 Eq. 28; and see *Inderwick v. Snell*, 2 Mac. & G. 216; *Costabadie v. C.*, 6 Ha. 410; though without dismissing the information: *A. G. v. Harrow Sch.*, *sup.*

Schemes framed by the Charity Commrs generally contain clauses establishing in them a species of visitatorial jurisdiction: see *Tudor, Char.* 76; with which the Court will not interfere: *Reg. v. Wilson*, W. N. (88) 12; and see *Re Hodgson's School*, 3 App. Ca. 857.

POWER OF A MAJORITY OF THE TRUSTEES.

In a public trust a majority of trustees bind the minority: *Perry v. Shipway*, 4 D. & J. 353; 1 Giff. 1, 9; *Spurgin v. White*, 7 Jur. N. S. 15; 3 L. T. 609; 9 W. R. 266; 2 Giff. 473.

A majority of the members have power to fix the discipline and membership of congregational churches: see *A. G. v. Gould*, 30 L. J. Ch. 77; 7 Jur. N. S. 34; 28 Beav. 485; but they have no power to alter the trusts: *Ward v. Hipwell*, 3 Giff. 547.

And as to injunctions restraining the minority from excluding preachers appointed by the majority, *v. sup.* Vol. I., pp. 722 *et seq.*

Under Charit. T. Act, 1860, s. 16, a majority of two-thirds of the trustees were empowered to deal with the charity property, and pass the legal estate; and now, under Charit. T. Act, 1869 (32 & 33 V. c. 110), s. 12, the like powers are given to a majority who are present at a meeting of their body duly constituted and vote on the question; and see Charit. T. Incorpor. Act, 1872 (35 & 36 V. c. 24), as to incorporation of charities and enrolment of deeds, and as to endowed schools, *inf.* pp. 1298 *et seq.*; and as to Ireland, 34 & 35 V. c. 102.

USAGE.

Usage may be regarded in construing obscure or ambiguous trusts: *A. G. v. St. Cross Hosp.*, 17 Beav. 435; 34 L. J. Ch. 441; *v. Gould*, 28 Beav. 485; 7 Jur. N. S. 34; *v. Sidney Suss. Coll.*, 4 Ch. 722, 732; *v. Windsor*, 8 H. L. C. 369, 402, 403, 423; *v. West*, 27 L. J. Ch. 789; 5 Jur. N. S. 77 (where from long usage payments for corn were held a charge on land); *v. Moor*, 20 Beav. 119; *v. Bristol*, 2 J. & W. 321; *v. Ewelme*, 17 Beav. 366, 390; *v. Smythies*, 2 Russ. & My. 717, 749; 1 Ke. 289, 307, 308; *Re v. Varlo*, Cowp. 248; *A. G. v. Parker*, 3 Atk. 576; *Goodman v. Mayor of Saltash*, 7 App. Ca. 633; *Re St. Nicholas*, 59 L. T. 614; *Re St. Nicholas Acons*, 60 L. T. 532.

Usage, moreover, is important against a claim set up by the trustees for a beneficial interest: *A. G. v. Mercers' Co.*, 18 W. R. 448; and by the Non-conformist Chapels Act, 1844 (7 & 8 V. c. 45), s. 2, if the instrument of trust of an institution existing for the purpose of religious worship do not in express terms, or by reference to some book or other document, define the religious doctrines, twenty-five years' usage immediately preceding any suit is to be conclusive evidence: *A. G. v. Bunce*, 6 Eq. 563; and see *A. G. v. Hutton*, Dru. 480, 530; *A. G. v. Anderson*, 57 L. J. Ch. 543, 546.

As to Roman Catholic charities, see Roman Catholic Charities Act, 1860 (23 & 24 V. c. 134), s. 5, providing that consistent usage for twenty years is to be deemed conclusive evidence of charitable trusts.

Long-continued and well-defined usage afforded ground for presuming a trust or condition sufficient to support the right of free inhabitants to dredge for oysters during a certain period of the year: *Goodman v. Mayor of Saltash*, *sup.*

Where freemen of a city had enjoyed by custom certain rents and profits for a considerable period, they were entitled to enjoy them under the Municipal Corporations Act, 1835 (5 & 6 W. IV. c. 76), s. 2, subject to any proceeding by the A. G. as to a scheme for distribution: *Stanley v. Mayor of Norwich*, W. N. (87) 72.

Where the admon of a charity was entrusted by the founder to the corp. and ministers of a city, but for a long period of time the corp. alone had acted, the ministers were entitled to be admitted in future as joint admons: *Ld. Prov. of Edinburgh v. Lord Advocate*, 4 App. Ca. 823.

But where there is no ambiguity, usage is immaterial, and the conditions

of the gift must be followed: see same cases, and *A. G. v. Rochester*, 5 D. M. & G. 797; *v. St. John's Hosp., Bedford*, 2 D. J. & S. 621; and see *v. Beverley*, 6 D. M. & G. 256, 268; as to length of time, *S. C.*, 6 H. L. C. 310; *A. G. v. Calvert*, 23 Beav. 248, 263, 264; *Re Campden Charities*, *sup.* p. 1292.

As to evidence of acts and opinions of founders, see *A. G. v. Drummond*, 1 D. & War. 153; *v. Calvert*, 23 Beav. 258.

LEGACY AND SUCCESSION DUTY.

For the duties on charitable legacies and the Acts, see Tudor, 357 *et seq.*; land tax, *Ib.* 272, 369.

By the Legacy Duty Act, 1799 (39 G. III. c. 73), bequests of specific articles to bodies corporate for preservation and not for sale are exempt from legacy duty.

Legacy duty was payable under 55 G. III. c. 184 (see sched. pt. 3), on charitable legacies if the amount was more than 20*l.*, though no one of the recipients ever received that amount; so that a legacy of 50*l.* a year, to be laid out in bread for the poor, was liable, though no one received more than 2*s.* a year in value: *Re Franklin's Char.*, 3 Sim. 147; see a similar case, *A. G. v. Fitzgerald*, 13 Sim. 83; *Re Pearce*, 24 Beav. 491; *Harris v. Howe*, 29 Beav. 261; *Re Griffiths*, 14 M. & W. 510; *contra Re Wilkinson*, 1 C. M. & R. 142; *A. G. v. Nash*, 1 M. & W. 237; where the amounts to be paid to each were determined by the will. But by the Succession Duty Act, 1853 (16 & 17 V. c. 51), s. 16, succession duty at 10 p. c. was imposed; and as to the rate of duty, see 51 V. c. 8, s. 21, sub-s. 2.

Charitable legacies in Ireland are exempt from duty: 56 G. III. c. 56, sched. pt. 3; 5 & 6 V. c. 82; 8 & 9 V. c. 76. The exemption has been held not to apply to gifts for England or Scotland by a testator domiciled in Ireland: *A. G. v. Hope's Exors*, Ir. R. 2 C. L. 368; but see *Thompson v. Adv. Gen.*, 12 Cl. & F. 1; nor (apparently) to legacies by an English law for an Irish charity: *In re Franklin's Char.*, 3 Sim. 147; *A. G. v. Fitzgerald*, 13 Sim. 83 (but in neither case was the point raised): Tudor, 359; nor to secret trusts: *inf.* p. 1343.

The exemption applies to charitable bequests as understood in the Court of Chancery: *A. G. v. Bagot*, 13 Ir. C. L. Rep. 48.

As to legacy and succession duty generally, *v. sup.* Vol. I., pp. 238—243.

SCHEME FOR CHARITY.

When a scheme has been settled by the Charity Commrs, the Court will not interfere, unless the Commrs have exceeded their jurisdiction, or the scheme contains something wrong in principle or in law; *Re Campden Charities*, 18 Ch. D. 310, C. A.

By the Charitable Trusts Act, 1853 (16 & 17 V. c. 137), ss. 54—60, the Charity Commrs were empowered to approve, provisionally, of schemes for charities with a view to submitting the same annually to Parliament for its sanction, but the provisions of these sections are rarely used; the powers conferred by sect. 2 of the Act of 1860 (*v. inf.* p. 1319) being more efficacious and convenient: see Tudor, 133, 450.

For the principles in accordance with which the Court exercises jurisdiction in directing schemes, see *Ironmongers' Co. v. A. G.*, 10 Cl. & F. 908; *S. C.*, C. & Ph. 208; 2 Beav. 313; *A. G. v. Sherborne Sch.*, 18 Beav. 256, 280.

For instances, see *A. G. v. Glyn*, 12 Sim. 84; *Martin v. Margham*, 14 Sim. 230; *Reeve v. A. G.*, 3 Ha. 191; and where the sign manual was required: *Ib.* 194, n.; and see judgment, *Ib.* 196; *Clark v. Taylor*, 1 Drew. 642; *Salisbury v. Denton*, 3 K. & J. 529; *A. G. v. Bunce*, 6 Eq. 563; where funds bequeathed to Presbyterians were applied for Baptists: *Re Maguire*, 9 Eq. 632.

Declaration by trustees of trusts of money, collected at or about the time, may represent the intent of contributors: *A. G. v. Clapham*, 4 D. M. & G. 591, 626; 10 Ha. 540.

As to the objects of ecclesiastical education and eleemosynary charities,

with reference to the founder's opinions, rules laid down and usage, see *A. G. v. Calvert*, 23 Beav. 248; and as to the effect of usage, *v. sup.* p. 1294.

The rule is to apportion increased rents among the original objects *pro rata*: *A. G. v. Windsor*, 8 H. L. C. 369, 405, 452; but in settling a scheme for dealing with increased rents the Court has exercised a discretion, and varied the proportions in which the different objects were to take: *A. G. v. Marchant*, 3 Eq. 424; *A. G. v. Caius Coll.*, 2 Keen, 150, *sup.* p. 1285; *Lewin*, 173.

Bequests are paid over to the trustees without a scheme when given to a permanent institution for its general purposes: *Walsh v. Gladstone*, 1 Ph. 290; *Soc. for Prop. of G. v. A. G.*, 3 Russ. 142; *Emery v. Hill*, 1 Russ. 112; *Re Lea, L. v. Cooke*, 34 Ch. D. 528, where the bequest was to a person having absolute control over a religious society "for the spread of the Gospel"; or to foreign trustees: *Mitford v. Reynolds*, 1 Ph. 185, 197; *Minet v. Vulliamy*, 1 Russ. 113, n.; *A. G. v. Lepine*, 19 Ves. 309; 2 Sw. 181; *Re Macauliffe*, (1895) P. 290, where the gift was to a Roman Catholic convent; but see *A. G. v. Sturge*, 19 Beav. 597. But if foreign trustees disclaim the gift fails: *New v. Bonaker*, 4 Eq. 655.

And in the case of a small fund awaiting division, a reference to Chambers to apportion the fund was directed without a scheme: *Re Hyde*, W. N. (73) 202; 22 W. R. 69.

Where the Court takes on itself the execution of the trust, a scheme has usually been directed: see same cases; and *Paice v. Abp. of Canterbury*, 14 Ves. 372; *Waldo v. Caley*, 16 Ves. 211; *A. G. v. Bowyer*, 3 Ves. 724; *A. G. v. Whiteley*, 11 Ves. 241; *Bp. of Hereford v. Adams*, 7 Ves. 326; *Baylis v. A. G.*, 2 Atk. 240, n.; and decree in *Doyley v. D.*, 7 Ves. 58, n.; 2 Eq. Ab. 194; and where a legacy is applied *cy-près*: *Re Clergy Soc.*, 2 K. & J. 615; as to the *cy-près* doctrine, *v. sup.* p. 1291.

A scheme or plan may be directed, even where the trustee has a discretionary power: *Waldo v. Caley*, 16 Ves. 211; but not so as to control his discretion, where the fund is part of an annual and temporary income, to be disposed of from time to time, as objects shall present themselves: *Mahon v. Savage*, 1 Sc. & L. 114; *A. G. v. Glegg, Bennett v. Honeywood*, Amb. 584, 585, n., 710; *Horde v. E. Suffolk*, 2 My. & K. 59.

Where trustees were directed to pay income to a specified society "or some one or more kindred institutions" having certain specified objects, it was held that the gift being charitable, and no discretion as to choice of institutions being given to the trustees, a scheme must be settled: *Re Delmar's Charitable Trust*, (1897) 2 Ch. 163; see Form 4, *sup.* p. 1284.

A charity for the relief of the poor of S. means those not receiving parish relief: *A. G. v. Wilkinson*, 1 Beav. 372, 373; and see *A. G. v. Rochester*, 5 D. M. & G. 797; *v. Marchant*, 3 Eq. 424; *v. Leage*, Tudor, Char. 105, 860.

The colonial secretary declining to act in a trust, the Court directed a scheme: *Barclay v. Maskelyne*, 4 Jur. N. S. 1294.

For common clauses and forms for scheme for regulating and managing a charity, see Tudor, Char. 816.

A scheme has frequently been directed, regard being had to particular circumstances: see *A. G. v. Skinners' Co.*, Jac. 629; *Pieschel v. Paris*, 2 S. & S. 392; decree in *Mills v. Farmer*, 1 Mer. App. 722; 19 Ves. 482; *Moggridge v. Thackwell*, 1 Ves. jun. 475; 7 Ves. 86; *A. G. v. Painters' Co.*, 2 Cox, 61; *Cook v. Duckenfield*, 2 Atk. 569.

Under an ancient charity for the reparations, ornaments, and other "necessary occasions" of a parish church, a scheme for a spire was **arege** **for**: *Re Palatine Estate Char.*, 39 Ch. D. 54.

Saltash, *sup.* for prisoners becoming unnecessary, the Court refused to apply

Where free industrial schools for children of convicted persons: *Re Prison* **for a considerab** **But in Ironmongers' Co. v. A. G.**, 10 Cl. & F. 908, funds **cial Corporations** of Christian captives were applied for charity schools in **ceeding** by the A. G.

Norwich, W. N. (87) Charity Commrs, diverting money from eleemosynary

corp. and ministers of poor people and apprenticing poor boys, to educa- **alone** **had acted**, the mⁿ 310, C. A.; and as to the distinction between dole and **admon**: *Ld. Prov. of A* the former being regarded as mischievous, the latter

But where there is no out of date, see *S. C.*; Tudor, Char. 157.

Where the Court cannot impute to a testator any charitable intention except in reference to a particular estate (as in a gift to endow a private chapel), no scheme can be sanctioned: *Hoare v. H.*, 56 L. T. 147.

For a hospital scheme, see *Re Bridewell Hosp.*, 6 Jur. N. S. 1134; 30 L. J. Ch. 99; 8 W. R. 718.

A petition under the Charities Procedure Act, 1812 (52 G. III. c. 101), heard in Court, was adjourned to Chambers, Petrs to attend with a scheme, and the A. G. to be served: *Re Hanson*, 9 Ha. liv. For mode of settling scheme in Chambers, see *Ib.*

And the A. G. must always be served where a scheme is directed, and has liberty to attend the proceedings without any special direction: *A. G. v. E. Stamford*, 1 Ph. 749; *Re Hanson*, 9 Ha. liv. The usual course is to submit the draft scheme to his solrs before bringing it in; and in *Re Wyersdale Sch.*, 10 Ha. lxxiv., the scheme stood over for his consideration.

But the A. G.'s attendance may, in a proper case, be dispensed with: *A. G. v. Haberdashers' Co.*, 2 My. & K. 817; and leave was given to different persons not parties to attend (only one set of costs to be allowed against the charity): *A. G. v. Shore*, 1 My. & C. 394; but was refused to a member of a corp. even at his own expense: *A. G. v. St. Cross Hosp.*, 18 Beav. 475; and as to parties' attendance on the inquiry, see *Re Shrewsbury Sch.*, 1 Mac. & G. 324, 334.

Where an application to a Scotch Court to settle a charitable scheme was necessary, because the trustee, an exor, declined to act, the Court, with a view to the saving of expense, directed the application to be made by the A. G., who must necessarily attend the subsequent proceedings in Chambers: *Re Fraser, Yeates v. F.*, 22 Ch. D. 827.

The masters' income from a charity in Court was apportioned between the old and new masters, after paying the costs of the application: *A. G. v. Smythies*, 16 Beav. 385.

The admon of a charity by the Court should not be continued after a scheme has been approved and final decree: *A. G. v. Haberdashers' Co.*, 2 My. & K. 817.

A scheme settled by a former decree may be altered as circumstances require: *A. G. v. St. John's Hosp., Bath*, 1 Ch. 92 (where renewal of leases on fines was refused, though previously sanctioned); *Re Browne's Hospital, Stamford*, 60 L. T. 288 (where the scheme was altered by diminishing the stipend of the sub-warden, or confrater); but only on substantial grounds, and clear evidence that the change will be beneficial: *A. G. v. Bp. of Worc.*, 9 Ha. 328; *v. Stewart*, 14 Eq. 17; and not without the consent of the A. G.; nor, *semble*, except on his application, 9 Ha. 360; 14 Eq. 24. And see *A. G. v. Lord Onslow*, Form 13, *sup.* p. 1288.

But the Court cannot in general control a charity regulated by Act of Parliament: *Re Shrewsbury School*, 1 M. & G. 333; see *A. G. v. Wyggeston's Hospital*, 12 Beav. 113.

A supplemental order, at the instance of the existing trustees of an old charity, to enable them to propose a new scheme, where the scheme gave no liberty to apply to the Court, and the A. G. had intimated his intention to file a new information, was refused, though moved on notice: *A. G. v. Hall*, M. R., 1 July, 1875, Reg. Min. 216.

SCHEMES FOR SCHOOLS.

As to schemes for schools, and directions and restrictions, see *Re King's Grammar Sch., Warwick*, 1 Ph. 564; *A. G. v. Bp. of Worcester*, 9 Ha. 328; *v. Gascoigne*, 2 My. & K. 647; *v. Caius Coll.*, 2 Keen, 150; *v. E. Stamford*, 1 Ph. 737; *Daly v. A. G.*, 11 Ir. Ch. Rep. 41; *Re Rugby Sch.*, 1 Beav. 457; *Royston Sch.*, 2 Beav. 228; *A. G. v. Cullum*, 1 Y. & C. Ch. 411; *v. Abp. of York*, 17 Beav. 495; *Re Chelmsford Sch.* 1 K. & J. 543, 558, n. As to religious instruction, *Berkhamstead Sch. Ca.*, 1 Eq. 102; *Bristol Gram. Sch.*, 28 Beav. 161, 168; *Re Manchester Sch.*, 1 Eq. 55; 2 Ch. 497. As to making distinction of paying and non-paying boys, &c., and as to competitive examinations, *Ib.* 509; and as to the latter point, see *Re Latymer's Char.*, 7 Eq. 353; *A. G. v. Haberdashers' Co.*, 19 Beav. 385 (religious instruction); *Re Storie*, 2 D. F. & J. 529, as to eligibility for exhibitions.

Authority was given to remove a school from the middle of the city of Bristol: *Re Colston*, 27 Beav. 16.

As to permitting the masters of a grammar school to take boarders, see *Berkhamstead Sch. Ca.*, 1 Eq. 102; *Bristol Sch. Ca.*, 21 Beav. 161; *A. G. v. Gloucester Corp.*, 28 Beav. 438; and as to the remuneration of the master, *v. Abp. of York*, 17 Beav. 495.

As to admitting dissenters to King Edwd. VI. schools, see *Sherborne Sch. Ca.*, 18 Beav. 256, 285; and whether they are fit trustees, *Re Ilminster Sch.*, 8 H. L. C. 495; 7 Jur. N. S. 1; 2 D. & J. 535; 4 Jur. N. S. 676. And Church of England trustees were appointed: *Re Stafford Charities*, 3 Jur. N. S. 1191; 25 Beav. 28; but the Court would not give any special directions as to religious instruction; *S. C.*, 25 Beav. 28; and where the primary object of the charity is eleemosynary, the trustees need not be members of the Church of England: *A. G. v. St. John's Hosp., Bath*, 2 Ch. D. 554.

A gift for religious worship generally would be executed in favour of the established religion; but effect will be given to gifts for dissenting purposes, if not contrary to law: *A. G. v. Pearson*, 3 Mer. 353, 409; and see *Tudor, Char.* 21, 22; and as to scheme for non-church schools, see *A. G. v. Haberdashers' Co.*, 19 Beav. 385.

And that under a charity for the benefit of the poor of a parish a portion of the income may be applied for the education of their children, see *Tudor, Char.* 155; *Re Campden Charities*, 18 Ch. D. 310, C. A.

For form of scheme approved by the Charity Commrs, see *Tudor, Char.* 837.

The Grammar Schools Act, 1840 (3 & 4 V. c. 77), for improving the condition and extending the benefits of grammar schools, gives the Court the same jurisdiction therein as under the Charit. Procedure Act, 1812 (Sir G. Romilly's; 52 G. III. c. 101).

As to grammar schools, see *Tudor, Char.* 162 *et seq.*

ENDOWED SCHOOLS ACTS.

By the 23 & 24 V. c. 11 (Endowed Schools Act, 1860), s. 1, trustees of endowed schools are to make orders for the admission of children of other denominations than that taught under the endowment, if not requiring them to be so instructed; and sect. 2 excepts the institutions mentioned in the Grammar Schools Act, 1840 (3 & 4 V. c. 77, s. 24), and National schools, and those aided by subscriptions, and Scotland and Ireland: *et v. inf.*

By the Endowed Schools Act, 1869 (32 & 33 V. c. 56), Commrs were appointed for the purpose of preparing schemes, within a limited time, and altering trusts, &c. as to "educational endowments" (s. 9), and governing bodies (s. 10), so as to conduce to the advancement of education in the case of all institutions (except those mentioned in ss. 8, 14) of more than fifty years' standing, and to apply the funds of endowments for certain other purposes mentioned in s. 30 for educational purposes. As to procedure in making, objecting to, inquiring into and proposing alternative schemes, as to appeals against schemes to the Queen in Council, and as to laying schemes before Parliament, amending them, and their approval by Her Majesty in Council, see ss. 31—51; see also the Elementary Education Act, 1870 (33 & 34 V. c. 75); and see the Endowed Schools Act, 1873 (36 & 37 V. c. 87), continuing the Act and amending details.

By the Endowed Schools Act, 1874 (37 & 38 V. c. 87), the powers of the Endowed Schools Commrs were transferred to the Charity Commission; parts of the above Acts were repealed and amended, and the time for making schemes was continued for five years from Dec. 31st, 1874, during which time no Court or Judge was to make any scheme, or appoint any new trustees, in cases within the Act, without the consent of the Committee of Council on Education.

By the Endowed Schools Continuance Act, 1879 (42 & 43 V. c. 66), s. 2, the powers were further continued to the 31st of December, 1882; they have since been continued from time to time by the Expiring Laws Continuance Acts: see 63 & 64 V. c. 37, sched. pt. 2.

Before the 37 & 38 V. c. 87, Chancery would make a scheme notwithstanding the pendency of one before the Commrs: *Re Prisoners' Char., Esp. Christ's Hosp.*, 8 Ch. 199; and see *Re Prison Chars.*, 16 Eq. 129.

Exhibitions tenable at a university are, if confined to any schools, school, or district (sects. 5, 14 (4)), within the Act, and Wales is a "district": *Re Meyrick's Fund*, 7 Ch. 500; 13 Eq. 269.

As to the right of the National Society to object to a transfer to a School Board (under 33 & 34 V. c. 75, ss. 14, 23) of a school united with and established by them, and the proper mode of objecting, see *Nat. Soc. v. Sch. Bd. of London*, 18 Eq. 608.

An endowment given to charitable uses more than fifty years before the Act, but appropriated by the Court of Chancery to educational purposes within fifty years, is not within sect. 14, sub-sect. 1, of the Act of 1869, so as to render the consent of the governing body necessary to a scheme: *Ross v. Charity Commrs, Re St. Dunstan's-in-the-East*, 9 App. Ca. 463.

And endowments given within the fifty years, and legitimately spent in improving or maintaining the school, are not necessarily to be excluded from a scheme as requiring the consent within the sub-section: *Re Christ's Hosp.*, 15 App. Ca. 172.

It is beyond the jurisdiction of the Court under the Act of 1869 to sanction a scheme opposed by an existing governing body, whose title is founded on royal charter and established by Act of Parliament, and against whom no breach of trust is charged: *A. G. v. Governors of Christ's Hosp.*, (1896) 1 Ch. 879. Sect. 14 of the Act has left the jurisdiction of the Court intact in regard to endowments within the fifty years' limit; it has neither diminished nor increased the jurisdiction. The section can at most assist the Court in the exercise of its discretion: *S. C.*

An endowed school having no instrument of foundation, or statutes, or written regulations, is not a "denominational foundation": *Re St. Leonard's, Shoreditch, Parochial School*, 10 App. Ca. 304.

As to the meaning of the terms "endowment" and "educational endowment" as used in the Act, see *Re Hemsworth Sch. and Hosp.*, 12 App. Ca. 444; *Re Hodgson's Sch.*, 3 App. Ca. 857; *Re Christ's Hosp.*, 15 App. Ca. 172.

A direction that persons may be continued at a school after manhood does not make it the less an educational endowment: *Re Hodgson's School*, 3 App. Ca. 857.

A charitable foundation providing for scholarships at Oxford for boys from six schools is a provision for the "maintenance" of the schools and part of their "educational endowment," and the fact that one of them is a public school does not exclude the jurisdiction of the Charity Commrs to make a scheme for the management of the whole charity: *A. G. v. Christ Church, Oxford*, (1894) 3 Ch. 524.

A scheme extending the area of an educational endowed charity is within sect. 9: *Re St. Leonard's, Shoreditch, Parochial School*, 10 App. Ca. 304.

A scheme providing that the educational fees of a particular class of boys should be increased is not contrary to sect. 11 of the Act of 1869, and sect. 5 of the amending Act: *Ross v. Charity Commrs, Re St. Dunstan's-in-the-East*, 9 App. Ca. 463.

As to the right of the Commrs, under a scheme leaving questions to be determined conclusively by them, to decide as to the validity of election of a representative governor, see *Reg. v. Wilson*, W. N. (88) 12.

As to the impropriety of a scheme providing for exemptions of scholars from prayers and religious worship, see *Re Christ's Hosp.*, 15 App. Ca. 172.

As the Charity Commrs may amend any scheme, no scheme is final: *Re Sutton Coldfield Sch.*, 7 App. Ca. 91.

The word "entitled" in sect. 11 refers to legal rights, and not to benefits enjoyed by permission or bounty: *Re Sutton Coldfield Sch.*, 7 App. Ca. 91; *Re Hemsworth Sch. and Hosp.*, 12 App. Ca. 442.

Founders are those who originally subscribe for the purpose of founding: *Re St. Leonard's, Shoreditch, Parochial Sch.*, 10 App. Ca. 304.

Under sect. 13, the master of a school who could be, but had not been, dismissed by a majority of the governors, was held to have a vested interest and entitled to be saved or compensated in any scheme: *Re Alleyn's Coll., Dulwich*, 1 App. Ca. 68; and the general interest of a class under the founder's will does not come within the term "vested interests": *Re Shaftoe's Char.*, 3 App. Ca. 872; nor rights of patronage in a school: *Re Christ's Hosp.*, 15 App. Ca. 172.

Sect. 19 does not prevent the Charity Commrs from making the office of rector of a parish a qualification for that of governor of a Church of England school: *Re Hodgson's Sch.*, 3 App. Ca. 857.

It is not *ultra vires* for the Commrs, under sect. 23, to provide a kind of visitatorial jurisdiction sufficient to indemnify governors and bind the objects of the charity in reference to proceedings under the scheme: *Re Hodgson's Sch.*, 3 App. Ca. 857.

And as to these Acts generally, see Tudor, Char. 597 *et seq.*

Donation governors, having rights of patronage, were persons "directly affected" within sect. 39, sub-sect. 3: *Re Christ's Hosp.*, 15 App. Ca. 172.

And as to persons having *locus standi* under that section, see *S. C.*

Under sect. 42, an appeal cannot be entertained as to an endowment the average gross annual income of which, during the three years next before the Act, is not more than 100*l.*: *Re Christ's Hosp.*, 15 App. Ca. 172.

CHARITIES PROCEDURE ACT, 1812 (52 G. III. c. 101).

By sect. 1 of this Act (commonly known as Sir Samuel Romilly's Act), in case of breach or supposed breach of trust, or if the direction of the Court is deemed necessary to administer any trust for charity, two or more persons might petition the L. C. or M. R. for relief, and on affidavit; and subject to any order as to costs, and to appeal (within two years from the entry of the order) to the H. Lds. By sect. 2, the petition is to be signed by the Petrs, attested by their solr, and allowed by the A. G. or S. G.: see *Exp. Skinner*, *Re Lawford's Char.*, 2 Mer. 453; and an order on an unsigned petition would be a nullity: *A. G. v. Green*, 1 Jac. & W. 305; and see Lewin, 1143. By sect. 3, the proceedings are exempt from duty.

After an order on petition, subsequent orders may be made on motion: *Re Slewringe's Char.*, 3 Mer. 707; *Re Chipping Sodbury Sch.*, 5 Sim. 410.

By the Char. Trusts Act, 1853 (16 & 17 V. c. 137), s. 43, the jurisdiction under the 52 G. III. c. 101, is expressly preserved.

But, except where the petition is presented by the A. G., the sanction of the Charity Commrs must be first obtained: 16 & 17 V. c. 137, ss. 18, 20; *Exp. Watford Bur. Bd.*, 2 Jur. N. S. 1045.

Their sanction is not necessary where a fund belonging to a charity has been paid into Court under the Trustee Relief Acts (now replaced by Trustee Act, 1893, s. 42): *Re St. Giles', Bloomsbury*, 25 Beav. 313; or Lands Cl. Cons. Acts: *Re Lister's Hosp.*, 6 D. M. & G. 184.

The Act has been held applicable only where the questions to be decided arise between the trustees and *cs. q. t.* of the charity: *Re Manch. New Coll.*, 16 Beav. 610; or between the *cs. q. t.* as to their proportions: *Re Hall*, 14 Beav. 115; *A. G. v. Bp. Worc.*, 9 Ha. 328; and then only in simple cases: *Re Suir, &c. Sch.*, 3 J. & Lat. 171; and where the Court sees that it is just and for the benefit of the charity to decide them: *Re Manch. New Coll.*, *sup.*; *A. G. v. Bp. Worc.*, 9 Ha. 328.

It is not applicable where there are adverse claims to the property: *Corp. of Ludlow v. Greenhouse*, 1 Bli. N. S. 17, 66; *Re Clarke's Char.*, 8 Sim. 34; *Re Phillipott's Char.*, *Ib.* 381; *Re Magd. Land Char.*, 9 Ha. 624; nor where the trustee disputes the title of the charity: *Re Olney Char.*, 11 Jur. 420; nor for setting aside a lease: *Exp. Brown*, Coop. 295; *Exp. Skinner*, *Re Lawford's Char.*, 2 Mer. 453; nor in other cases where the breach of trust affects third parties: *S. C.*; *Corp. Ludlow v. Greenhouse*, *sup.*; Lewin, 1142.

But the Court can, on the petition, decide between conflicting claims of different charities depending on a mere question of construction: *Re Upton Warren*, 1 My. & K. 410.

And as to the jurisdiction and proceedings under the Act, see cases collected, *Re Hall*, 14 Beav. 120, n., 122, n.; Tudor, Char. 328.

Proceedings under the Act have the same effect as in an action: *A. G. v. Bp. Worc.*, 9 Ha. 328.

Orders may, if otherwise proper under the Act, be made:—

For altering a scheme settled by decree: *S. C.*; for deciding questions as to the site of the charity: *Re Manchester Coll.*, 16 Beav. 610, 617, 623, 629; or to sell charity land: *Re Ashton*, 22 Beav. 288.

For authorizing the trustees to apply to Parliament, or for assisting the

trustees in other ways in the admon of the charity property : *Re Shrewsbury Sch.*, 1 Mac. & G. 324.

For apportioning charities under the Ch. Bldg. Act, 1845 (8 & 9 V. c. 70) : *Re West Ham Char.*, 2 D. & S. 218 ; *Exp. Brompton*, 5 D. & S. 626, Form 8, p. 1286. (But the Charity Commrs can now make these orders in general, *v. inf.*) And for appointing new trustees : *Bignold v. Springfield*, 7 Cl. & F. 71.

An order under 8 & 9 V. c. 70, apportioning charities on the division of a parish is not final, but the Court has jurisdiction to make fresh orders from time to time to meet the changing circumstances of the district parishes and original parish : *Re Campden Charities* (No. 2), 24 Ch. D. 213.

In *Re Fowey*, 4 Beav. 225, 226, a reference went on the A. G.'s petition, under the Charities Procedure Act, 1832 (2 W. IV. c. 57), to appoint new trustees, settle a scheme, and ascertain the property, and who had the legal estate.

And as to appointing or removing trustees, *v. inf.* pp. 1307, 1326.

It was referred to the A. G. to decide whether an information or petition for the same, or partly the same, objects should proceed : *A. G. v. Green*, 1 Jac. & W. 303.

Trustees are entitled to their costs under the Act, but only so far as the Act provides : *Re Bedford Char.*, 2 Sw. 532.

More than one person must petition under it, and they must have a direct interest in the charity : *Ib.* 518, 525 ; *Re Garstang Sch.*, 7 L. J. Ch. 169.

APPOINTMENT OF TRUSTEES.

New trustees of a charity may be appointed by the Court on petition, in an information or action, under the Trustee Acts, without the fiat of the A. G., or a certificate of the Charity Commrs, though all proceedings in the suit have been stayed : *A. G. v. Cooper*, 8 Jur. N. S. 50 ; 10 W. R. 31 ; 7 L. T. 149.

The 52 G. III. c. 101, *sup.* p. 1300, applies to the appointment of new trustees : *Bignold v. Springfield*, 7 Cl. & F. 71 ; but the petition must be intitled in that Act, as well as the Trustee Acts, and have the fiat of the A. G. : *Re Rolle's Char.*, 10 Ha. xxxix. ; 3 D. M. & G. 153 ; *Re Warwick Char.*, 1 Ph. 559 ; unless there is an action (*A. G. v. Cooper, sup.*) or matter (*Re Jarvis' Char.*, 1 Dr. & S. 97) "actually pending."

The petition is not always served on the A. G. : *Re Warwick Char.*, 1 Ph. 559. In *Re Oxford Char.*, M. R., Aug. 1861, it was.

As to the provisions of 2 & 3 W. IV. c. 57, s. 3 (since repealed), where all the trustees of a charity were dead, see Tudor, 183.

Charit. T. Acts, &c.—By the Charit. T. Act, 1863 (16 & 17 V. c. 137), s. 28, new trustees of any charity, the gross annual income whereof exceeded 30*l.*, may be appointed by one of the Equity Judges in Chambers, and the Court has power at the same time to make an order under the Trustee Act, without petition, vesting the estates in the new trustees : *Re Davenport's Charity*, 4 D. M. & G. 839. But the sanction of the Charity Commrs, under sect. 17, must first be obtained. Where relief is obtainable under the section mandamus will not lie : *Reg v. Charity Commrs*, (1897) 1 Q. B. 407. By Jud. Act, 1873, ss. 34, 39, the jurisdiction under this section is now vested in the Ch. Div., and by O. LV, 13, applications under the section are to be by summons.

By the Charit. T. Act, 1860 (23 & 24 V. c. 136), s. 2, the Charity Commrs are empowered, upon the application of the trustees, or a majority of them, under their hands or common seal, to make the like orders for the appointment of new trustees of charities as could have been made by a Judge at Chambers. This power extends even to contentious cases : *Re Burnham National Schools*, 17 Eq. 241 ; but the Commrs are not bound to exercise jurisdiction in such cases : sect. 5. They cannot exercise jurisdiction where the gross annual income exceeds 50*l.*, except upon the application of the trustees or admors of the charity, or a majority of them : sect. 4. The powers are now extended to appointing and removing trustees of places of religious worship : Charit. T. Act, 1869 (32 & 33 V. c. 110), s. 15.

Trustees of charities are now commonly appointed and removed by orders of the Commrs : Tudor, 188.

The Charity Commrs may appoint additional trustees of a school vested

in the joint rectors of the parish (under 6 & 7 W. IV. c. 70, s. 3, and 4 & 5 V. c. 38, s. 7) as sole trustees. Such additional trustees must be members of the Church of England. The fact that the exercise of the power would enable the trustees to hand over the school to a school board is no objection (as to which see also *Nat. Soc. v. School Bd. for London*, 18 Eq. 608), and the discretion of the Commrs in appointing trustees will not be interfered with on appeal unless there has been gross and palpable miscarriage: *Re Burnham Nat. Sch.*, 17 Eq. 241; and see *Re Campden Charities*, 18 Ch. D. 310, C. A.; *A. G. v. Bp. of Manchester*, 3 Eq. 436; *Tudor*, Char. 192.

As to the power of an old vestry to appoint trustees devolving on a newly-constituted one under the Met. Local Management Acts, see *Re Hayles' Estate*, 10 W. R. 577; 31 Beav. 139; *secus*, the right of electing a minister vested in parishioners: *Carter v. Cropley*, 8 D. M. & G. 680.

In *Re Conyer's Sch.*, 10 Ha. v., the governors of the school were incorporated by charter, but the corp. having ceased to exist, new trustees were appointed with the assent of the Crown.

The election of new trustees in place of those who were dead, abroad, and declined to act respectively, was confirmed on summons in Chambers: *Re Lincoln, &c Chapel*, 1 Jur. N. S. 1011; 3 W. R. 608.

Rector and churchwardens were appointed sole trustees of land given to repair a church: *Re Donington*, 6 Jur. N. S. 290; 8 W. R. 301; 2 L. T. 10.

Schemes may provide for the future appointments of trustees to be made in Chambers, with notice to the A. G.: *Re Conyer's Sch.*, 10 Ha. v.; but in *Re Puckering's Char.*, 25 March, 1854, MSS., V.-C. W. authorized the trustees themselves to fill up vacancies from time to time, as formerly.

The Court would not fill up the number of trustees originally appointed under the Mun. Corp. Act (5 & 6 W. IV. c. 76), it not being thought necessary: *Re Worcester Char.*, 2 Ph. 284. In *Re Shrewsbury Sch.*, 1 Mac. & G., 84, 85, it did so, but not without a reference.

And as to the number of vacancies justifying an application to the Court, see *Re Gloucester Char.*, 10 Ha. iii.

As to appointing Dissenters trustees of a Church of England charity, see *Re Ilminster Sch.*, 8 H. L. O. 495; *Re Stafford Char.*, 25 Beav. 28.

In *Re East Bergholt*, 2 Eq. 90, a direction was inserted, in an order appointing new trustees, that whenever the number should be reduced to five an application for a fresh appointment should be made in Chambers, notice being given to the A. G.: and see *Re Conyer's Sch.*, 10 Ha. v., App. v.

In *Re Donington Char.*, 6 Jur. N. S. 290; 8 W. R. 301; 2 L. T. 10, V.-C. S., on appeal from the County Court appointing the surveyor of highways and the overseers trustees of a charity for repairing the church, the order was varied by making the rector and churchwardens the only trustees; appellant's costs to be paid out of the charity income, and the respondents' by themselves.

Where a testator named as trustee for a charity abroad a public officer, and the office was abolished before the testator's death, new trustees were appointed: *A. G. v. Stephens*, 3 My. & K. 347. But see *New v. Bonaker*, 4 Eq. 655, *sup.* p. 1293.

As to selecting and appointing trustees, proof of fitness, and the A. G.'s fiat, see *Re Lancaster Char.*, 7 Jur. N. S. 96; 3 L. T. 582; 2 W. R. 192.

Though the deed declaring the uses was not enrolled under the Charit. Uses Act, 1735 (9 G. II. c. 36), the trustee of the legal estate submitting to act as the Court should direct, the appointment of new trustees was decreed: *A. G. v. Ward*, 6 Ha. 477. As to giving such deed in evidence, and as to usage under the Nonconformist Chapels Act, 1844 (7 & 8 V. c. 45), *ib.* 482, 483.

Where the A.-G., in order to get the advice of persons interested in the charity, gives public notice of the intention to appoint new trustees, &c., persons coming forward and making suggestions or objections are not entitled to their costs from the charity funds: *Re Gloucester Char.*, 10 Ha. iii.

Trustee Appointment Acts.—By the Trustee Appointment Act, 1850 (13 & 14 V. c. 28, commonly known as Peto's Act), "wherever freehold, leasehold, copyhold, or customary property in England or Wales has been or shall be acquired by any congregation, or society, or body of persons associated for religious purposes, or for the promotion of education, as a chapel, meeting-

house," &c., "and wherever the conveyance, assignment, or other assurance of such property has been, or may be, taken" to trustees duly appointed, such conveyance, assignment, or other assurance shall not only vest the property in the parties named, but also in their successors from time to time, and where there is no power to appoint new trustees, the society may, for the purpose of vesting the estate, appoint new trustees; but every such appointment, whether under a power in the trust deed, or by virtue of the Act, must be evidenced by deed under the hand and seal of the chairman, and attested by two witnesses. As to the construction of the Act, see *Re Houghton's Chapel*, 2 W. R. 631.

By the Trustee Appointment Act, 1869 (32 & 33 V. c. 26), the provisions of Peto's Act were extended to burial-grounds, and by the Trustee Appointment Act, 1890 (53 & 54 V. c. 19), s. 2, are made to "apply to and include any land acquired by trustees in connection with any society or body of persons comprising several congregations, or other sections or divisions, or component parts associated together for any religious purpose, when such land is held in trust for any of the following purposes: (1) a place for religious worship; (2) an endowment or provision for the maintenance of a place of religious worship, or the minister thereof, or provision for expenses connected therewith; (3) a burial ground; (4) a place for education and training of students, whether for the ministry or for any other purpose; (5) a school house for a Sunday school, day school, or other school; (6) a residence for a minister or schoolmaster, or for the caretaker of a place of religious worship, or of a school house, or a meeting house, or offices, or other buildings for or in connection with religious or educational purposes." The power of appointing new trustees conferred by the Conveyancing and Law of Property Act, 1881, or any other statutory power for the same purpose for the time being in force (now the Trustee Act, 1893, ss. 10—12), is to apply to all land acquired and held on trust for any purpose to which Peto's Act or the Act of 1869 (32 & 33 V. c. 26) applies, and any such statutory power may be exercised either by the persons and in manner therein provided, or by the persons and in the mode in which, under the instrument creating the trust, or any other instrument, the appointment of a new trustee in place of a deceased trustee can be effected: sect. 3. The vesting clause in Peto's Act is extended to the case of trustees appointed under any power conferred by the Act of 1890, or under any other statutory power: sect. 4; and where by force of the Act of 1890 an appointment of a trustee can be made under a power in an instrument as well as under a statutory power, the latter power is not to be exercised until a period of twelve months from the date of the vacancy to be filled up has expired: sect. 5; and provision is made whereby purchasers and mortgagees from trustees invalidly appointed are protected, if no proceedings are taken or effectively prosecuted to set aside the appointment within six months from its date: sect. 6. Where trustees, or the major part of them, or other persons present at a meeting duly constituted, are empowered to appoint trustees by resolution, a memorandum of the appointment of any trustee which states that the meeting was duly constituted, and is otherwise in the form indicated by Peto's Act, is to be sufficient and conclusive evidence that the appointment appearing by the memorandum was duly made: sect. 7.

As to the provisions of the Trustee Act, 1893, replacing Part VII. of the Conv. Act, 1881, in reference to the appointment of new trustees, *v. sup.* p. 1205; and as to their application in the case of charities, see *Re Coates to Parsons*, 34 Ch. D. 370; Tudor, Char. 182.

As to the transfer of the estates of charities to the county councils, under the Local Government Act, 1888 (51 & 52 V. c. 41), s. 64, see Tudor, Char. 182.

VESTING CHARITY PROPERTY.

By the Trustee Act, 1893 (56 & 57 V. c. 93), s. 39, the Court is empowered to vest charity property in the trustees of the charity.

This power was exercised in the case of *Re Norton Folgate*, V.-O. K. B., 10 May, 1851, B. 722; and in *Re Basingstoke Sch.*, V.-C. of E., 31 May, 1850, A. 1134, a person was appointed to convey an outstanding legal estate to the new trustees, under a scheme approved by the Court.

As to the power of a Judge in Chambers and of the Charity Commrs to make orders vesting charity lands and securities, see *inf.* Section II.

As to the jurisdiction of the Court, under the Charitable Trusts Act, 1853 (16 & 17 V. c. 137), to vest charity estates in the official trustees of charity lands, and to direct transfer of funds, or deposit of securities, to or with the official trustees of charitable funds, see *inf.* p. 1316.

By the Municipal Corporations Act (5 & 6 W. IV. c. 76), s. 71, where any municipal corporation was, in its corporate capacity, a trustee for charity, the admon of the charity was to devolve on new trustees to be appointed by the L. C. (or V.-C., *Re Northampton Char.*, 3 D. M. & G. 179; *Re Gloucester Char.*, 10 Ha. iii.). This section was held not to vest the legal estate in the charity lands in the new trustees: *Bignold v. Springfield*, 7 Cl. & F. 71, 117; *Christ's Hosp. v. Grainger*, 16 Sim. 83; but this was done by the 16 & 17 V. c. 137, s. 65: *Re Huntingdon Char.*, 27 Beav. 214.

By the Municipal Corporations Act, 1882 (45 & 46 V. c. 50), repealing 5 & 6 W. IV. c. 76, and 16 & 17 V. c. 137, s. 65, without prejudice to anything done under these Acts respectively, the provision for the transfer of the legal estate without conveyance or appointment of new trustees is re-enacted: sect. 133. The section does not continue the power to make orders for the admon of trust estates.

By the Municipal Corporations Act, 1883 (46 & 47 V. c. 18), s. 3, the property of corps. dissolved by that Act is to be applied for the public benefit of the inhabitants of the place in such manner as may for the time being be provided by a scheme of the Charity Commrs, and until any such scheme takes effect the existing management is continued, but the legal estate is to vest in the official trustees of charity lands, or the official trustees of charitable funds, as the case may be; and by sect. 8, the Commrs may provide, by the appointment of interim trustees and otherwise, for the security and interim management of the application of the property as to which they may have power to make a scheme.

In cases where a bishop is a trustee for a charity, the Charity Commrs may, if by a change of the diocese the charity lands become part of another diocese, make an order vesting the land in the bishop of that diocese: 21 & 22 V. c. 61, s. 1.

RECENT ENABLING STATUTES.

By the Religious Disabilities Act, 1846 (9 & 10 V. c. 59), Jews were put on the same footing as to their charities as Dissenters; the Act was held retrospective as to a Jewish charity: *Re Michel*, 6 Jur. N. S. 573; 28 Beav. 39.

By the Trustees Appointment Act, 1850 (13 & 14 V. c. 28), the titles of religious congregations and educational societies were simplified.

By the Ecclesiastical Commrs Acts, 1850 and 1860, and the Episcopal and Caputular Estates Acts, 1851 and 1854 (13 & 14 V. c. 94; 14 & 15 V. c. 104; 17 & 18 V. c. 116, and 23 & 24 V. c. 124), the Acts relating to the Ecclesiastical Commrs were amended, and the management and improvement of episcopal and caputular estates facilitated.

By the Public Libraries Act, 1892 (55 & 56 V. c. 53), consolidating and amending previous Acts, the establishment of free public libraries and museums in municipal towns is promoted.

By the Universities and Colleges Estates Acts, 1858, 1860, 1880 and 1898 (21 & 22 V. c. 44; 23 & 24 V. c. 59; 43 & 44 V. c. 46, and 61 & 62 V. c. 55), powers are given to the Universities and their Colleges, and Eton and Winchester, to sell, enfranchise and exchange, under conditions, and to lease for farming, building and mining, and to deal with their lessees' interests, under restrictions, and subject, in certain cases, to the consent of the Board of Agriculture.

By the Ecclesiastical Leases Act, 1858 (21 & 22 V. c. 57), the Act enabling ecclesiastical corps. to grant leases for long terms of years is amended.

By the Roman Catholic Charities Act, 1832 (2 & 3 W. IV. c. 115), which is retrospective (*Bradshaw v. Tasker*, *West v. Shuttleworth*, 2 My. & K. 221, 684), Roman Catholics were placed on the same footing as Protestant Dissenters;

and by the Roman Catholic Charities Act, 1860 (23 & 24 V. c. 134), Roman Catholic charities for lawful purposes are not to be invalidated by the addition of superstitious or unlawful trusts; but the Court or Charity Commrs may direct an apportionment, under which the proportion of the charity devoted to unlawful purposes may be held upon lawful charitable trusts for the benefit of Roman Catholics. But these Acts are not to be taken to repeal or alter the provisions of the Roman Catholics Relief Act, 1829 (10 G. IV. c. 7), as to the suppression of religious orders of the Church of Rome. See as to these enactments, Tudor, Char. 20, 576.

And as to the effect of these and other enabling statutes, see Tudor, Char. 22.

ALLOTMENTS EXTENSION ACT.

By the Allotments Extension Act, 1882 (45 & 46 V. c. 80), trustees of lands held for the benefit of the poor of any parish or place are to take proceedings for letting such lands in allotments to cottagers, labourers, and others, and powers of settling differences (sect. 8), and adjudicating upon complaints in respect of allotments, and as to the settling of rules made for giving effect to the Act, are conferred upon the Charity Commrs (sect. 9). In case of neglect or refusal by trustees to proceed under the Act, the Charity Commrs may issue their order for remedying such neglect or refusal, and such order may be enforced in like manner as an order made by them under the Charitable Trusts Acts (sect. 10). The Commrs may also give to trustees a certificate that land is so unsuitable for allotments that no part can be usefully set apart for the purposes of the Act; and in that case the obligation to set apart any part of the land does not take effect, but the certificate may at any time be revoked (sect. 11). By sect. 14, where a scheme is made by the Commrs after the passing of the Act in relation to any charity, and part of the endowment of such charity consists of land other than buildings, and the appurtenances of buildings, the Commrs are required to insert in such scheme a provision authorizing the trustees of the charity to set apart portions of the said lands for allotments. By sect. 15, nothing in the Act is to impair or alter any powers conferred by the Endowed Schools Acts.

The Act has not taken away from the Charity Commrs the power of authorizing a sale of charity lands given by sects. 24 and 26 of the Charitable Trusts Act, 1853: *Parish of Sutton to Church*, 26 Ch. D. 173.

By the Allotments Act, 1887 (50 & 51 V. c. 48), s. 13, sub-s. 2, all trustees within the meaning of the Act of 1882 may, in lieu of letting land in allotments, sell or let such land to the sanitary authority of the district, upon such terms as may be agreed upon with the sanction, as regards the trustees, of the Charity Commrs.

As to the difficulties which have been experienced in working the Act of 1882, see Tudor, Char. 460, 461, 685.

LOCAL GOVERNMENT ACT, 1894.

Under the Local Government Act, 1894 (56 & 57 V. c. 73), s. 14, parish councils are authorized to appoint trustees in the place of churchwardens, who are the only trustees of a charity, other than an ecclesiastical charity; and sect. 75 of the Act contains a definition of the expression "ecclesiastical charity" which includes any charity the endowment for which is held "for the benefit of any particular church or denomination, or of any members thereof as such."

A charity for gifts to poor widows, with a preference to those who were "most constant in their attendance on the public service of the Church," is a parochial charity, and not an ecclesiastical charity within this enactment: *Re Ross's Charity*, (1897) 2 Ch. 397; *secus*, where the objects of the charity were persons who regularly attended divine service at the parish church, lived a godly, righteous, and sober life, and were partakers of the Holy Communion, the endowment being held to be for the benefit of members of the Church of England as such: *Re Perry Almshouses*, (1898) 1 Ch. 391. And see *Re Spendluffe's Charity*, 83 L. T. 498.

As to the jurisdiction of the Charity Commrs, and that a letter from them may constitute a "determination," see sect. 70; *A. G. v. Hughes*, 81 L. T. 679; 48 W. R. 150, C. A.

COSTS.

By the Crown Suits Act, 1855 (18 & 19 V. c. 90), s. 1, in all actions, and suits, and other legal proceedings since instituted on behalf of the Crown in Great Britain or Ireland, when the Crown succeeds, the A. G. or Lord Advocate is entitled to recover costs for the Crown as between subject and subject, such costs to be paid into the Exchequer. By sect. 2, Defts are entitled to recover costs in like manner as between subject and subject, and the Commrs of the Treasury are required to pay them out of any moneys to be voted by Parliament for that purpose. For forms applicable when costs are given to or against the Crown, *v. sup.* p. 1290.

Costs can only be given to a party against the Crown in cases within the Act: see *Re Vernon* (1901), 1 I. R. 1; for such order, see *A. G. v. Hammer*, 4 D. & J. 205, *sup.* p. 1290; and as to costs payable by the Crown in a case as to succession duty, see the Crown Suits Act, 1861 (24 & 25 V. c. 92).

The Act does not apply to charity cases: *A. G. v. Dean and Canons of Windsor*, 8 H. L. C. 459.

In general, a relator entitled to costs is so as between solr and client, the part not paid by the Defts being paid by the estate; and the relator may, under special circumstances, be entitled to costs, charges, and expenses, to be paid out of the part of the estate in question: *A. G. v. Kerr*, 4 Beav. 297.

In *A. G. v. Ironmongers' Co.*, 10 Beav. 194, the relator was only allowed costs out of pocket for expenses incurred in relation to a scheme not properly sanctioned though useful.

A relator was entitled to charge costs payable by a corporation on their trust property: *A. G. v. Thetford*, 8 W. R. 467.

In *A. G. v. Nethercote*, 11 Sim. 529, an application under the Judgments Act, 1838 (1 & 2 V. c. 110), s. 17, that interest on costs might be paid out of the charity estates, was refused, the V.-C. considering the Act to relate only to costs to be paid by one party to another; but in *A. G. v. Bp. of St. David's*, *sup.* p. 1290, the A. G.'s and relators' and trustees' costs, charges, and expenses in the suit and in relation to the charity, were taxed for each year since 1840, with interest allowed on each year's costs at 4l. per cent., and to be raised by mortgage of the estates; and as to interest on costs, *v. sup.* Vol. I., p. 307, *et* Chap. XVII., "Costs."

Trustees were allowed their costs out of the funds, though there had been (with no *mala fides*) great errors and misapplications: *A. G. v. Caius Coll.*, 2 Keen, 150, 170.

But trustees defending a suit, after being advised by counsel that the property they claimed was held for charitable purposes, were allowed no costs, the A. G. not pressing for costs against them personally: *A. G. v. Webster*, 20 Eq. 483.

As to A. G.'s costs, see *Corp. of London v. A. G.*, 1 H. L. C. 471; *A. G. v. Corp. of London*, 2 Mac. & G. 247, 273, and cases cited, *ib.* p. 255; *Re Bedford Char.*, 29 L. T. 5; Dan. 60. He is entitled to them as between solr and client: *Moggridge v. Thackwell*, 1 Ves. jun. 475; 7 Ves. 36, 88; 13 Ves. 416; *Mills v. Farmer*, 19 Ves. 490; *A. G. v. Ashburnham*, 1 S. & S. 394, 397, where there was no relator.

Summons for A. G.'s costs relating to a charity, not being costs in the matter, must state the matters in respect of which payment of costs is desired; and on summons for appointment of trustees, a direction to the taxing master to include in the costs of A. G. any charges and expenses properly incurred by him in relation to the college, "not being costs in these matters," was altered by striking out the last six words: *Re Dulwich Coll.*, 15 Eq. 294; 21 W. R. 519.

In *M. of South Molton v. A. G.*, 5 H. L. C. 1, costs up to the hearing were given against the relator, but not those incurred under the decree below, which was reversed.

In *A. G. v. Fishmongers' Co.*, 1 Keen, 492, the relator had only party and party costs.

S. II.] *Orders in Chambers under Charitable Trusts Acts.* 1307.

Petrs seeking to have a construction put upon a scheme are entitled to costs if there is a substantial ground for the application, though made chiefly for private purposes: *Re Storie*, 2 D. F. & J. 529.

A petition to change a scheme for a fund which had been applied *cy-près* was dismissed without costs, and respondent's full costs came out of the fund: *A. G. v. Stewart*, 14 Eq. 17.

Charity trustees were not entitled to charge against the charity costs of a suit dismissed without costs; but one who had severed in his defence and supported the information was allowed costs: *A. G. v. Mercers' Co.*, 18 W. R. 448; and as to costs between co-Defts, *Ib.*, and *A. G. v. Chester*, *sup.* p. 1289.

An unfounded action to recover a charity fund of small amount in the hands of trustees was dismissed with solr and client costs: *Andrews v. Barnes*, 39 Ch. D. 133, C. A.

As to costs of applications where charity lands have been taken by railway cos., see *Re L. B. & S. C. Ry.*, 18 Beav. 608; *Re Lathropp's Char.*, 1 Eq. 467; *Re St. Thomas' Hospital*, 11 W. R. 1018 (erection of buildings); *Re Shakespeare Walk School*, 12 Ch. D. 178 (expenses of new scheme); *Re St. Paul's Schools, Finsbury*, 52 L. J. Ch. 454; 48 L. T. 412; 31 W. R. 424; *Re St. Alban's, Wood Street*, 66 L. T. 51; and *inf.* Chap. LIII., LANDS CLAUSES CONSOLIDATION ACTS, p. 2451.

Under the Charitable Trusts Amendment Act, 1855, s. 40, the Charity Commrs have power to order solrs' bills of costs for business transacted on behalf of a charity to be taxed by the taxing masters. As to the way in which this power is exercised so as to enable the Commrs to tax bills in their own office, see Tudor, Char. 354, 553.

SECTION II.—ORDERS IN CHAMBERS UNDER THE CHARITABLE TRUSTS ACTS.

1. *Appointment of Trustees—Charitable Trusts Act, 1853* (16 & 17 V. c. 137), s. 28.

It is ordered that A. B. &c., of &c., be appointed trustees of the [*state title*] charity [*If so*, in substitution for C. &c., the deceased trustees; *Or if so*, And D. and E. &c. (two), of the trustees of the — charity, by their solr desiring to retire from, *or* declining to act in the trusts thereof, It is ordered that A. and B. &c. be appointed trustees of the said charity, in substitution for the said D. and E., and, *if so*, jointly with F. and H. &c., the surviving, *or* continuing trustees]. And see Form 1, p. 1210.

For directions for schemes, and for orders approving schemes, which are applicable under these Acts, see pp. 1281, 1282, 1287, 1288.

Orders for the removal and appointment of trustees, approving of schemes, vesting lands in the official trustee, for payment of money, or directing the transfer of stock or securities to the official trustees, and for payment of dividends, production of deeds, and payment of costs, may now be made by the Board: *v. inf.* p. 1319.

Applications to the Court should be made by the Board in the first instance.

For the forms of orders and proceedings in use by the Charity Commrs, see Tudor, Char. 789—815.

For various schemes for the registration of charities, see *Ib.* Part III., pp. 816—854.

For precedents of declaration of trust, conditions of sale, and conveyances of charity land, see Cooke & Harwood, 344—348; Prideaux's Conv. vol. ii. 17th ed. pp. 435 *et seq.*

2. Removal and Appointment of Trustee.

It is ordered that A. of &c., the (surviving) trustee [or one of the (surviving) trustees] of the — charity be removed from being such trustee [If so, and that B. of &c. be appointed a trustee of the said charity in substitution for the said A.].

3. Vesting Land, or any Term or Estate therein, in Official Trustee— *Charitable Trusts Act, 1853, s. 48; Charitable Trusts Amendment Act, 1855, s. 15.*

[If vested in a corp., And the &c., Describe the corp., having in writing under their common seal consented, or by their solr consenting; If copyhold or customary land, and L. the lord of the manor of &c., whereof the copyhold, or customary land &c., hereinafter mentioned are, or is holden, having in writing consented, or by his solr consenting, to this order], Let the land [manors, messuages, buildings, tenements, and hereditaments, corporeal or incorporeal, of any tenure or description, 16 & 17 V. c. 137, s. 66; Use the appropriate words] devised [or bequeathed] by the will of &c. [or comprised in the indenture dated &c., made between &c., or in the surrender (and admission) made (and taken) the — day of —, or in the indenture of lease made &c., dated &c., for the term thereby demised, or mentioned and described in the schedule to the Master's certificate dated &c., or in the affidavit of &c., filed &c.], and holden upon trust for the said charity [If the lands cannot be ascertained, or it is uncertain whether all are so, any land, or and any other land, or (any) term, or estate in land, holden upon trust for the said charity], vest in the official trustees of charity lands, in trust for the said charity; If ordered, as to copyhold or customary land, And Let the sum of £— be paid to the said L., or to the lord or lady of the said manor for the time being, on the — day of — next, or, if so, on the — day of — next, and the — day of —, and the — day of — in every succeeding year, in compensation for fines or other profits, which would have become due upon the death, or admittance, of the tenants of the said copyhold, or customary land &c., or any part thereof].

As to vesting orders, *v. sup.* pp. 1228 *et seq.*; and as to the official trustee, *v. inf.* p. 1316.

For order approving scheme, and appointing new trustees, and vesting the lands and hereditaments specified by affidavit, and all other lands, or any term or estate therein, held in trust for the charity, in the official trustee, and for the extrix of the last surviving trustee to transfer consols to the official trustees, and to tax the applicants and the A. G. their costs, charges,

and expenses of the application, &c., and pay them out of the income, see *Re Titchmarsh*, M. R. in Chambers, 25 May, 1857, B. 1120.

For orders vesting specified lands, see *Re Westfield's Char.*, V.-C. S. in Chambers, 1 March, 1860, B. 357; lands and rent-charge, *Re Beckenham Char.*, M. R. in Chambers, 29 July, 1854, A. 1618.

For order under the Charitable Trusts Acts, and the Trustee Act, 1850, appointing new trustees, and vesting lands and rent-charges, &c., specified by affidavit, or any other land, &c., in the official trustee, and for persons in whose name stock belonging to the charity was standing to transfer it to the official trustees, and vesting the right to sue for or recover any chose in action in the new and continuing trustees of the charity, see *Re Saffron Walden Char.*, V.-C. S. in Chambers, 16 Nov. 1857, B. 125, *et sup.* p. 1289.

For an order directing a scheme to be settled, see *Re Sion Hosp.*, M. R. in Chambers, 27 Nov. 1876, B. 1826. For like orders in actions, *v. sup.* p. 1283.

4. *Directions as to Deeds, &c.*

AND Let the said &c. [*retiring trustees*] deliver up to such new [and surviving, or continuing] trustees, upon oath, all deeds, books, papers, and writings, in their custody or power as such trustees, relating to the said charity, or the estates, funds, or property thereof.

See 16 & 17 V. c. 137, s. 53, *inf.* p. 1317.

5. *Order for Leave to Transfer Stock or Deposit Securities, &c.—Charitable Trusts Act, 1853, s. 51; Charitable Trusts Act, 1855, s. 25.*

AND Let the said A. and B. &c. [*trustees or other persons in whose names, or the represves of any deceased person in whose name, the stock &c. is standing, sect. 51*] be at liberty to transfer the £— [*Consols, or as the case may be, see sect. 51*], standing in their names [*or in the name of — deceased*] in the books of (the bank), and held in trust for the [*state title*] charity, to the account of the official trustees of charitable funds at the bank, in trust for the said — charity; [*If so, and to deposit the following &c., Mention the securities to be deposited, see sect. 51, held in trust for the said charity, with the official trustees of charitable funds, in trust for the said charity*].

6. *Order to Transfer Stock or Deposit Securities, &c.—Same Sections.*

AND the Judge being of opinion that the stock [*or securities*] hereinafter mentioned, held in trust for the [*state title*] charity, ought for the purpose of security [*or convenient admon*] to be transferred to [*or deposited with*] the official trustees of charitable funds, Let A., on or before &c., transfer &c. [*Form 5, sup.*].

7. *Official Trustees to Transfer Stock into their Names, and to pay Dividends to the Trustees of the Charity—Charitable Trusts Acts, 1853, 1855, 1887* (16 & 17 V. c. 137, ss. 51, 52; 18 & 19 V. c. 124, ss. 12, 21, 25; 50 & 51 V. c. 49, s. 4).

DISCHARGE trustees and appoint new—"And it appearing that the (Consols) hereinafter mentioned are held in trust for the [*state title*] charity, and the Judge being of opinion that such anns ought, for the purpose of security, or convenient admon, to be transferred to the official trustees of charitable funds, Let the official trustees of charitable funds be authorized and empowered to call for the transfer of, and to transfer to, the account of the official trustees of charitable funds at the bank, in trust for the said charity, £— (Consols), standing in the books of the Bank of England in the names of &c.; And Let the official trustees of charitable funds from time to time pay or remit all dividends accruing due and received by them in respect of the said anns to the trustees of the said charity for the time being for the purposes thereof, upon the receipt or receipts in writing under the hands or hand of the said trustees, or any one or more of them."—*Re L. Wharton's Char.*, M. R. in Chambers, 9 Aug. 1859, B. 2597.

And for like order as to several sums of stock belonging to distinct charities, see *Re Reigate Char.*, M. R. in Chambers, 8 Aug. 1860, B. 2099.

Under sect. 4 of the Charitable Trusts Act, 1887 (50 & 51 V. c. 49), regulations have been made by the Treasury as to the mode in which orders authorized by law for the payment of any money to or by the official trustees, or held upon their banking account, or for the transfer of any stock or securities to or by the official trustees, are to be signed, authenticated, and carried into effect: see Tudor, *Char.* 594, 787.

8. *Official Trustees to receive Arrears of Dividends—Charitable Trusts Acts, 1853, 1855, 1860, 1887* (16 & 17 V. c. 137, s. 51; 18 & 19 V. c. 124, ss. 12, 18, 24; 23 & 24 V. c. 136, s. 12; 50 & 51 V. c. 49, s. 4).

DIRECTION as to stock [Form 7, *sup.*].—"And Let the official trustees of charitable funds be empowered to receive and recover in trust for the said charity; *If Government stock and securities*, all dividends (interest or income) accrued from the said anns &c., which at the time of such transfer shall be in arrear and unreceived; *If other stock or securities &c.*, see 16 & 17 V. c. 137, s. 51, all dividends (interest or income) accrued from the said stock &c., which shall for the time being be in arrear and unreceived."

9. *Payment of Principal Money to Official Trustees—Charitable Trusts Amendment Act, 1855*, ss. 12, 18, 23.

AND Let the said A. and B. &c. [Form 5, p. 1309], be at liberty to [or the Judge being of opinion that &c., ought &c., Form 6, *sup.*, Let the said A. &c., on or before &c.] pay the principal sum of £— now in their hands [or as the case may be] belonging to the said charity into the bank, to the account of the official trustees of charitable funds, to be invested in the names of the official trustees of charitable funds, in &c. [*the public funds*] for the benefit of the said charity.

10. *Transfer of Stock, and Payment of Interest out of Court to the Official Trustees—Charitable Trusts Act, 1853, s. 51; Charitable Trusts Act, 1855, s. 25.*

LET, pursuant to the order or certificate of the Charity Commrs for England and Wales, dated &c., the funds in Court be dealt with as directed in the Payment Schedule hereto; And it is ordered that it be referred to the taxing master to tax the costs of the applicants of and relating to this application.

(Insert in Payment Schedule.)

		£ s. d.	£ s. d.
Out of £— cash and interest— Pay costs to be taxed under this order.			
Pay residue of cash and interest....	The Official Trustees of Charitable Funds.		
Or, if cash and interest insufficient : Sell sufficient (New Consols) with £— cash and interest to raise costs to be taxed, &c.			
Out of proceeds, £— cash and interest, pay the said costs.			
Transfer residue of (New Consols)..	The same.		

For order for investment of cash in Court belonging to a charity in Reduced Anns, and transfer thereof to the official trustees, and that they remit all dividends to the trustees of the charity, see *Re Cranbourn Schools*, V.-C. W., 28 Feb. 1863, A. 407.

11. *Transfer to a Liability Account with restraining Order.*

UPON the application of &c.—And all parties, by their solr, consenting to this order, Let the fund in Court be dealt with as directed in the schedule hereto.—[*Add Payment Schedule directing fund in Court to be transferred to the account of the official trustees of charitable funds at the Bank of England to be held by them in trust, "In the matter of F— deceased, the contingent liability of the testator's estate under the lease of &c.," and subject thereto in trust for the charities, with directions that no part of the said anns to be so transferred to the said official trustees be sold, transferred, or otherwise disposed of by them before the — day of — in the year 1886 [when the lease would expire] without notice to the respondents, and directing that the interest until further order be paid by the official trustees to the trustees for the time being of the two charities in the proportions mentioned.*—Costs out of testator's residuary estate.—(The order in *Re Forest*, M. R. in Chambers, 6 April, 1869, A. 888, from which this form is adapted, was settled with the Charity Commrs.)

12. *Direction as to Costs.*

AND Let the costs [*If so, charges and expenses properly incurred*] of the applicants (and of the A. G.) of and relating to this application,

and that of the — day of —, be taxed &c.; And Let the said trustees be at liberty to (retain and) pay the same, when taxed, out of the income of the charity estates [*or funds, or property; Or, if so, direction for raising and paying the costs out of the corpus*].

There is no special provision in the Acts enabling the Court to order payment of the costs; the general powers conferred by 16 & 17 V. c. 137, s. 28, include it. For direction to apportion costs, *v. sup.* Form 15, p. 1289.

13. *Order that College render Accounts of Charity—Endowed Schools Act, 1869 (32 & 33 V. c. 56), s. 49; and Charitable Trusts Acts, 1853 and 1855.*

UPON motion &c. by counsel &c.—This Court being of opinion that the principal &c. of Jesus College, Oxford, are bound to comply with the requisitions made to them by the said Commrs, under the authority of the above-mentioned Acts, to render certain accounts and statements and answers to inquiries relating to the said endowment called the Meyrick Fund &c., and the property and income thereof, such accounts and statements and inquiries being as follows:—(a) An account of the property belonging to the said endowment—(b) An account of the receipts and expenditure for the four years ending the 31st December, 1870—(c) A list of the persons holding exhibitions under the foundation—(d) A list of the trustees in whom any portion of the endowment is legally vested—(e) A list of the managing trustees, if different from those who hold the property—(f) A statement of the schemes, statutes, or ordinances which now govern the endowment.—Let the said principal &c. of — pay to the Commrs appointed for the purpose of the above-mentioned Acts their costs of this application, to be taxed &c.—“And the said Commrs are to be at liberty to apply to this Court as they shall be advised in the event of the said principal &c. not complying with such requisitions as aforesaid.”—*Re Meyrick Fund*, V.-C. W., 11 Jan. 1872, B. 143; *S. C.*, 13 Eq. 269; 7 Ch. 500.

14. *Trustees not accounting to Charity Commissioners guilty of Contempt—Charitable Trusts Act, 1853, ss. 62 and 66.*

UPON motion for attachment &c. [*motion being against the trustees of the G. E. Trust for contempt in not complying with order of Charity Commrs for delivery of accounts*]; This Court being of opinion the above-mentioned charity, known as the G. E. Trust, is one within the control of the Charity Commrs for England and Wales [*applicants*], and that the order made by them and dated the — day of —, 1893, was proper, and that the disobedience to that order was improper, and must under the 14th sect. of the Charitable Trusts Act, 1853, be adjudged to be a contempt of this Court; Doth order that R. L. H., the Rt. Hon. L. Baron P., the Rt. Hon. Sir V. J. K. S., the Hon. A. L.,

and J. S., the trustees of the above-named G. E. Trust [*respondents*], do pay to the said Charity Commrs their costs of this motion, to be taxed &c.—*Re Gilchrist Educational Trust*, Kekewich, J., 19 Dec. 1894, A. 01094; (1895) 1 Ch. 367.

For order, upon motion of the Charity Commrs, under the Charitable Trusts Act, 1853 (16 & 17 V. c. 137), s. 14, adjudging a trustee guilty of a contempt of the Court of Chancery in not producing the accounts of the income of a charity, and ordering him to pay the costs of the application, but postponing the drawing up of the order and the consideration of his committal, see *Re Tamworth Sch.*, 3 Ch. 543.

For order for leave to enfranchise copyholds, see Form 14, p. 1289.

15. *Leave to Trustees to sell Property not a Charitable Endowment—Charitable Trusts Act, 1855 (18 & 19 V. c. 124), s. 29.*

THE application of the President &c., of the Royal Society of London, which upon hearing &c., was adjourned &c.; And it having been proved to the satisfaction of this Court that the estate at &c., agreed to be sold by the Royal Society to A. B., has been purchased or acquired by the society out of property which might be legally applied by such society as income, and does not form an endowment within the meaning of the Charitable Trusts Acts, 1853 and 1855; Declare that, notwithstanding the 29th section of the Charitable Trusts Act, 1855, the said Royal Society of London has power to sell the said estate without the consent of the Charity Commrs.—*Royal Society to Thompson, Hall*, V.-C., 5 March, 1881, B. 429; S. C., 17 Ch. D. 407.

16. *Declaration of Right to sell without Consent of Charity Commissioners.*

THE application of A. B., which upon hearing &c., was adjourned &c., Declare, that, notwithstanding the 29th section of the Charitable Trusts Act, 1855, a good title to the said hereditaments has been shown in accordance with the terms of the said contract, and that the said trustees, or the survivors of them, are entitled to sell and convey the said hereditaments for an estate in fee simple without the concurrence or consent of the Charity Commrs, and also that, although no such concurrence or consent has been obtained, it is not necessary that the purchase-money should be paid into Court under the provisions of the 69th section of the Lands Clauses Consolidation Act, 1845.—*Finnis to Forbes*, Bacon, V.-C., 30 May, 1883, A. 1097; S. C., 24 Ch. D. 591.

NOTES.

CHARITABLE TRUSTS ACTS.

The Charitable Trusts Acts comprise the Acts of 1853, 16 & 17 V. c. 137; 1855, 18 & 19 V. c. 124; 1860, 23 & 24 V. c. 136; 1862, 25 & 26 V. c. 112; 1869, 32 & 33 V. c. 110; 1887, 50 & 51 V. c. 49; 1891, 54 V. c. 17.

CHARITABLE TRUSTS ACT, 1853—LEGAL PROCEEDINGS.

By the 16 & 17 V. c. 137, ss. 1—8, the Board of the Charity Commrs is constituted.

By sects. 9—16, the Board is empowered to inquire into and advise and direct charities: and see 18 & 19 V. c. 124, *inf.*; *Re Meyrick Fund*, 13 Eq. 269; 7 Ch. 500; and by sect. 14 persons refusing to render accounts, &c., are to be deemed guilty of a contempt of Court: see *Re St. Bride's Estate*, 35 Ch. D. 147, n.; W. N. (77) 95, 149; *Re Tamworth Sch.*, 3 Ch. 543.

By sect. 17, before any "suit petition, or other proceeding," not being an application in any suit or matter actually pending, for relief, order, or direction, as to any charity, or its property or income, by any person, he must give the Board written notice of it, stating fully its nature and objects; and the Board may authorize or direct it to be taken, according to the notice, or for such objects, or in such manner, and under such stipulations as they think fit: and, save as in sect. 18, no such proceeding is to be entertained by any Court or Judge, except upon and in conformity with an order or certificate of the Board; but this enactment is not to extend to or affect any adverse claimant to the charity.

Charity trustees may still pay the trust fund into Court under the Trustee Act, 1893, s. 42 (replacing the Trustee Relief Act), and so relieve themselves of their trust, but are not entitled afterwards to petition the Court for a scheme to administer the fund: *Re Poplar Sch.*, 8 Ch. D. 543.

The words "suit or other proceeding" in sect. 17, do not include an action, which before the Jud. Acts must have been brought at common law, or one for enforcement of any right not relating to the admon of a charity; e.g., an action against the master to restrain him from presenting himself at the school, or continuing to occupy the school-house on the grounds of invalid appointment, unfitness, and removal by resolution of the governors: *Holme v. Guy*, 5 Ch. D. 901, C. A.; or an action by the master to restrain the managers from dismissing him and ejecting him from the school-house, though the question was raised whether the managers had been properly appointed: *Rendall v. Blair*, 45 Ch. D. 139, C. A.; or to restrain managers from removing him without giving him an opportunity of being duly heard: *Fisher v. Jackson*, (1891) 2 Ch. 84; or under an invalid resolution: *Lane v. Norman*, W. N. (91) 202; 40 W. R. 268; 61 L. J. Ch. 149; 66 L. T. 83; and so an action by the medical officer of a hospital merely for an injunction to restrain the governors from excluding him from his office, does not require the sanction of the Commrs: *Benthal v. E. of Kilmorey*, 25 Ch. D. 39, C. A.; *Britain v. Overton*, 25 Ch. D. 41, n.

But the consent of the Board is necessary to allow an action to proceed for obtaining an account of funds to be transferred to the Ecclesiastical Commrs, which would be distributed by them as a charity: *A. G. v. Dean and Canons of Manchester*, 18 Ch. D. 596; or by a school board for an account in respect of endowments transferred to the Commrs: *Llanbadarnfawr School Board v. Official Trustees of Charit. Funds*, (1901) 1 Q. B. 430, C. A.; or for a declaration that the Plt was entitled to a scholarship under the trust deed of a school, such action involving the partial execution or admon of charitable trusts: *Rooke v. Dawson*, (1895) 1 Ch. 480 (where an order was made staying the action for want of the certificate of the Commrs).

The Commrs, it seems, decline to authorize a relator's action, but will certify to the A. G., so that he may then proceed *ex officio*: Tudor, Char. 316.

The words "actually pending" mean pending at the time of the application: *Re Lister*, 6 D. M. & G. 184; *Re St. Giles*, 25 Beav. 313; *Braund v. F. of Devon*, 3 Ch. 800; *Re William of Kyngeston*, 30 W. R. 78; but when a final order has been made on petition, the matter is no longer actually pending: *Re Jarvis*, 1 Dr. & Sm. 97; and see *Re Duncan*, L. R. 2 Ch. 356.

An information in which proceedings were stayed was a pending matter: *A. G. v. Cooper*, 10 W. R. 31; 8 Jur. N. S. 50; 7 L. T. 149; and see *Re Ford*, 3 Drew. 324.

In *Re Bingley Sch.*, 2 Drew. 283, where trustees had under their private Act to apply in Chambers, this was not repealed by sect. 17, but the Board was to be applied to; and so in the case of a petition for the appointment of new trustees under a scheme previously settled by the Court: *Re Jarvis*, 1 Dr. & Sm. 97, 99; 5 Jur. N. S. 724.

Sect. 17 does not apply to the charities exempted by sect. 62, *v. inf.* p. 1317;

Glen v. Gregg, 21 Ch. D. 513, C. A.; distinguishing *A. G. v. Sidney Sussex Coll.*, 15 W. R. 162; 21 Ch. D. 514, n., C. A.; nor to places of religious worship under 18 & 19 V. c. 81, s. 9; *Glen v. Gregg, sup.*; but see now 32 & 33 V. c. 110, s. 15, *inf.* p. 1319.

The Court will not entertain proceedings, however pressing, till sanctioned by the Board: *Re Watford, V.-U. W.*, 2 Jur. N. S. 1045; and even in certified cases the A. G. may call for a relator: *A. G. v. Boucherett*, 25 Beav. 116; as to the A. G.'s power to sanction a compromise, see *S. C.*

The sanction of the Commrs must be given formally, and an informal letter is not sufficient: *Thomas v. Harford*, 48 L. T. 262; and the granting of the sanction is not matter of form, but of substance, for serious consideration: *A. G. v. Dean and Canons of Manchester*, 18 Ch. D. 596.

Where the consent is requisite, the Court will not necessarily dismiss the action, but may adjourn the hearing, so as to give the Plt an opportunity of ascertaining whether the Commrs will give their consent: *Rendall v. Blair*, 45 Ch. D. 139.

The Board's assent is not requisite to the disposal of charity money paid into Court under the Lands Clauses Act: *Re Lister*, 6 D. M. & G. 184, and cases there cited (if the trustees of the charity can be regarded as persons "absolutely entitled" under sect. 69: see *Tudor, Char.* 281, 481); or under the Trustee Relief Act (now Trustee Act, 1893, s. 42): *Re St. Giles*, 25 Beav. 313; 27 L. J. Ch. 550 (on petition for scheme); and see *Re William of Kyngeston*, 30 W. R. 78; *Re Tid St. Giles*, 17 W. R. 758; *Dan. Pr.* 1759, 6th ed. 2040; *contra, Re Skeete's Char.*, 1 Jur. N. S. 1037; *Re Faversham Char.*, 10 W. R. 291; 5 L. T. 787; *Re L. B. & S. C. Ry.*, 18 Beav. 608.

A person claiming as one of the objects of a charitable bequest must obtain leave to bring a suit to administer the estate. Where the sanction of the Board did not appear, demurrer was allowed: *Braund v. E. of Devon*, 3 Ch. 800. Where part of property was given to a charity exempted by sect. 62, and part to a charity not exempt, no notice of proceedings as to the former was required: *Re Meyrick's Char.*, 24 L. J. Ch. 669; 1 Jur. N. S. 438; 3 W. R. 435; nor as to the conveyance of land bought out of the general funds of the charity: *Corp. Sons of Clergy v. Stock Exchange*, 6 Jur. N. S. 84.

By sect. 18, the A. G.'s power to act *ex officio* is saved, and his fiat still requisite as before, in proceedings not taken under the Act.

By sect. 19, the Board may authorize proceedings, or (sect. 20) certify to the A. G. cases for his consideration.

JURISDICTION OF COURTS OF LAW.

By sects. 28—30, jurisdiction to make in Chambers any orders which could previously have been made in a suit regularly instituted was conferred on the Chancery Judges as to charities in the City of London and elsewhere in cases of charities with a gross annual income exceeding 30*l.*, without appeal, except where it exceeds 100*l.*; and similar power was given to the Chancery Palatine Court of Lancaster.

As to this, see O. LV, 13, 14; LXV, 24, 25, and *Re Davenport's Char.*, 4 D. M. & G. 839; and as to applications under the City of London Parochial Charities Act, 1883, *v. inf.* p. 1320.

Under sect. 28 the Court has jurisdiction to decide whether the property is or is not held upon a charitable trust: *Re Norwich Town Close Estate Char.*, 40 Ch. D. 298, C. A.

An appeal lies where the aggregate income of the charities exceeds 100*l.*: *Re Char. Gifts for Prisoners*, 8 Ch. 199.

A deed founding a charity, and duly enrolled under the Charitable Uses Act, 1735 (9 G. II. c. 36), is not "a scheme legally established" within sect. 29 of the Charitable Trusts Amendment Act, 1855; and the trustees in whom the lands of the charity are vested cannot sell such lands under a power of sale contained in the deed, otherwise than with the authority of Parliament, or of the Court, or with the approval of the Charity Commrs: *Re Mason's Orphanage and L. & N. W. Ry. Co.*, (1896) 1 Ch. 596, C. A.

By sects. 32—38, orders as to charities either in Chancery or Lunacy may be made by County Courts where the gross annual income does not exceed 30*l.* (now 50*l.*, by 23 & 24 V. c. 136, s. 11), subject to the control of, and confirmation of the orders by, the Charity Commrs.

By sects. 39, 40, appeals were to be brought to the Court of Chancery on

notice within a month, with the approval of the Board, and security being given for costs if required by them. Such appeals can be disposed of in Chambers. And see *Re Donington Church Estate*, 6 Jur. N. S. 290; 8 W. R. 301; and County Court Rules, 1889, O. XLVIII, 1. But this jurisdiction of County Courts in charity cases is now rarely exercised: Tudor, Char. 344, 506.

By sect. 41, the jurisdiction given by sects. 23—38 is not to be exercised to try questions of title, &c., between a charity and an adverse claimant.

An action by trustees of a charity to recover a rent-charge of 10*l.* issuing out of land, is not a proceeding "under the Act" within sect. 41, and the question being the title to rent-charge and not to land, and the value of the hereditaments in dispute, therefore, not exceeding 50*l.* by the year, the jurisdiction of the County Court is not excluded: *Bassano v. Bradley*, (1896) 1 Q. B. 645.

POWERS OF CHARITY COMMISSIONERS.

Sects. 21—27, and the 23 & 24 V. c. 136, s. 15, gives the Board power to sanction leases, &c., raise money for improvements, &c., manage property, make compromises, sales, purchases, exchanges, &c.; and see 18 & 19 V. c. 124, *inf.* p. 1318, and 23 & 24 V. c. 136, s. 15.

Exchanges are, however, more simply and economically effected through the Board of Agriculture (formerly the Land Commrs): Tudor, Char. 268; and so in the case of partitions, *Ib.* 270.

In general the Commrs require any capital expenditure for repairs, improvements, &c., to be recouped out of income; Tudor, Char. 265, 486. As to procedure in case of sale, *v. Ib.* 490.

The direction to let allotments contained in the Allotments Extension Act, 1882 (45 & 46 V. c. 80), is not inconsistent with and has not taken away the power of authorizing a sale vested by the Charitable Trusts Acts in the Commrs: *Parish of Sutton to Church*, 26 Ch. D. 173.

The consent of the Commrs to a sale of land held on trust for general purposes of a charity, and not subject to any distinct specific and particular trust, is not required: *Re Corp. of Sons of Clergy and Skinner*, (1893) 1 Ch. 178.

By sects. 42, 43, public notices of applications for schemes, or appointing or removing trustees under the Act, are to be given; and every application may be made by the A. G., or by one or more of the trustees, or by two or more inhabitants; and the jurisdiction under the 52 G. III. c. 101, is preserved.

By sect. 44, the statement in the certificate, or order of the Board, of the amount of income of any charity, is to be sufficient evidence for determining the jurisdiction or proceedings under the Act, with a proviso as to any endowment for particular or special purposes.

By sect. 46, the rights and privileges of the Church of England with respect to charities are reserved.

By sect. 47, amended by 18 & 19 V. c. 124, s. 15, the secretary of the Board for the time being is to be a corp. sole, by the name of "the Official Trustee of Charity Lands," for taking, holding, or conveying their lands.

By sects. 48, 49, the lands may be ordered to vest in him (see Form 3, *sup.* p. 1308), and re-vested in the charity trustees; and by sect. 50, he is to be a bare trustee. And see 18 & 19 V. c. 124, s. 37.

By sect. 51, as amended by 18 & 19 V. c. 124, s. 18, and 50 & 51 V. c. 49, s. 4, official trustees of charitable funds are appointed, who are to have perpetual succession, and are to consist of such officers of the Board as the Board with the consent of the Treasury from time to time appoint; and trustees, &c., or others holding anns, stocks, shares or securities, for or on behalf of a charity, may be ordered to transfer or deposit them to or with such official trustees. As to their powers and duties and accounts and indemnity, see 18 & 19 V. c. 124, ss. 12, 17—29; 23 & 24 V. c. 136, ss. 12, 17, 18, 23; 50 & 51 V. c. 49, ss. 4, 5.

By sect. 52, the official trustees are to pay the income of the charity to its trustees or admors, or dispose of it and transfer the principal, as they may be directed.

By sect. 53, the deposit of deeds of any charity may be directed, Form 4, p. 1309; and see 23 & 24 V. c. 136, s. 19.

By sects. 54—60, the Board may frame provisionally such schemes as it considers can only be effected under the authority of Parliament, and in its annual report bring them before the notice of Parliament as approved by the Board, and mention any objections raised; as to these powers, *v. sup.* p. 1295.

By sect. 61, and the 18 & 19 V. c. 124, ss. 44, 45, the delivery of trustees' accounts is regulated.

EXEMPTIONS FROM ACT.

By sect. 62, the Universities and Colleges of Oxford and Cambridge, &c., Cathedral or Collegiate Churches, unendowed institutions, Queen Anne's Bounty, the British Museum, friendly societies, and savings banks, are exempted from the operation of the Act; and provisions are made as to charities supported partly by voluntary subscriptions: see *Re Wilson*, 19 Beav. 594; *Hamilton v. Spottiswoode*, 15 W. R. 118; 36 L. J. Ch. 51; but the exemption is not to extend to Cathedral, Collegiate, Chapter, or other schools; and see *A. G. v. Sidney Sussex Coll.*, 4 Ch. 722, *et inf.*

The exemption is confined to schools *ejusdem generis* with those specified: *Re Stockport Ragged, &c. School*, (1898) 2 Ch. 687, C. A.; and accordingly the consent of the Charity Commrs to a mortgage of the land and buildings of an industrial school is necessary: *S. C.*

As to Roman Catholics, see 18 & 19 V. c. 124, s. 47; 22 & 23 V. c. 50; 23 & 24 V. c. 134, *et sup.* pp. 1304, 1305.

The word "endowment" in this section means an endowment for a particular purpose, *e.g.*, property devoted to the purpose of maintaining buildings belonging to and held together with a chapel: *Re St. John's Street Wesleyan Chapel, Chester*, (1893) 2 Ch. 618; and permanently invested voluntary contributions do not form an endowment: *Clergymen's Widows, &c. Char. v. Sutton*, 27 Beav. 651; 29 L. J. Ch. 393; and the expression "income of any endowment" means *primâ facie* the income of any invested funds, whether held upon any special trust or for the general purposes of the charity; but bequests and donations made for the general purposes of a charity partly maintained by voluntary subscriptions, and lawfully applicable as income consistently with the terms of the gift, are, whether invested by the governing body or not, exempt from the jurisdiction of the Commrs: *Re Clergy Orphan Corp.*, (1894) 3 Ch. 145, C. A.; and see *Re Gilchrist Educational Trust, inf.*

And a legacy given generally to a charity, unendowed and supported partly by voluntary contributions, is not within the Act: *Re Wilson*, 19 Beav. 594.

Land purchased out of moneys arising from voluntary contributions of members of a society legally applicable thereto; and land purchased by a city ward for a ward charity school unendowed, and maintained by voluntary contributions, are within the section, and may be sold without the consent of the Commrs: *Royal Society of London v. Thompson*, 17 Ch. D. 407; *Finnia to Forbes* (No. 2), 24 Ch. D. 591; *sup.* p. 1313. Government grants and contributions by boards, boards of guardians, and other public authorities to an industrial school are not "voluntary contributions" within sect. 62: *Re Stockport Ragged, &c. School, sup.*

The exemption in sect. 62 of "buildings registered for religious worship," was held not to extend to other buildings and property held along with a chapel, but only to the chapel itself: *In re St. John's Street Wesleyan Chapel, Chester*, (1893) 2 Ch. 618; but now by the Charitable Trusts (Places of Religious Worship) Amendment Act, 1894 (57 & 58 V. c. 35), the exemption is extended to (a) any forecourt, yard, garden, burial ground, vestry or caretaker's house, in respect of situation connected with, and held upon the same trusts as, any building registered and *bonâ fide* used as a place for meeting for religious worship under the Places of Worship Registration Act, 1855 (18 & 19 V. c. 81), *v. sup.* p. 1315; and (b) any Sunday school, house, or other land or building which shall be certified by order of the Charity Commrs to be held upon the same trusts as any building registered and

used as aforesaid or upon like trusts, and to be in respect of situation so connected with such building that it cannot conveniently be separated therefrom.

By sect. 63, the exempted charities may petition the Commrs to have the benefit of the Act.

A governing body presenting a petition must be duly constituted: *Hamilton v. Spottiswoode*, 15 W. R. 118; 38 L. J. Ch. 51.

By sect. 64, and 18 & 19 V. c. 124, s. 46, any charity, exempted or not, may refer its disputes to the arbitration of the Board.

Sect. 65 provided for vesting the legal estate in lands held by municipal corps.; but this section was repealed by the Municipal Corps. Act, 1882 (45 & 46 V. c. 50), and is replaced by sect. 133 of that Act.

By sect. 66, the meaning of terms used is defined. "Charity" is to mean every endowed foundation and institution taking or to take effect in England or Wales, and coming within the meaning, purview, or interpretation of the 43 Eliz. c. 4, or as to which, or the admon of the revenues or property whereof, the Court of Chancery has or may exercise jurisdiction. By sect. 48 of the Charitable Trusts Amendment Act, 1855 (*inf.*), "charity" shall apply to every institution in England or Wales endowed for charitable purposes, but not those exempted by sect. 62 nor (sect. 49) to the colleges of Eton or Winchester. A charity founded and endowed in England, but to be administered abroad, is within the Act, and, *semble*, one founded and endowed abroad to be applied in England or Wales: *Re Duncan*, 2 Ch. 356.

Land purchased by a City ward out of their common moneys for providing a watchhouse and suitable rooms for the business and custody of the records of the ward was held not to be impressed with a charitable trust within the Acts: *Finnis to Forbes* (No. 1), 24 Ch. D. 587.

"Endowment" is also defined by sect. 66; as to the effect of the definition, see *Clergymen's Widows, &c. Char. v. Sutton*, 27 Beav. 665; *Tudor, Char.* 533, 534.

The fact that an absolute discretion is given to the trustees as to the mode of application of a fund for the benefit of a charity will not prevent the bequest from being an endowment within sect. 66: *Re Gilchrist Educational Trust*, (1895) 1 Ch. 367.

A sole trustee of a charity fund, with power to revoke the trusts and dispose of the fund, is, until such revocation, liable to be called on to account by the Charity Commrs: *Re Tamworth Sch.*, 3 Ch. 543.

As to the Court enforcing orders of the Commrs, see *S. C.* and Charitable Trusts Act, 1853, s. 14; 1855, s. 9; 1860, s. 20; and Forms 13, 14, *sup.* p. 1312.

CHARITABLE TRUSTS AMENDMENT ACT, 1855.

By 18 & 19 V. c. 124, ss. 6—9, the powers of the Board to inquire into charities are extended; and sects. 61 and 64 of the previous Act, and other details, amended. Colleges may be compelled to make discovery of endowments of which they are trustees: *Re Meyricke Fund*, 13 Eq. 269; 7 Ch. 500.

By sects. 10, 13, power is given to the Board to apportion parochial charities under 30*l.* a year, after division of parishes, and with separate trustees: *v. sup.* p. 1286, Form 8, and notes, *Ib.*

By sects. 16, 29, 38, 39, power is given to acting trustees to grant leases and create charges; but by sect. 29 no sale, mortgage, charge, or lease in reversion after more than three years, or for a fine, or for more than twenty-one years, is to be made without the authority of Parliament or of the Court, or the approval of the Board. *Semble*, this does not enable the Commrs to give effect to contracts made before the Act: *Moore v. Clench*, 1 Ch. D. 447.

As to the effect of sect. 38, see *Parish of Sutton to Church*, 26 Ch. D. 173.

By sects. 32, 35, 38, the Board may authorize payment for equality of exchange or partition.

By sects. 33, 34, 38, power is given to ascertain lands charged with rents in favour of charities. By sect. 39, the Board may approve schemes for letting.

By sect. 40, the Board may direct taxation of charity costs.

s. II.] *Orders in Chambers under Charitable Trusts Acts.* 1819

CHARITABLE TRUSTS ACT, 1860.

By 23 & 24 V. c. 136, s. 2, power was given to the Board to act as a Court of admon, and to make orders in cases as to appointment or removal of trustees, schoolmasters, mistresses, or other officers, assurance, transfer, payment, or vesting of property, &c., which could previously have been made in Chambers under 16 & 17 V. c. 137, ss. 28—30, *sup.* p. 1315: see *Re Burnham Nat. Sch.*, 17 Eq. 241; *et sup.* p. 1301.

Under this section, orders—forms of which, Nos. 1 and 2, are given *sup.* pp. 1307, 1308—are usually made by the Board; but by sect. 4 they cannot make any order—(a) as to any charity, the gross income of which exceeds 50*l.* besides the value of land or buildings in hand, except on the application of a majority of the trustees; nor (b) remove a trustee on account of his religion; nor (c) in contentions, &c. cases which they may think more fit to be decided by a judicial Court (sect. 5); as to which, see *Re Hackney Char.*, 12 W. R. 1129; 13 W. R. 398; 34 L. J. Ch. 169; *Re Burnham Nat. Sch.*, 17 Eq. 241; (d) nor can they try questions of title, &c., between a charity and an adverse claimant.

When once a formal application for a scheme under the Act has been made to the Commrs their jurisdiction attaches absolutely, and the application cannot be withdrawn: *Re Poor's Lands Charity, Bethnal Green*, (1891) 3 Ch. 400.

By sects. 8, 9, appeals under the Act were to be brought in Chancery: see *Re Hackney Char.*, *sup.*, and *Exp. Nicholls, Re Poole's Char.*, 4 D. J. & S. 588; and see *Charit. T. Act*, 1853, s. 40; *Re Donington Church Estate*, 6 Jur. N. S. 290; 8 W. R. 301.

And by the *Charit. T. Act*, 1869 (32 & 33 V. c. 110), s. 10, appeals may be presented in the case of all charities by the same persons only as in the case of a charity the gross annual income of which does not exceed 50*l.* (i.e., in effect, only by the A. G., or a person authorized by him, or by the Charity Commrs); and by sect. 11, twenty-one days' notice of appeal must be given to the A. G. For form of application to A. G. for leave to appeal, see D. C. F. 1059.

By 23 & 24 V. c. 136, s. 10, the Board's jurisdiction extends to charities vested in corporations.

By sect. 13, magistrates are empowered, under an order of the Board, to give possession of charity buildings or property held over by any master or mistress, officer, or recipient of charity.

By sect. 14, a future master or mistress of an endowed school, except a grammar school, may, after due notice, be removed by a majority of trustees, with the subsequent approval of the Board, and with, in certain cases, the visitor's consent.

By sect. 16, any sale, exchange, partition, mortgage, lease or other disposition by two-thirds of the trustees, duly convened, was to have the same legal effect as if made by all the acting trustees and the official trustee: but see now 32 & 33 V. c. 110, s. 12, *v. sup.* p. 1294.

By 25 & 26 V. c. 112, no provision in any Act of Parliament or order of the Court of Chancery as to the appointment, &c. of trustees, &c., with approval, &c. of the Court, shall (unless by express direction) exclude the jurisdiction of the Commrs.

CHARITABLE TRUSTS ACT, 1869.

By 32 & 33 V. c. 110, powers are given to the Board as to what may be inserted in their orders, giving notice of their discharging them when made by mistake, and as to their form and effect. As to sects. 10, 11, *v. sup.*; sect. 12, *v. sup.* p. 1294.

By sect. 14, charities exempted from the operation of the *Charit. T. Acts* (see 16 & 17 V. c. 137, ss. 62, 66; 18 & 19 V. c. 124, s. 49) may apply to have those Acts, or any provision thereof, extended to them.

By sect. 15, the powers of the Board, under the *Charit. T. Acts*, 1853, 1869, to make orders for removal and appointment of trustees, vesting property, and the establishment of schemes, are extended to buildings registered and *bond fide* used as places of meeting for public worship.

By sect. 17, the 16 & 17 V. c. 137, s. 63, and 23 & 24 V. c. 136, s. 16, are repealed.

As to Charity Commrs for Ireland, see 34 & 35 V. c. 102, and the statutes therein referred to.

CHARITABLE TRUSTEES INCORPORATION ACT, 1872.

By 35 & 36 V. c. 24, s. 1, the Charity Commrs may, on the application of the trustees of charities, grant them a certificate of incorporation, constituting them a body corporate; and by sect. 2, the charity property is to vest in the body corporate.

By sect. 3, the application must be in writing and signed.

By sect. 4, trustees are to be effectually appointed to the satisfaction of the Commrs before granting the certificate, and provision is made for appointing them from time to time afterwards.

By sect. 5, incorporation is not to affect the liabilities or duties of trustees, or the control over them by the Commrs, nor (sect. 11) the validity of contracts which would otherwise have been good.

By sect. 6, the certificate is conclusive evidence of incorporation; and sects. 7, 8, 9, apply to keeping a record of applications, fees for inspection, enforcing orders of the Commrs, and stamps on applications and certificates.

By sect. 10, gifts to the charity, before or after incorporation, "are to take effect as if the same had been made to or in favour of the incorporated body or otherwise for the like purposes."

By sect. 12, payments or transfers made *bonâ fide* in reliance on instruments executed under the common seal, but defective, are protected.

As to sect. 13 (enrolment), *v. inf.* pp. 1338, 1339; sect 14 (definition of "public charitable purposes"), *v. sup.* p. 1318.

This Act has been rarely used, as the same effect is, it is said, produced by vesting the charity property in the official trustees: Tudor, Char. 452.

CITY OF LONDON PAROCHIAL CHARITIES ACT, 1883.

By this Act (46 & 47 V. c. 36), the Charity Commrs are empowered "to inquire into the nature, tenure, and value of all the property and endowments" of certain parochial charities of the City of London, and to prepare schemes for "the future application and management of the charity property and endowments." But by sect. 21, no scheme is to affect any endowment originally given to charitable uses less than fifty years before the commencement of the Act, unless the governing body assent to the scheme. By sect. 39, power is given to the Commrs to direct the sale of any part of the charity property upon such terms and conditions, and to such purchasers, as they may think fit; and the trustees for the time being of such property are thereupon to effect such sale. By sect. 48, a new corporate governing body, to be called "The Trustees of the London Parochial Charities," is to be established, with perpetual succession and a common seal.

By sect. 10 of the Act, any person claiming any vested interest not duly recognized by the Commrs, or alleging that any property which the Commrs have determined to be charity property within the Act is not charity property, may apply to the High Court of Justice, by petition or summons, asking for a declaration as to his right. The Commrs may appear, and the decision of the Judge is to be final, unless special leave to appeal is given.

The expression "charity property" includes all property held for the benefit of a parish: *Re St. Botolph*, 35 Ch. D. 142; and see *Re St. Alphage, London Wall*, 59 L. T. 614; *Re St. Bride's*, 35 Ch. D. 147, n.; *Re St. Nicholas Acons*, 60 L. T. 532; *e.g.*, an advowson vested in trustees for the benefit of a parish, and a vicarage held on the same trusts: *Re St. Stephen, Coleman Street*, 39 Ch. D. 492. As to the meaning of "vested interest," see *Re St. John, Evangelist*, 59 L. T. 617; *Re St. Alphage, sup.*; *Re St. Edmund King and Martyr*, 60 L. T. 622. As to costs of payment of moneys out of Court, and service on parties bound by the scheme of the Commrs, see *Re St. Alban's, Wood Street*, 66 L. T. 51.

CHARITABLE TRUSTS ACT, 1887.

This Act (50 & 51 V. c. 49) makes provision for the appointment of assistant Commrs (sects. 2, 3), and as to the appointment and powers of the official trustees of charity funds and the official trustee of charity lands (sects. 4, 5). The keeping of the banking and other accounts of the official trustees, and conduct of their business, are now governed by Treasury regulations made under this Act.

CHARITABLE TRUSTS (RECOVERY) ACT, 1891.

By this Act (54 V. c. 17, s. 3) the Charity Commrs are empowered, with the sanction of the A. G., to institute any action, petition, or other proceedings on behalf of any charity for the recovery of any property the gross annual income of which does not, in the opinion of the Board, exceed 20*l.* a year. The Act provides (sect. 5) for the mode of procedure by the Board, and the making of rules of Court (sect. 6). Printed reports of the Charity Commrs appointed under 58 G. III. c. 91, and other Acts for inquiring into charities, are to be admissible as *prima facie* evidence on notice given; and where any yearly or other periodical payment has been made in respect of any land to or for the benefit of any charity or charitable purpose for twelve consecutive years, such payment is to be *prima facie* evidence of the liability of the land to such yearly or periodical payment, and no proof of the origin of such payment shall be necessary (sect. 5).

Proceedings by the Board under the Act may be commenced by originating summons (Rules commencing 14th June, 1892, r. 2); the Board are to be deemed to represent all parties interested in the charity, and the charity trustees, official trustee of charity lands, or official trustees of charitable funds are not to be made parties unless the Court (*i.e.*, Ch. Div., r. 1) or a Judge otherwise orders (r. 3; and as to notice to be given under sect. 5, see r. 4). Orders for production or discovery against the Board are to be made upon their secretary (r. 5). For forms under the Act, see D. C. F. 1061, 1062.

CHARITY INQUIRIES (EXPENSES) ACT, 1892.

By this Act (55 & 56 V. c. 15) councils of counties or county boroughs are authorized to contribute to the expenses of charities appropriated in whole or in part for the benefit of their county or county borough.

SECTION III.—SETTING ASIDE LEASES—ACCOUNT OF CHARITY PROPERTY.

1. *Mode of Letting declared Improper—Inquiries as to Property—What steps proper to set aside Leases and recover past Rents—Condition of School—Master's Income.*

DECLARE that the mode hitherto practised of letting and granting the estates of the charity &c., at inadequate rents and for fines is improper, and ought to be discontinued; Let an inquiry be made (in whom, and how, the legal estate in the charity is vested, and) of what the charity property consists, and what is its present rental and real annual value, and by whom, and under what lease or leases, the same

is held, and whether any and what proceedings ought to be taken for setting aside such leases, or any and which of them, or for recovering any and what past rents of the properties therein contained, or with respect to the fines taken thereon, and what is the present state and condition of the school &c., and what has been the income received from the school lands by the Deft since he was appointed master of the said school, and what is the probable amount which would have been received for fines on leases of the said lands in the next two years, if the mode of letting hitherto practised had been continued.—Reserve consideration of scheme.—Adjourn &c.—*A. G. v. Daniel*, M. R., 19 July, 1851, A. 1257.

And see *A. G. v. Waxchandlers' Co.*, L. R. 6 H. L. 1.

2. *Inquiries as to Church Property and Leases—Churchwardens to be served.*

"LET the following &c.:—1. An inquiry of what messuages, lands, and tenements the G. church property in the pleadings mentioned consists, and to what trusts each and every part thereof is subject; 2. An inquiry whether any and what part thereof is let, and to whom and under what leases, and what is the annual value of the property comprised in each lease; 3. An inquiry whether any and what proceedings should be taken for setting aside any and which of the leases of the said charity estates and property;" Liberty to propose a scheme; And the churchwardens of the parish to be served, and to be at liberty to appear.—*A. G. v. Salkeld*, M. R., 1 March, 1853, A. 597. And see Form 6, p. 1285.

For order for compensation for improvement on setting aside charity sales or leases, see *A. G. v. Kerr*, 3 Beav. 427, n.; 2 Beav. 420.

For order as to the interest of a charity in an estate partly purchased with the charity funds, see *A. G. v. Corp. Newcastle*, 5 Beav. 318.

For inquiry under the 52 G. III. c. 101, whether a sale was for the benefit of the charity, and if not, as to repairs, see *Re Parkes*, 12 Sim. 332.

3. *Order to take Proceedings to set aside Improper Leases of Charity Estates.*

LET the Petr, the Plt, be at liberty to take such proceedings as he may be advised, either at law or in equity, against the respective lessees and tenants of the charity property, for setting aside the several leases thereof, or obtaining immediate possession.—*A. G. v. Salkeld*, M. R., 8 July, 1854, A. 1269.

4. *Judgment setting aside Lease.*

DECLARE that the lease dated &c., of the charity lands in the pleadings mentioned, called the H., for the term of 99 years, granted in

pursuance of the agreement dated &c., is void, and order and adjudge the same accordingly; And Let the Defts deliver up the said lease to the relators, M. and A., churchwardens of the said parish of E. M., to be cancelled; And Let the said Defts, B. and H., deliver up possession of the said charity lands, with the appurtenances, and all other the premises comprised in the said lease, to the said M. and A., as such churchwardens as aforesaid; And Let an account be taken of the rents of the said lands and premises accrued due since &c., and which have been received by the said Defts, or by any other person or persons, by their or either of their order, or for their or either of their use, and in case it shall appear, upon taking the said account, that the said Defts, or any or either of them, have been in the occupation of any part of the said lands and premises since &c., or if it cannot be ascertained what rents have been received in respect of such lands, the said Defts are to be charged, in taking the aforesaid account, according to a valuation to be set thereon, having regard to what is a reasonable rent to be paid by the said Defts during such time; And Let the said Defts be charged therewith.—Order for payment, and inquiry as to and delivery of “deeds, documents, books, accounts, evidences, or writings belonging to the said lands,” and as to costs.—*A. G. v. Sir G. H. F. Berkeley and Wife and Lord Hotham*, M. R., 12 June, 1823, A. 1913; *S. C.*, *sub nom. A. G. v. Hotham*, T. & R. 220, 221.

5. *The like—where a House which the Minister had a Right to occupy has been Leased without his Sanction.*

DECLARE that, having regard to the declaration of trust contained in the indenture dated &c., in the pleadings mentioned, the agreement for a lease, dated &c., in the pleadings mentioned, to the Deft I., was improperly made, and ought to be set aside and be delivered up to be cancelled, and order and adjudge the same accordingly; And Let the Deft I., on or before &c., deliver up possession of the house in the pleadings mentioned to the Plts &c., as trustees of the said indenture.—Defts to pay Plt's costs.—*Ward v. Hipwell*, V.-O. S., 12 March, 1862, B. 533; *S. C.*, 3 Giff. 547; 8 Jur. N. S. 666.

For order restraining minister, who had been duly dismissed, from officiating, &c., see *Cooper v. Gordon*, V.-O. S., 28 May, 1869, A. 1400, *sup.* Vol. I. pp. 722, 723; *S. C.*, 8 Eq. 249.

6. *College declared Trustee—Increased Income apportioned amongst the Charities.*

[Property then producing £250 per annum was given, as to £243 : 14s. 8d., among certain specified objects, and as to the remainder (£6 : 5s. 4d.) testator's will was that it should be from time to time bestowed in such charitable uses as “my supervisors shall think fit.”]

“DECLARE that the lands and funds now in the possession of the college as trustees or supervisors of P.'s will, except &c., are subject

to the trusts of the said will, and that the schoolhouse and other houses situate in F., together with the income arising from such part thereof as shall not be occupied for the purposes of the school, and the lodgings of the master and usher, are applicable exclusively to the purposes of the said will.—Inquiry what the property, other than the property in F., now consists of, and in whom the same is now vested.—Declare that the whole income of such property, after setting apart a proper sum to answer contingencies, ought to be divided amongst the several objects mentioned in the said will; and that, in the distribution of the income among such objects, the master and fellows are entitled to apply, to such charitable objects as they think fit, such share of the said income as shall bear to the whole thereof the same proportion as the sum of £6 : 5s. 4d. bears to the sum of £250.”—Reference to approve scheme, Forms 1 or 2, *sup.* p. 1283.—*A. G. v. Caius Coll.*, M. R., 31 May, 1837, A. 631; 2 Keen, 150, 170.

For decree declaring a city co. trustees of devised lands for a school, and directing a scheme, see *A. G. v. Skinners' Co.*, L. C., 22 Nov. 1821, A. 1249; Jac. 629; 2 Russ. 425; and for the order on further consideration declaring the co. entitled beneficially to the surplus rents of other property, after making certain payments to almsmen, &c., and for repairs, *S. C.*, 3 April, 1827, A. 1241; 2 Russ. 447.

For declaration that the whole estate was given for charitable purposes, including increased rents, that a certain piece of land was not part of the charity lands, and that the boundary thereof ought to be ascertained, and the rents apportioned, see *A. G. v. Waxchandlers' Co.*, L. R. 6 H. L. 14.

NOTES.

SETTING ASIDE LEASES OF CHARITY ESTATES.

The right of the A. G. to question an improvident lease was barred after twenty years by the Real Property Limitation Act, 1833 (3 & 4 W. IV. c. 27) (now twelve years: R. P. L. Act, 1874 (37 & 38 V. c. 57), s. 1): *Magd. Coll. Ox. v. A. G.*, 6 H. L. C. 189; 26 L. J. Ch. 620; 3 Jur. N. S. 675; *A. G. v. Davey*, 4 D. & J. 136, reversing *S. C.*, 19 Beav. 521; *A. G. v. Payne*, 27 Beav. 168; *Magd. Hosp. v. Knolls*, 4 App. Ca. 324; but if a tenancy has been created by payment of rent, the statute does not run until the last payment: *S. C.*; *Bunting v. Sargent*, 13 Ch. D. 330; and the poor of a parish are a “class of persons” within the meaning of the Act: *Tudor*, 295; and see *A. G. v. Bristol*, 2 J. & W. 321.

The burden of proving a charity lease fair lies on the lessee; and a husbandry lease of charity lands for ninety-nine years at a fixed rent cannot stand: *A. G. v. Hall*, 16 Beav. 388.

On setting aside a lease by trustees of a charity, the Court directs it to be cancelled *in toto*, and will not reserve to the lessee the benefit of the covenants: *A. G. v. Morgan*, 2 Russ. 306.

Allowances will be made for lasting improvements: *A. G. v. Gains*, 11 Beav. 63; but improvements cannot be allowed for without an account of back rents: *A. G. v. Magd. Coll.*, 18 Beav. 223, 255; *v. Davey*, 19 Beav. 521.

And the account being carried back to the accruer of Deft's title, improvements were allowed for from that time, and no costs: *S. C.* And see *A. G. v. Waxchandlers' Co.*, L. R. 6 H. L. 1.

In *A. G. v. Pretymann*, 8 Beav. 316, leave was given to the lessee, not a party, to attend the inquiry whether proceedings should be taken for setting aside the lease.

In *Jones v. Powell*, 4 Beav. 96, trustees of an underlease of charity property were authorized to apply to Parliament for compensation clause in Street Improvement Act.

As to building leases of charity property, see *A. G. v. Foord*, 6 Beav. 288; *Re Cross*, 27 Beav. 592; and as to leases of charity lands, *A. G. v. Kerr*, 2 Beav. 420; 3 Beav. 427, n.; *et sup.* p. 1322; *v. S. Sea Co.*, 4 Beav. 453; *v. Pargeter*, *v. Foord*, 6 Beav. 150, 288; *v. Glyn*, 12 Sim. 84; *v. Pilgrim*, 12 Beav. 57; *v. Wyggeston Hosp.*, *Ib.* 113.

A scheme settled in 1856 was amended by striking out a clause as to granting building leases with the consent of the Commrs for ninety-nine years absolute, or for twenty-one years with a covenant for perpetual renewal on payment of fine, leaving the granting of leases to be governed by the Charitable Trusts Act, 1853, s. 21: *Re Henry Smith's Char.*, 20 Ch. D. 516, C. A.

Trustees of a charity were allowed to grant leases according to a model form appended to the order without reference to Chambers: *A. G. v. Christ Church, Oxford*, 3 Giff. 514.

A corp. may sue to set aside transactions fraudulent against it, though effected in its name by members of the governing body, and the right is not affected by the A. G. also having power to call them in question: *A. G. v. Wilson*, C. & Ph. 1.

As to the liability of a municipal corp. to compensate for a charity estate alienated, and to account for the rents, see *A. G. v. East Retford*, 2 My. & K. 35; *v. Corp. of Leicester*, 9 Beav. 546, a case of a new municipal corp.; and as to costs, *S. C.*; and their duty to give every information, *A. G. v. East Retford*, *sup.*; but the form of the decree was not approved in *A. G. v. Corp. of Newark*, 1 Ha. 398.

An account of rents which have been misapplied without any fraudulent intention will not be carried back: *S. CC.*, *A. G. v. Newbury*, 3 My. & K. 647; *v. Drapers' Co.*, 4 Beav. 67; *v. Waxchandlers' Co.*, L. R. 6 H. L. 14, 23; *et v. inf.*; Lewin, 1148; and as to the Scotch law, *Ld. Adv. v. Drysdale*, L. R. 2 Sc. 368.

Where the minister had the option of occupying a house, a lease of it without his sanction was set aside with costs: *Ward v. Hipwell*, 3 Giff. 547; 8 Jur. N. S. 666; *et sup.* Form 5.

The Court refused to allow future renewals on beneficial terms, according to previous custom; but regard was had to any expenditure by lessees on faith of renewal: *A. G. v. St. John's Hospital, Bath*, 1 Ch. 92; 14 W. R. 237; 35 L. J. Ch. 207; and see *A. G. v. Wyggeston Hospital*, 12 Beav. 113.

A conveyance by the trustee of a private chapel to the Church Building Commrs was set aside as a breach of trust after consecration and assignment of a district: *A. G. v. Bp. of Manchester*, 3 Eq. 436; but a power in a majority of the trustees to transfer the school to a school board was no objection to the exercise by the Charity Commrs of their power to appoint new trustees: *Re Burnham Nat. Sch.*, 17 Eq. 241.

A direction to lease to wife's kindred for ever at two-thirds of true value was held void as a perpetuity, and the charity took discharged of it: *A. G. v. Greenhill*, 33 Beav. 193; 9 Jur. N. S. 1307; 3 New Rep. 236; and see *A. G. v. Abp. York*, 17 Beav. 495.

Leases of charity lands cannot be made in reversion after more than three years, nor on a fine, nor for lives, nor for more than twenty-one years, without the authority of Parliament, or of the Court, or the sanction of the commrs: Charit. T. Amendment Act, 1855 (18 & 19 V. c. 124), s. 29; and covenants to renew, so as to exceed the proper term, are void; and see 13 Eliz. c. 10; 14 Eliz. c. 11; 18 Eliz. c. 11; Tudor, Char. 262.

This does not apply to leases under a scheme or special power (sect. 39), nor, *semble*, to contracts made before the Act: *Moore v. Clench*, 1 Ch. D. 447.

A lease for more than twenty-one years, made without the required consent, does not enure for any purpose, but is absolutely void: *Bp. of Bangor v. Parry*, (1891) 2 Q. B. 277.

A lease of land to parish officers to enable them to perform their statutory obligations by providing a workhouse is a lease for a charitable use, and the Poor Law Amendment Act, 1844 (7 & 8 V. c. 101), s. 73, only cures defect of enrolment in such a case: *Webster v. Southey*, 36 Ch. D. 9.

A charitable society incorporated by statute is a hospital within 13 Eliz. c. 10, and cannot grant a lease for more than twenty-one years and such lease is void *ab initio* and not merely voidable: *Magdalen Hospital v. Knotts*, 4 App. Ca. 324; affirming, 8 Ch. D. 709, C. A.

The powers conferred by the Agricultural Holdings (England) Act, 1883, on a landlord in respect of charging the land are not to be exercised by trustees for ecclesiastical or charitable purposes except with the previous approval in writing of the Charity Commrs: 46 & 47 V. c. 61, s. 40.

IMPROPER ELECTION OF OBJECTS OF CHARITY.

Objects of charity selected *bonâ fide*, but on an erroneous construction of an old scheme, were not removed: *Re Storie*, 2 D. F. & J. 529; but votes given (after notice) to an unqualified candidate were held to have been thrown away, and the opposing candidate was held duly elected: *Etherington v. Wilson*, 20 Eq. 606 (reversed on the main point, 1 Ch. D. 160, C. A., *v. inf.*). *Secus*, where no express notice of the disqualification was given to the electors: *Reg. v. Tewkesbury*, L. R. 3 Q. B. 629.

Where the scheme directed a competitive examination, and preference, *ceteris paribus*, to sons of freemen, an election of the son of a freeman in preference to a candidate who had passed a better examination was set aside: *Re Nettle's Char.*, 14 Eq. 434. "A parishioner" means merely a person occupying premises rated to the parish: *Etherington v. Wilson*, 1 Ch. D. 160, C. A.; and see *Shaw v. Thompson*, 3 Ch. D. 233; Lewin, 89, 613; Tudor, Char. 104, 208, 867 *et seq.*

BREACH OF TRUST—REMOVING TRUSTEES OF CHARITIES.

The holders of funds as to which certain trusts are (by statute) to arise upon the election of a new council, not yet elected, may be restrained from committing breaches of the trusts, though *in futuro*, and from imperilling the funds: *A. G. v. Aspinall*, 2 My. & Cr. 613.

As to redress against trustees of charities for breaches of trust, see Lewin, Ch. xxxi. s. 4, p. 1139 *et seq.*

New trustees of a dissenting chapel, appointed at the instance of seceders, were removed, and an action of ejectment restrained: *Newsome v. Flowers*, 30 Beav. 461; 10 W. R. 26, *et sup.* Vol. I. pp. 722, 723.

Trustees of a chapel will be removed if they hold opinions contrary to those which, under the trusts, ought to be taught in the chapel: *A. G. v. Pearson*, *v. Shore*, 7 Sim. 309, 316; and see *A. G. v. Anderson*, 57 L. J. Ch. 543, 550.

A trustee who, contrary to the scheme, was lessee of part of the land was ordered to give up his lease or resign the trusteeship: *Foord v. Baker*, 27 Beav. 193.

Objections to a person which would prevent the Court from appointing him a trustee may not be sufficient ground for removing him: *A. G. v. Clapham*, 10 Ha. 613.

Trustees who had acted *bonâ fide* were not removed, though they had committed great errors and misapplied the funds: *A. G. v. Caius Coll.*, 2 Keen, 150; and as to not interfering with the will of the founder as to trustees, *S. C.*

Although under the Municipal Corps. Act (*v. inf.* p. 1327) the Court could control the governors of a corporate charity as such, it had no inherent power to do so, but could always do so "so far as they are to be considered trustees of the revenue": *A. G. v. Govs. of Foundling Hosp.*, 2 Ves. J. 47; *Exp. Kirkby Ravensworth Hosp.*, 15 Ves. 314; *Mayor of Colchester v. Lowten*, 1 V. & B. 246; or when making a fraudulent use of their powers as visitors or governors: *S. C.*; and might divest them of their trust for an abuse of it: *A. G. v. E. Clarendon*, 17 Ves. 491, 499.

TAKING ACCOUNTS AGAINST CHARITY TRUSTEES.

As to the A. G.'s power to sanction a compromise, see *A. G. v. Boucherett*, 25 Beav. 116; and as to carrying back accounts against the trustees of a charity who have misapplied the funds, or the recipients of the funds, and arrangements with the A. G., see *A. G. v. Corp. of Newbury*, 3 My. & K. 647; *v. Brettingham*, 3 Beav. 91; *v. Pretymann*, 4 Beav. 462; *v. Drapers' Co.*, 4 Beav. 67; 6 Beav. 382; 10 Beav. 558; Lewin, 1148; and as to costs and

useless accounts, see *S. CC.*, 4 Beav. 71; *A. G. v. Christ's Hosp.*, *Id.* 73; *v. Shearman*, 2 Beav. 104; and as to the periods for directing account of back rents, *v. Davey*, 19 Beav. 521.

The Court will not make trustees who have acted fairly and honestly, but erroneously, account for rents received before information filed (writ issued): *A. G. v. Waxchandlers' Co.*, L. R. 6 H. L. 1, 14, 23; *v. Caius Coll.*, 2 Keen, 150, 166; *v. Drapers' Co.*, 4 Beav. 67 *et sup.* p. 1326.

And as to charging with annual rests, see *A. G. v. Solly*, 2 Sim. 518, and cases there.

Charity trustees may pass their accounts in a suit against the A. G., as on information by him: *Christ's Hosp. v. A. G.*, 5 Ha. 257.

The members of a committee formed to receive voluntary subscriptions for charitable purposes are not trustees but agents, and an action for an account by some of them against the others cannot be maintained: *Strickland v. Weldon*, 28 Ch. D. 426.

As to the power of the Charity Commrs to require accounts from trustees under the Charitable Trusts Acts (1853, s. 10; 1855, s. 6), see Tudor, Char. 471, 537.

APPLICATION OF FUNDS.

Subscription out of funds of a charity (for support of a guild and its poorer brethren) towards building a charity school, in return for right of admission of boys, was no misapplication: *Anderson v. Wrights of Glasgow*, 12 L. T. 805, H. L.

Property held for repair of a chapel, and surplus for the poor, could not be applied in rebuilding, though the chapel was dilapidated, and the income had greatly increased: *Re Booth*, 14 W. R. 761.

Sale of Consols belonging to a charity for purpose of reinvestment was ordered: *Re Clergy Orphan Corp.*, 18 Eq. 280.

An order was made for investing proceeds of charity lands and payment of interest to secretary for time being, there being no treasurer: *Re Codrington's Char.*, 18 Eq. 658.

Purchase-money (in Court) of freeholds was invested in leaseholds at the request of the trustees: *Re Rehoboth Chapel*, 19 Eq. 180.

Charity trustees may now invest the funds in real securities, legal or equitable: 33 & 34 V. c. 34, ss. 1, 3; but if the equity of redemption is foreclosed or otherwise barred, the land is to be held upon trust for immediate sale: sect. 2.

A corp. holding funds for charitable purposes were held to be trustees within the meaning of the Trust Investment Act, 1889 (52 & 53 V. c. 32): *Re Manchester Royal Infirmary*; *The Same v. A. G.*, 43 Ch. D. 420. That Act is now replaced by the Trustee Act, 1893: *v. sup.* pp. 1182, 1183.

Where the funds of two charities had been mixed together, but part which could be traced as belonging to one of them had been invested in land which had much increased in value, the profit was to be attributed to the whole trust and apportioned accordingly: *Prov. of Edinburgh v. Ld. Adv.*, 4 App. Ca. 823.

As to controlling the application of the funds of municipal corps. under 5 & 6 W. IV. c. 76, s. 92 (now repealed), see *A. G. v. Mayor of Liverpool*, 1 My. & C. 171, 200; *v. Mayor of Wigan*, 5 D. M. & G. 52; *Reg. v. Mayor of Sheffield*, L. R. 6 Q. B. 652; *Reg. v. Corp. of Liverpool*, 21 W. R. 674; Tudor, Char. 197 *et seq.*; and under Municipal Corps. Act, 1882 (45 & 46 V. c. 50), s. 140; see *A. G. v. Swansea Corp.*, (1896) 1 Ch. 602; *Tynemouth Corp. v. A. G.* (1899), A. C. 293, H. L.

WHEN INCREASED RENTS, ETC., BELONG TO THE CHARITY.

These cases are of two kinds: 1. Where a testator devises land to a corp., or an individual, and affixes to the devise a condition that the devisee shall make certain payments to some object of the testator's bounty—there the land and all accretions belong to the devisee, and he is bound to make the payments. 2. Where the land is devised on trust to apply the rents in a particular manner, under which two questions may arise: (a) are all the

rents disposed of; (b) if not, does the surplus belong to the devisee or to the other objects mentioned in the devise: *A. G. v. Waxchandlers' Co.*, L. R. 6 H. L. 1, 19.

The question is always one of the intention of the donor: *Ib.* p. 9; *A. G. v. Bristol*, 2 J. & W. 317, 318; *Mayor of South Molton v. A. G.*, 5 H. L. C. 1, 31. See the authorities reviewed there by Lord St. Leonards.

In a case within the first class, the objects of bounty can never claim more than the exact sum charged: *A. G. v. Windsor*, 8 H. L. C. 369; and it is not ground for an action that the devisees have dealt improperly with part of the land, leaving ample for satisfying the charitable purposes: *Mayor of South Molton v. A. G.*, 5 H. L. C. 27.

If the rents which represent the estate "are given in certain proportions so as to exhaust the whole of the present rents, and if no one is entitled to be benefited more than another beyond that which is specifically given, that is a representation of the estate itself in those proportions; and if the rents increase, each recipient will have his proportion increased accordingly": *S. C.*, 5 H. L. C. 31, 32, per Lord St. Leonards.

As to how far the doling out by a donor of the exact amount of rent, and so, in effect, disposing of the whole rent in those particular proportions, is a devotion of the increased rents to charity, see *A. G. v. Bristol*, 2 J. & W. 318; *Mayor of South Molton v. A. G.*, 5 H. L. C. 37; *A. G. v. Drapers' Co.*, 4 Beav. 67.

In *Merchant Taylors' Co.*, 6 Ch. 512, the increase went to the charity. In these cases the Court will not follow back rents received *bond fide* before the filing of the information (issue of the writ): *A. G. v. Waxchandlers' Co.*, L. R. 6 H. L. 14, 23, *et sup.* p. 1325.

In *A. G. v. Jesus Coll. Oxford*, 29 Beav. 163, testator gave land, then rented at 142l. 17s. a year, to Jesus College for providing 108l. a year in exhibitions, &c., and gave 30l. a year to the schoolmaster and scholars at B., and the remaining 4l. 17s., a house worth 3l. 12s. a year, and 1l. 5s. for a school and repairs. The increased rents were apportioned between the college and the school in the proportion of 138l. and 4l. 17s. respectively to 142l. 17s.: and see *A. G. v. Caius Coll.*, Form 6, *sup.* p. 1323.

If an income equal to the whole of the rents at that time is given to a charity it takes the increase: *A. G. v. Corp. of Beverley*, 6 H. L. C. 310; 6 D. M. & G. 256, 265, 269; 15 Beav. 540; *A. G. v. Dean, &c. of Windsor*, 8 H. L. C. 369; 6 Jur. N. S. 833; 24 Beav. 679, 691, 715; in such cases the rule is to apportion the accretions between the different objects *pro rata*, but the Court has discretion, and may increase one and not another: *A. G. v. Marchant*, 3 Eq. 424; a surplus undisposed of points to an intent to benefit the donee, still more if liable to loss, or to a charge before his interest begins; the donor's acts at the time are important on the construction of the gift, but the donee's only as showing his intent in accepting, and the donee being a charity, not a trading corp., varies the case: *A. G. v. Trinity Coll.*, 24 Beav. 383, 392, 398, 400.

In *M. of South Molton v. A. G.*, 5 H. L. C. 1; 18 Jur. 435; 14 Beav. 357, the corp. took the increased rents: and see *Re Ashton*, 27 Beav. 115.

The surplus income of a charity for almswomen was applied for schools; for if given to them they would have ceased to be almswomen; and if revenues of property, given not for individual benefit but for performance of duties, "increase so as to exceed a reasonable compensation for the duties, the surplus must be applied to other charitable purposes": *A. G. v. Brentwood Sch.*, 1 My. & K. 376, 394; as to the *cy-près* doctrine, *v. sup.* p. 1291.

For principles and instances as to the application by the Court of surplus rents, see *A. G. v. Smythies*, 2 Russ. & M. 717; *v. Gascoigne*, 2 My. & K. 647; *v. Wilson*, 2 Keen, 680; *v. Cordwainers' Co.*, 3 My. & K. 362, 534; *v. Fishmongers' Co.*, 5 My. & C. 11; *v. Coopers' Co.*, 3 Beav. 29; *v. Merchant Venturers' Co.*, 5 Beav. 338; *v. Drapers' Co.*; *v. Grocers' Co.*, 6 Beav. 382, 526; Lewin, 172, 173.

SECTION IV.—GIFTS TO CHARITIES BY DEED OR WILL.

1. *Charitable Legacies declared void pro tanto.*

DECLARE that the said testator's said will ought &c. [see Chap. XLIV., "ADMINISTRATION," p. 1467], except as to so much of the charity legacies thereby bequeathed as is directed to be paid out of the money to arise by sale of the testator's real and leasehold estates, or to come out of any mortgages or chattels real belonging to the testator; And as to so much of the said charity legacies as is directed to be paid out of the money to arise by sale of the said freehold and leasehold estates, Declare, that the same is void, as being contrary to the Mortmain and Charitable Uses Act, 1888.—See *Hayter v. Goode*, V.-C., 18 March, 1822, A. 1353.

Where the testator died before the Mortmain and Charitable Uses Act, 1888 (13 Aug. 1888), the reference will be to the Charitable Uses Act, 1735, being the statute of 9 G. II. c. 36, intituled, "An Act to restrain the disposition of lands, whereby the same become unalienable," and familiarly known as "The Mortmain Act."

Neither this nor the next form are applicable when the testator has died since the Mortmain and Charitable Uses Act, 1891 (5 Aug. 1891). As to the effect of that Act, *v. inf.* pp. 1338, 1339, 1348.

2. *The like—Short Form.*

THIS Court doth Declare that the will of the testator A. ought to be performed and carried into execution, except as to any gifts for a charitable purpose in the will of the testator contained of any real estate or personal estate which has arisen from or is connected with land, and order and adjudge the same accordingly.—*Re Balls*, B. v. *Hockley*, M. R., 5 Feb. 1876, A. 188.

For order declaring a bequest to a charity partly good, see *Carter v. Green*, 3 K. & J. 607; *Jones v. J.*, M. R., 19 May, 1774, A. 654.

3. *Land devised to Charity directed to be sold—Mortmain and Charitable Uses Act, 1891, s. 5.*

INQUIRY as to real estate devised by the testator to or for the benefit of any charitable use. Inquiries as to incumbrances. Account of what due to incumbrancers consenting to sale. Inquiry as to priority of incumbrances. An inquiry whether any and what portion of such real estate is required for actual occupation for the purposes of the charity, and not as an investment.—And Let the said real estate be sold with the approbation of the Judge before the — day of — [one year from the death of the testator, or such extended period as the Judge may determine] free from the incumbrances (if any) of such of the incumbrancers as shall consent to the sale, and subject to the

incumbrances of such of them as shall not consent.—And Let the money to arise by the sale of the said real estate be paid into Court to the credit of this action, *A. v. B.* (1892), A. 543. “Proceeds of sale of real estate devised to charity,” and if such money or any part thereof (following Form 2, p. 1391).—Liberty to apply as regards the retention of land certified to be required for occupation as aforesaid.

As to the Mortmain and Charitable Uses Act, 1891, see *inf.* p. 1338.

This form is applicable where a testator has died since the 15th August, 1891, leaving a will under which a charity will become entitled to “land.” (As to the meaning of “land,” see *inf.* p. 1338.)

4. *Bequest for Building when Land should be given—Scheme to be settled for Application cy-près meanwhile.*

AND it appearing by the Master's said certificate that no land has been given or is available for the purpose of the residuary charitable gift contained in the will of the testatrix S. C., This Court doth order that a scheme for the application *cy-près*, until such land may become available, of the funds comprised in the said residuary charitable gift be settled by the Judge.—Adjourn &c.—Liberty to apply.—*Chamberlayne v. Brockett*, 24 March, 1876, A. 816; S. C., 8 Ch. 206.

5. *Establishing Charity—Apportioning Pure and Mixed Personality—Scheme—Further Order—Supplemental Suit—Trust Deed established.*

(TESTATOR gave residue of personality, consisting partly of mortgages, to charity. After decree, one of the next of kin assigned her interest in them to the charity; on this the supplemental bill was filed.) “In the original cause, Declare that the debts, funeral expenses, and legacies of C., the testator &c., and the costs of that cause, ought to be paid out of the testator's general personal estate, and out of the money secured by mortgage, or on other real securities, *pro rata* (rateably), except so far as such costs relate to any proceedings to be had under the directions hereinafter given for regulating the charity in question or appointing new trustees thereof, which ought to be wholly paid out of the testator's general personal estate.”—Tax all parties' subsequent costs of that cause; Deft H. out of the balance due from him to retain his own and pay the other parties' costs; Defts D. &c., the exors, to get in the outstanding personal estate.—“An inquiry how much thereof and of the other personal estate of the testator not specifically bequeathed will constitute principal and interest secured by mortgage or other real security, and how much will constitute the general residue of the testator's personal estate, exclusive of principal and interest secured by mortgage or other real security; And it appearing that the testator's debts, legacies and funeral expenses have been paid out of the general

personal estate, Let the several proportions thereof, and also of the costs of the original cause to be borne out of the said funds respectively, be ascertained and certified; And Let the Deft T. assign the trust vested in him by the testator's will to P., approved of by &c., as a new trustee in his room; And Declare that the surplus of the testator's personal estate, exclusive of such part thereof as shall appear to have been secured by mortgage, or upon other real security, after bearing the proportion of the debts, funeral expenses, and legacies of the testator, and the costs hereinbefore directed to be borne thereout, ought to be applied for the several charitable purposes mentioned in the testator's will; And Let such surplus be retained by or paid to the Defts, the trustees, to, for, and upon the several charitable trusts, intents, and purposes in the testator's will mentioned."—Scheme for applying the fund, and keeping up the number of trustees to be settled.—"And Declare that one moiety of so much of the testator's personal estate as shall appear to have arisen from money secured by mortgage or upon other real security, after bearing the proportion of the debts, funeral expenses, and legacies of the testator, and of the costs hereinbefore directed to be paid thereout, will belong to the Deft D., as one of the next of kin of the testator; And Let such moiety be paid to him accordingly; And Declare that the other moiety belonged to the Deft C., as the other next of kin: And, on the supplemental bill, Declare that the deed of trust, dated &c., ought to be established and carried into execution; And decree the same accordingly."—Tax all parties' costs of that cause.—Inquiry "whether the Defts, the trustees, have (properly) incurred any and what expenses respecting the trust deed, and, if so, the same to be taxed; And Let the costs and any expenses (properly) incurred by the Defts, the trustees, be paid out of such part of the testator's estate as, according to the declaration made in the original cause, would have belonged to the Deft C.; And Declare that the residue thereof, after payment of such costs and expenses thereout as aforesaid, will, according to the said trust deed, now be applicable to the several charitable purposes mentioned in the testator's will; And Let the same be paid to or retained by the said Defts, the trustees, to, for, and upon the charitable trusts &c., in the will mentioned."—Liberty to apply.—*A. G. v. Hurst (E. Winchelsea)*, M. R. 2 Dec. 1791, A. 487; 3 B. C. C. 373; 2 Cox, 364.

This form was followed in *Hopkinson v. Ellis*, 10 Beav. 175. As to cases falling within the Mortmain and Charitable Uses Act, 1891, *v. inf.* pp. 1338, 1348.

6. *Scheme directed, where blanks left in Will, as to Pure Personalty.*

LET the order dated 2 Nov. 1892, be reversed, And Declare that the residuary personal estate of E. W., subject to the life interest therein bequeathed to E. C., is, as regards so much thereof as is pure personalty, subject to a trust for charitable purposes; And Let a scheme

for the disposal at the death of E. C. of the said bequest for charitable purposes be settled by the Judge.—Costs (subject to such life interest) out of testator's estate.—*Re White (Rev. E.)*, *W. v. W.*, C. A., 8 Feb. 1893, B. 249; (1893) 2 Ch. 41.

7. *Grant to Charity declared Void.*

DECLARE that the grant to the charity is void as being contrary &c., the grantor having died within twelve months after the making of such grant.—*Arnett v. Swann*, L. C., 27 June, 1766, A. 536.

For order supplying defective execution of power in favour of charity, see *Sayer v. S.*, 7 Ha. 390.

As to the effect of the Mortmain and Charitable Uses Act, 1891, on gifts *inter vivos*, *v. inf.* pp. 1339, 1340.

8. *Inquiry whether Testator executed a Deed enrolled.*

An inquiry whether the testator in his lifetime, and when, executed any deed or deeds, enrolled, pursuant to the Mortmain and Charitable Uses Act, 1888, for the purpose of carrying into effect any of the charitable gifts purporting to be made by his will, or any codicil thereto.—*Green v. Britten*, L. JJ., 4 Aug. 1863, A. 2510; *S. C.*, 42 L. J. Ch. 187.

9. *Order to enrol Deed after proper Time—Mortmain and Charitable Uses Act, 1888 (51 & 52 V. c. 42), s. 5.*

UPON the application of A. &c., the surviving trustees of the above-mentioned indenture, and upon hearing &c., it is ordered that the said indenture of conveyance dated &c., be enrolled in the Central Office within six months from the date of this order, notwithstanding the time by law limited for that purpose has expired.—See *Re Page*, V.-C. M., 5 Aug. 1870, B. 2378; and see note, *inf.* p. 1337.

10. *Gift to Charity by Deed declared Void.*

"DECLARE that the charitable gifts contained in the indentures dated &c., are void as being contrary to the statute &c. [Form 1, p. 1329]. And Declare that the Deft K., the heir-at-law of &c., is now absolutely entitled to the hereditaments comprised in the said indentures of &c., and subject to the payment of the costs, charges, and expenses hereinafter directed to be taxed and paid.—Discharge receiver &c.—Costs declared a charge.—Direction to tax and pay costs out of fund in Court; deficiency, if any, to be raised by sale or mortgage, unless such deficiency shall, within one month from the filing of the taxing master's certificate, be paid by the Deft K.—Liberty to apply.—See

Wickham v. Marq. of Bath, M. R., 4 Nov. 1865, B. 2592; S. C., 1 Eq. 17. See notes, *inf.* pp. 1336 *et seq.*; *Martin v. Freeman*, 58 L. T. 538; *Churcher v. Martin*, 42 Ch. D. 312.

This order, as entered, contained a direction for the Plts to convey, but the deed in question being void, no conveyance is necessary: see *Churcher v. Martin*, 42 Ch. D. 312, 316.

11. *Gift to Charity void under 9 G. II. c. 36, as to Realty or impure Personalty, but Title of Heir-at-Law and Next of Kin barred by Statutes of Limitations.*

THE application by originating summons dated &c. [for the determination of the questions whether the heir-at-law and next of kin of the testator became entitled to his real estate and impure personal estate, and, if so, whether any claim on their part was now barred by the operation of the Statutes of Limitations]; Declare that all rights of T. L. the above-named testator, T. H. L.'s heir-at-law and only next of kin, according to the statutes for the distribution of the effects of intestates, and of the said James H., who, by the order dated 25 Jan. 1899, was appointed to represent the heir-at-law of the testator and all persons claiming under him to be entitled to the real estate for all the purposes of this action, and of the Deft Jonathan H. the legal pers. represve of the said T. L., have been barred by the Statutes of Limitations by reason of the possession of S. K. and his representatives; And the Deft M. L. B. B. [exor of S. K.] by his counsel admitting that the said S. K. and his legal pers. represves from time to time have made no claim to any beneficial interest in the testator's real or personal estate; Declare that the Plts Sir H. I., J. L. T. and A. C. de R. [the trustees for the Plt Association], are devisees and residuary legatees of the testator T. H. L.'s real and personal estate subject to the two anns in his will mentioned conditionally with gifts over; And the Plts by their counsel accepting the account of the said S. K., deceased, and of his legal pers. represves from time to time, Let the Deft M. L. B. B. the legal pers. represve of the said S. K., convey and assign all such estate as may be now vested in him in the real and leasehold estates now remaining subject to the trusts of the will of the testator to the said Plts as such devisees and residuary legatees (subject to the said anns if still subsisting) and hand over the deeds and documents relating to the title of the same (upon oath if required) to the said Plts, such conveyance and assignment to be settled by the Judge in case the parties differ; And (after directing sale of certain stock and bonds and payment thereof of costs) order that the said real estate and leaseholds and residue of the said stock and bonds be held by the Plts upon the trusts declared by the will of the testator concerning "The L. Bequest."—*Re Lacy's Estate, The Royal General-Theatrical Fund Assoc. v. Kydd*, Stirling, J., 17 May, 1899, B. 2156; (1899) 2 Ch. 149.

12. *Accounts of Personalty in Administration Action, distinguishing Pure from Mixed.*

INQUIRIES as to parties and next of kin ; Account of testator's personalty—"An inquiry of what particulars the testator's said personal estate consisted at the time of his death, distinguishing such parts thereof as have arisen from or are connected with land (in England and Wales) from the other parts of his said personal estate : An inquiry what were the values of such respective parts of the testator's said personal estate at his death" ;—Accounts of debts, funeral expenses, legacies, and anns ; Inquiry what parts of personal estate outstanding—"And Let the testator's personal estate not specifically bequeathed be applied in payment of his debts and funeral expenses in a due course of admon, and then in payment of the legacies and anns given by his will, but subject and without prejudice to any question whether any of the charitable legacies given by the testator are valid charitable bequests, and, if so, whether the same or any of them may to any extent be void under the [statute applicable, *v. sup.* p. 1329] and to the apportionment thereof."—Inquiries as to charitable institutions mentioned in the will [Form 13, *inf.*].—Adjourn &c.—*Mumford v. Creswell*, M. R., 7 July, 1860, B. 1631. And see *Kitely v. Roberts*, V.-C. K., 10 June, 1858, A. 1252 ; *Robinson v. Geldard*, 3 Mac. & G. 735 ; 3 D. & S. 501 ; *Tempest v. T.*, 7 D. M. & G. 472 ; and *Clough v. C.*, V.-C. H., 5 Dec. 1874, A. 2949.

This form and Form 15 *inf.* are not applicable where the testator has died since 5th Aug. 1891 : *v. inf.* p. 1338.

For other forms for distinguishing pure from mixed personalty, see Seton, 5th ed. p. 1129.

For inquiry if personalty was pure, if not, as to the next of kin ; if pure, to take account, see *Reeve v. A. G.*, 3 Ha. 193.

13. *Inquiries as to Charities and their Treasurers.*

An inquiry what are the several charitable institutions meant and intended by the testator in the residuary bequests contained in his will [or in the bequests contained in his will of the ultimate residue of his estate] ; And who are the present treasurers of such charitable institutions respectively ; And in case there shall be no such treasurer, then who are the trustees or managers, or other proper officers thereof respectively, authorized to give discharges for the said respective bequests.—*Farrer v. Dain*, V.-C. K., 17 July, 1856, A. 1658 ; *Blosse v. Eagles*, V.-C. W., 18 Jan. 1873, A. 170.

14. *Inquiries as to Charities and Lands in Mortmain.*

An inquiry whether there were or was at the testator's decease any and what ragged schools or ragged school established and in operation

at S. &c., and whether any and which of them are or is still in operation; And if so, what are or is the nature and constitution of such charities respectively; An inquiry whether there was at the testator's decease any and what land belonging to or vested in the college in his will named, called M., sufficient and available for the purpose of a library being built thereon, such inquiries to be without prejudice to any question as to the validity or effect of any bequest contained in the testator's will and codicils, or any of them.—*Barclay v. Maskelyne*, V.-C. W., 25 July, 1857, A. 1543; S. C., on further consideration, 4 Jur. N. S. 1294.

Similar inquiries were directed in *Sinnett v. Herbert*, 7 Ch. 232, and *Chamberlayne v. Brockett*, 8 Ch. 206; 16 Dec. 1872, L. C. and L. JJ., A. 3262, on further consideration, and reserving subsequent further consideration.

15. *Declaration that Charity Legacies ought to abate.*

DIRECTIONS to ascertain values of pure and impure personalty, and apportion debts, funeral expenses, and costs—"And Declare that the charitable legacies given by the will of the testator ought to abate, in the proportion which that part of the testator's personal estate savouring of realty (which has arisen from or is connected with land) bears to the whole personal estate."—Inquiry what payable for principal and interest in respect of the charity legacies having regard to the declaration.—*Robinson v. Geldard*, V.-C. K. B., 14 July, 1849, B. 1568, 3 Mac. & G. 735; 3 D. & S. 501.

16. *Declaration as to Funds for Payment of Debts, &c., where Testator has marshalled his Assets in favour of the Charity.*

DECLARE that the real estate of G., the testator &c., is in the first instance chargeable with the payment of the testator's debts, legacies, and funeral and testamentary expenses, and, in the next place, that the mixed personalty of the testator is so applicable if such real estate shall be insufficient.—Directions as to payment of costs and carrying over of funds in Court.—*Wills v. Bourne*, L. C. for M. R., 26 Nov. 1873, B. 2896; S. C., 16 Eq. 487.

17. *Extension of Time for Sale of Real Estate—Mortmain and Charitable Uses Act, 1891, s. 5.*

LET the time limited by the order of the — day of —, for the sale of the real estate thereby directed to be sold, be extended to the — day of —.

For form of application, see D. C. F. 1066.

18. *Order authorizing retention of Land—Mortmain and Charitable Uses Act, 1891, s. 8.*

It appearing by the Master's certificate dated the — day of —, that the real estate mentioned in the — paragraph thereof was devised by the testator's will to the — Charity, and that the same is required for actual occupation for the purposes of such charity, and not as an investment, Let the said charity be at liberty, notwithstanding the 5th section of the Mortmain and Charitable Uses Act, 1891, to retain such land.

For form of application, see D. C. F. 1067.

19. *Land devised on Trust for Sale held not within Mortmain and Charitable Uses Act, 1891, s. 5.*

THE application by originating summons dated &c. of the Plts, the executors and trustees of the will and codicils of the above-mentioned testator J. W., deceased, for the determination of the question whether the direction for sale contained in the 5th section of the Mortmain and Charitable Uses Act, 1891, applies to the lands and hereditaments now subject to the trusts of the said will and codicils or any of such lands and hereditaments, and if it does so apply, then that the time limited by the same section for the sale of such of the same lands and hereditaments as yet remain unsold might be extended for such period or periods as the Court should think fit, which upon hearing counsel for the applicants and for the Deft in Chambers was adjourned &c., The Court being of opinion that upon the true construction of the said will there is no devise of land as defined in sect. 3 of the said Mortmain and Charitable Uses Act, 1891, and that therefore the direction for sale contained in sect. 5 of that Act does not apply to any of the lands and hereditaments subject to the trusts of the said will and codicils, Doth not think fit to make any order upon the said application, The costs of both parties of the application to be taxed and paid out of the testator's estate.—See *Re Wilkinson, Esam v. A. G.*, Kekewich, J., 12 Jan. 1900, B. 267.

NOTES.

VALIDITY OF GIFTS BY DEED OR WILL.

Though the declaration that the charitable devises or bequests are valid or invalid has sometimes been given in the original judgment (Forms 1, 2, p. 1329), it is more usual not to give them till the further hearing, when all the facts and particulars have been ascertained.

The form of direction to distinguish pure and impure personal estate has varied; "pure" and "impure," "mixed" and "savouring, or partaking of realty," have been used indifferently. But the words given in Form 12, *sup.*—"which has arisen from or is connected with land in England or Wales,"—are more accurate, and have been approved by Turner, L. J., and other Judges: see *Re Watts, Cornford v. Elliott*, 29 Ch. D. 952.

STATUTES OF MORTMAIN.

By the Charitable Uses Act, 1735 (9 G. II. c. 36), it was provided that no voluntary gift of lands, or money, &c., to be laid out in lands, should be valid unless by deed executed twelve months, and enrolled in Chancery six months, before the donor's death, or by transfer of stock made six months before his death: and see subsequent statutes, *inf.*

By the Gifts for Churches Act, 1803 (43 G. III. c. 108), by deed enrolled, or will made three months before death, land (five acres or less) or personalty to 500*l.* may be given for churches, parsonages, churchyards, or glebe, &c.: *Fisher v. Brierley*, 1 D. F. & J. 643; *Girdlestone v. Creed*, 10 Ha. 480; *Ch. Building Soc. v. Coles*, 5 D. M. & G. 324; *Sinnett v. Herbert*, 7 Ch. 232; *Re Hendry, Watson v. Blakeney*, 56 L. T. 908; 35 W. R. 730 (gift of 200*l.* for repair of a church clock held good; *scus*, gift for choir fund); *Re Vaughan, V. v. Thomas*, 33 Ch. D. 187 (gift on trust to apply income in repairing a churchyard held good).

A gift upon a secret trust for a purpose within the statute is good: *O'Brien v. Tysen*, 28 Ch. D. 372.

The proviso in the Act excepting from the enabling provisions thereof women covert without their husbands is not affected by the Married Women's Property Act, 1882, s. 1, sub-s. 1; so that a gift for the erection of a church by a married woman by will executed three months before death was invalid: *Re Smith, Clements v. Ward*, 35 Ch. D. 589.

MORTMAIN AND CHARITABLE USES ACT, 1888.

By 51 & 52 V. c. 42, the statute of 9 G. II. c. 36 is repealed, and by sect. 4 every assurance (which expression, by sect. 10, includes testamentary disposition) of land—*i. e.*, in England or Wales, for the Act does not extend to Scotland or Ireland (see sect. 11)—or of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses is void unless made in accordance with the requirements of the Act, *i. e.*, that the assurance must take effect in possession immediately from the making thereof, and must be without any power of revocation, reservation, condition, or provision for the benefit of the assurator or any person claiming under him, except the following, *viz.*, a grant or reservation of a peppercorn or other nominal rent, or of mines, minerals, or any easement, covenants or provisions as to buildings, streets, drainage, or nuisances, a right of entry on non-payment of rent and stipulations of a like nature; but the same benefits must be reserved to persons claiming under the assurator as to the assurator himself. If the assurance is of land or personal estate, other than stock in the public funds, it must be enrolled in the Central Office of the Supreme Court of Judicature within six months after its execution, and must also, except in the case of copyholds, be by deed executed in the presence of at least two witnesses. Where the uses are declared by a separate instrument, that instrument, and not the assurance, must be enrolled, but the enrolment must in that case be within six months after the making of the assurance.

If the assurance is made in good faith for full and valuable consideration, which consideration may consist wholly or partly of a rent, rent-charge, or other annual payment, with or without a right of re-entry for non-payment, the above are the only requirements; but in other cases it is further required that the assurance, if of land or personal estate, other than stock in the public funds, must be made at least twelve months before the death of the assurator, and if of stock in the public funds, must be by transfer at least six months before such death. The Act also contains provisions under which the omission to enrol an instrument within the requisite time may be remedied, if such omission has arisen from ignorance or inadvertence, or through the destruction or loss of the instrument by time or accident, and if also the assurance to be validated was made in good faith for full and valuable consideration, to take effect in possession without any power of revocation, &c., except such as is authorized, and possession or enjoyment is held under such assurance: sect. 5.

Assurances for the purposes only of a "public park," a "schoolhouse" for an "elementary school," or a "public museum," as defined by the Act, are

exempt; but such assurances by will or voluntary deed are required to be executed not less than twelve months before the death of the testator or assessor, and enrolled in the books of the Charity Commrs within six months after the death of the testator, or in case of a deed, of the execution of the deed, and the quantity of land assured by will under the section must not exceed twenty acres for a park, or two acres for a museum, or one acre for a school: sect. 6.

Assurances to or in trust for any of the universities and colleges of Oxford, Cambridge, London, and Durham, the Victoria University, or any of the colleges or houses of learning within those universities, colleges of Eton, Winchester, and Westminster, and Keble College, and also assurances (otherwise than by will) made in good faith for full and valuable consideration to trustees on behalf of any society or body of persons associated together for religious purposes, or for the promotion of education; art, literature, science, or other like purposes, of land not exceeding two acres for the erection thereon of a building for such purposes, or any of them, are also exempted: sect. 7.

By sect. 10, "land" includes tenements and hereditaments, corporeal and incorporeal, of whatsoever tenure, and any estate or interest in land.

MORTMAIN AND CHARITABLE USES ACT, 1891.

By 54 & 55 V. c. 73, s. 3, "land," as defined in the Mortmain and Charitable Uses Act, 1888, is to include tenements and hereditaments, corporeal and incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land, and the definition of land contained in the Act of 1888 is repealed. By sect. 5 it is provided that land may be assured by will to or for the benefit of any charitable use, and by sect. 7, that any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable uses shall be held to or for the benefit of the charitable uses as though there had been no such direction to lay it out in the purchase of land; but by sect. 9 the Act is only to apply to the will of a testator dying after the passing of the Act, viz., the 5th of August, 1891.

By sects. 5, 6, land assured by will to or for the benefit of any charitable use must be sold within one year from the death of the testator, or such extended period as may be determined by the Court or the Charity Commrs, and if not so sold shall, at the expiration of the time limited for sale, vest forthwith in the official trustees of charity lands, and the Charity Commrs shall take all necessary steps for the sale or completion of the sale of such land, to be effected with all reasonable speed by the administering trustees for the time being thereof, and for this purpose the Commrs may make any order under their seal, directing such trustees to proceed with the sale or the completion of the sale of the said land, or removing such trustees and appointing others, and may provide by such order for the payment of the proceeds of sale to the official trustees of charitable funds in trust for the charity, and for the payment of the costs and expenses incurred by the administering trustees in or connected with the sale; and by sect. 8, the High Court, or any Judge thereof sitting at Chambers, or the Charity Commrs, may, if satisfied that the land is required for actual occupation for the purposes of the charity, and not as an investment, by order sanction the retention or acquisition thereof.

The Act applies to all wills coming into operation after August 5, 1891, and therefore a gift to a charity, in a will made before the Act, by a testatrix who died after it, of such part of residue "as may by law be given for charitable purposes," passes the whole of the residue: *In re Bridger; Brompton Hospital for Consumption v. Lewis*, (1894) 1 Ch. 297, C. A.; (1893) 1 Ch. 46.

The provision enabling the assurance of land by will extends to future as well as present interests, and a devise of land to one for life, with remainder to a charity, is therefore good: *Re Hume*, (1895) 1 Ch. 422, C. A.

The power to extend time for sale may be exercised generally and from time to time, and not merely in respect to a contract of sale made within the year: *Re Sidebottom*, (1901) 2 Ch. 1, C. A.

It has been held that where a testator devises land to trustees on trust for sale and to apply the proceeds to charitable purposes, such proceeds are within the exception in sect. 3, so that the land need not be sold within the

year under sect. 5: *Re Rev. Philip Brooking*, Dec. 1893, noted in Marcy's Forms of Original Summons, pp. 57, 58; and this has been followed (in the absence of argument) by Kekewich, J., in *Re Wilkinson*, *Esam v. A. G.*, Jan. 12, 1900, Form 18, *sup.* p. 1135.

By the Mortmain and Charitable Uses Amendment Act, 1892, the exemption contained in sect. 6 of the Mortmain and Charitable Uses Act, 1888, is extended to an assurance by deed of land to a local authority, except that such deed need not be executed twelve months before the death of the assessor.

As to Ireland, see 7 & 8 V. c. 97; 30 & 31 V. c. 54; 34 & 35 V. c. 102.

The Act does not apply to colonial wills, and the validity thereunder of a gift of money to be invested in England depends on the colonial law: *Canterbury Corp. v. Wyburn*, (1895) A. C. 89, P. C.

GIFTS AND ACTS INTER VIVOS.

26 & 27 V. c. 106 (Charity Lands Act, 1863) provides that deeds by which lands are demised for charitable uses are to be deemed to have been made to take effect from the making thereof.

Exemptions from provisions of Mortmain Acts as to sites for schools: School Sites Acts, 1841, 1844, 1849, 1851 (4 & 5 V. c. 38; 7 & 8 V. c. 37; 12 & 13 V. c. 49; 14 & 15 V. c. 24); Commons Act, 1899 (62 & 63 V. c. 30), s. 22. Workhouses: 7 & 8 V. c. 101, s. 73 (Poor Law Amendment Act, 1844). Greenwich Hospital: 28 & 29 V. c. 89. Dwellings for the working classes in populous places: 53 & 54 V. c. 16. Technical and industrial institutions: 55 & 56 V. c. 29, s. 10. Exemptions in the case of societies for religious, educational, artistic, and like purposes: Mortmain and Charitable Uses Act, 1891, s. 7, sub-s. (ii).

Charities may invest in real securities: 33 & 34 V. c. 34, *sup.* p. 1184. See *Aston v. Wood*, 22 W. R. 893; 43 L. J. Ch. 715; 31 L. T. 293; *et inf.* p. 1344.

By the Public Libraries Act, 1892 (55 & 56 V. c. 53), s. 13, persons holding land for ecclesiastical, parochial, or charitable purposes are empowered to convey land, not exceeding one acre, for the purposes of that Act.

Exemption in case of assurance of land by deed to a local authority: Mortmain and Charitable Uses Amendment Act, 1892.

For a complete list of exemptions in cases of gifts *inter vivos*, see Bristowe, Mortmain and Charitable Uses Act, 1891, pp. 100, 101.

As to grants of wastes, &c., by lords of manors, see the Gifts for Churches Act, 1811 (51 G. III. c. 115); *Forbes v. Eccles. Commrs.*, 15 Eq. 51; as to restrictions on these powers, see Commons Act, 1899 (62 & 63 V. c. 30), s. 22.

A covenant by an instrument held to be a deed, to invest a sum, during the covenantor's life or a year after, upon charity trusts, was held void so far as it was necessary to resort to prohibited kinds of property: *Jeffries v. Alexander*, 8 H. L. C. 594; *S. C.*, *sub nom. Alexander v. Brame*, 7 D. M. & G. 525 (in this case an action had been directed to see if the covenant was valid: see 19 Beav. 436); and so, also, where a bequest was made in pursuance of a voluntary covenant: *Fox v. Lounds*, 19 Eq. 453. But where a husband covenanted to pay a sum after the death of husband and wife to the wife's appointees, and she by will, executed the same day, appointed the sum to trustees upon trust to pay legacies, and the residue to such purposes as she should by deed-poll direct, and by deed-poll the same day directed the trustees to pay to other trustees for charitable purposes, it was held that the transaction was not a device to avoid the Mortmain Act: *Re Robson, Emley v. Davidson*, 19 Ch. D. 156, C. A.

For a deed void as reserving an interest to the donor, see *Wickham v. Bath*, 1 Eq. 17, Form 10, *sup.* p. 1132. But as to what will not be such a reservation, see *Fisher v. Brierley*, 1 D. F. & J. 643; *semble*, under 4 & 5 V. c. 38, on gift for schools, a reservation does not defeat the grant: *Ib.*

A deed not complying with the formalities of the Charitable Uses Act, 1735 (9 G. II. c. 36), s. 3, was absolutely void, and not valid as conveying the legal estate, and void only as creating charitable trusts: *Churcher v. Martin*, 42 Ch. D. 312; and trustees in possession under the deed for more than twelve years were protected by the Statute of Limitations: *S. C.*

As to attestation of deed enrolled, see *Wickham v. Bath*, 1 Eq. 17.

Money for erection, establishment, and support of a hospital was handed

to a trustee, who invested it in Consols and executed a declaration of trust. The donor died within twelve months, and the gift was held void: *Hawkins v. Allen*, 10 Eq. 246.

Recital of the grant in the will of a grantor who died within the twelve months was no confirmation: *A. G. v. Munby*, 1 Mer. 327. Grant by A. (rector of G.) to a trustee for the rector of G., was valid, though retained by A.: *Ib.*

On subsequent dealings with land in mortmain the deeds do not require enrolment: *Ashton v. Jones*, 6 Jur. N. S. 970; 28 Beav. 460; *A. G. v. Glyn*, 12 Sim. 84.

Property purchased for the benefit of a parish, and devoted for three centuries to charitable purposes, is subject to a charity trust, and not the property of the parish: *A. G. v. Webster*, 20 Eq. 483, 885; and see *Fell v. Official Trustee of Charity Lands*, (1898) 2 Ch. 44, C. A.

A voluntary conveyance to trustees for charitable purposes was not within 27 Eliz. c. 4, so as to be avoided by a subsequent sale by the grantor: *Ramsay v. Gilchrist*, (1892) A. C. 412, P. C.; see now the Voluntary Conveyances Act, 1893 (56 & 57 V. c. 21).

The only part of the Mortmain and Charitable Uses Act, 1891, which affects assurances *inter vivos* is sect. 3 (*sup.* p. 1338), altering the definition of "land" in the Mortmain and Charitable Uses Act, 1888.

The effect of this is that every kind of property which fell within the old definition, but not within the new, may be assured to charity either by will or *inter vivos* without restriction of any kind: see *inf.* p. 1348.

The new definition includes only "lands, tenements, and hereditaments." As regards property of these kinds, the restrictions imposed by the Mortmain and Charitable Uses Act, 1888, in the case of assurances *inter vivos* are not affected by the Mortmain and Charitable Uses Act, 1891.

WHAT IS A CHARITY.

See many instances enumerated, Tudor, Char. Trusts, pp. 1—17; Story, Eq. Jur. s. 1164, n.; Wms. Ex. 1070, 9th ed. 916; 1 Jarm. W. 192, 193; and in *Loscombe v. Wintringham*, 13 Beav. 89, n., 91, n.

A charitable gift is such as is described in the preamble to 43 Eliz. c. 4 (preserved by sect. 13 of the Mortmain and Charitable Uses Act, 1888), or as can be considered analogous to the gifts there described: *Cocks v. Manners*, 12 Eq. 74; *Dolan v. Macdermot*, 3 Ch. 676; *A. G. v. Heelis*, 2 S. & S. 67, 76; Tudor, Char. 1; *Comms for Income Tax v. Pemsel*, (1891) App. Cas. 531; and see 35 & 36 V. c. 24, s. 14; and, in general, gifts for public purposes are charitable: see *Goodman v. Mayor of Saltash*, 7 App. Cas. 633 (grant of right to free inhabitants to fish in estuary); *Wilson v. Barnes*, 38 Ch. D. 507, C. A. (grant of woods to copyholders for reparation of sea dyke); *In re Christchurch Inclosure Act*, 38 Ch. D. 520, C. A. (allotment of turf common in trust for occupiers of cottages); *Smith v. Kerr*, (1900) 2 Ch. 511 (ancient grant of messuage and land to be used as an Inn of Chancery); *Re Norwich Town Close*, 40 Ch. D. 298, C. A.; Lewin, 18; Tudor, Char. pp. 11—14.

The following have been held to be charities:—

A voluntary association of ladies for pious and charitable purposes: *Cocks v. Manners*, 12 Eq. 574 (but religious purposes are not charitable unless tending to public edification: *Ib.*). The Royal Society and the Royal Geographical Society: *Beaumont v. Oliveira*; L. R. 4 Ch. 309; and the Royal General Theatrical Fund Association: *Re Lacy*; *Royal, &c. Association v. Kydd*, (1899) 2 Ch. 149; citing *Spiller v. Maude*, 32 Ch. D. 158, n. (which is not overruled by *Cunnack v. Edwards*, (1896) 2 Ch. 679). Societies for Abolition of Vivisection and for Protection of Animals: *Armstrong v. Reeves*, 25 L. R. Ir. 325; *Re Foveaux*; *Cross v. London Anti-Vivisection Society*, (1895) 2 Ch. 501; Vegetarian Societies: *Re Cranston*; *Webb v. Oldfield*, (1898) 1 I. R. 431, C. A.; a volunteer corps: *Re Lord Stratheden and Campbell, At v. L. S.*, (1894) 3 Ch. 265. "Such charities and other public purposes as lawfully might be in the parish of T.": *Dolan v. Macdermot*, 3 Ch. 676. Property given "for the use and benefit of the said parish": *A. G. v. Hotham*, T. & R. 209; *v. Webster*, 20 Eq. 483. A common inclosed and vested in Commrs (by an Act of Parliament passed with consent of owners), or trusts

for improving a town: *A. G. v. Helia*, 2 S. & S. 67. Levying rates for lighting, &c., a town, under a private Act: *A. G. v. Eastlake*, 11 Ha. 205; and that the question whether charitable or not, depends not on the source from which the funds come, but the objects for which they are applied: see *1b*. And the following gifts have been upheld as charitable:—A bequest to the Chancellor of the Exchequer for the benefit of Great Britain: *Nightingale v. Goulburn*, 2 Ph. 594; 5 Ha. 484. A bequest to found an institution to study and cure the maladies of animals useful to man: *Univ. London v. Yarrow*, 1 D. & J. 72; 23 Beav. 159. Gifts to advance different sciences, as by a public library, botanic garden, &c. (see 55 & 56 V. c. 53): *Harrison v. Corp. Southampton*, 2 Sm. & G. 387; for the advancement and propagation of education in economic and sanitary science in Great Britain: *Re Berridge, B. v. Turner*, 63 L. T. 470; S. C., 62 L. T. 365; for missionary purposes in connection with the Moravian Church: *Comms for Income Tax v. Fensel*, (1891) A. C. 531. A bequest of money “to establish a school for educating the poor children” of a parish: *Hartshorne v. Nicholson*, 26 Beav. 58. A gift “to the poor and the service of God”: *Re Darling*, (1896) 1 Ch. 50, following *Powerscourt v. P.*, 1 Molloy, 616. A gift for the benefit of persons not under fifty years, as being for benefit of “aged persons” within 43 Eliz. c. 4: *Re Wall, Pomeroy v. Williway*, 42 Ch. D. 510. A gift for pensioning the “old and worn-out clerks” of a firm: *Re Gosling, W. N.* (00) 15; 48 W. R. 300. A bequest of residue to and amongst certain institutions, “or to any other religious institution or purposes” as A. and B. might think proper: *Wilkinson v. Lindgren*, 5 Ch. 570. A bequest “to the Christian brethren in trust of A. B. and C. D. one year after my death:” *Re Brown; Paden v. Finlay* (1898), 1 I. R. 423.

A gift to “charitable and deserving” objects, the word charitable being treated as the governing word: *Re Sutton, Stone v. A. G.*, 28 Ch. D. 464.

A gift for “charities, societies, and institutions,” as S. should nominate, though objects not charitable were specified: *Re Douglas, Obert v. Barrow*, 35 Ch. D. 472, C. A.

Land held on trust for the use and benefit of a parish: *Re St. Botolph-without-Bishopsgate*, 35 Ch. D. 142.

A bequest to a corp. for the good of the borough or the inhabitants or institutions thereof: *M. of Wrexham v. Tamplin*, 21 W. R. 768; 28 L. T. 761. For the “descendants of W. as they might severally need”: *Gillam v. Taylor*, 16 Eq. 581; 21 W. R. 823. Bequest to minister of Unitarian chapel to be applied as thought fit towards support of Unitarians, where no scheme was required: *Re Barnett*, 29 L. J. Ch. 871. To “publish and propagate the sacred writings of Joanna Southcote”: *Thornton v. Howe*, 31 Beav. 14. For “maintaining the worship of God”: *A. G. v. Pearson*, 3 Mer. 353, 409; or maintaining dissenting doctrines so long as not contrary to law: *S. C.* In aid of the poor rate and other parochial burdens, or for the benefit of the poor independent of the parish: *A. G. v. Blizzard*, 21 Beav. 233; 25 L. J. Ch. 171. For the benefit of poor persons emigrating to certain colonies, with the sanction of Government: *Barclay v. Maskelyne*, 4 Jur. N. S. 1294. For “twenty aged widows and spinsters of the parish of X.,” where the word “poor” was implied: *Thompson v. Corby*, 27 Beav. 649; 8 W. R. 267. For the vicar of a parish for the time being on conditions as to preaching: *Re Parker*, 11 W. R. 937. To “poor pious members of the Methodist Society” in G.: *Dawson v. Small*, 18 Eq. 114. Among “poor pious persons, male or female, old or infirm, as the exors see fit, not omitting large and sick families, if of good character”: *Nash v. Morley*, 5 Beav. 177.

A bequest to rector and churchwardens to pay income amongst respectable single women of good character above age of 60 years, to be paid by monthly instalments, but so that no recipient shall receive more than 10l. a year: *Re Dudgeon*, 74 L. T. 613.

A gift by the vicar of a parish to the vicar for the time being of a building used as a village club and reading room to be “maintained for the furtherance of Conservative principles and religious and mental improvement and to be kept free from intoxicants and dancing”: *Re Scowcroft, Ormrod v. Wilkinson*, (1898) 2 Ch. 638.

A direction that only the children of “parishioners” should be eligible was held satisfied by a merely temporary residence and payment of rates for the purpose of qualification: *Etherington v. Wilson*, 1 Ch. D. 160, C. A. As to the *primâ facie* meaning of “parish,” see *Re Sandbach School, A. G. v. Crewe*, (1901) 2 Ch. 317.

A charitable gift to the "poorest" of a specified class must be construed as a gift to the actual poor, not to the least wealthy of a wealthy class: *A. G. v. D. Northumberland*, 7 Ch. D. 745.

A trust for maintenance of horses and dogs which at the time of his death belonged to the testator was held valid, though not charitable: *Re Dean, Cooper-Dean v. Stevens*, 41 Ch. D. 552.

A gift of a debt due to the donor is not void because such debt may have to be paid out of the real estate of the debtor: *Re Robson, Emley v. Davidson*, 19 Ch. D. 156, C. A.

A trust for the repair of a road does not necessarily come to an end because local authorities have become under an obligation to repair it: *A. G. v. Day*, (1900) 1 Ch. 31.

A bequest for a religious purpose is *primâ facie* charitable, though such purpose may be effected partly by an application *not per se* charitable: *Townsend v. Carus*, 3 Ha. 257; and if the Court concludes that the gift is for religious purposes, it must be treated as charitable unless the contrary can be shown: *Re White, W. v. W.*, (1893) 2 Ch. 41, C. A.; and see *Dolan v. Macdermot*, *sup.*; but in general the question is not whether the bequest may, but whether it must, be applied to purposes strictly charitable: *Morice v. Bp. of Durham*, 9 Ves. 399, 406; but see *Cocks v. Manners*, 12 Eq. 74; *Re Sutton, Stone v. A. G.*, *sup.*; *Re Douglas, Obert v. Barrow*, *sup.* There may be a charity in the legal sense for purposes which are both eleemosynary and ecclesiastical or religious: *Re Perry Almshouses*, (1899) 1 Ch. 21, C. A.

A bequest of money "for some one or more purposes, charitable, philanthropic, or," is not bad simply by reason of the existence of the blank, but must be treated as one "for charitable or philanthropic purposes." Such a bequest, however, is not a good charitable bequest, as there may be philanthropic purposes which are not charitable: *In re Macduff, M. v. M.*, (1896) 2 Ch. 451, C. A.

For an ambiguous description of a charity, and as to admitting parol evidence, see *Re Kilvert's Trusts*, L. R. 12 Eq. 183; 7 Ch. 170; *Re Davies*, 21 W. R. 154; *Re Hyde*, 22 W. R. 69.

The following have been held not to be charities:—

Dominican Convent, Carisbrook: *Cocks v. Manners*, 12 Eq. 574. After specific charitable legacies, a pecuniary bequest "to be disposed of by my exors in the manner they judge most effectual to promote true religion in the world in general and the servants of God in particular, something after the manner I have used in this my will": *Budget v. Hulford*, W. N. (73) 175. "Such objects of benevolence and liberality as D., in his own discretion, shall most approve": *Morice v. Bp. of Durham*, 9 Ves. 399; *Re Hewitt, Mayor of Gateshead v. Hudspeth*, 53 L. J. Ch. 132; 49 L. T. 587. Gift for the benefit of persons engaged in the wine trade, without any reference to their age or poverty: *Re Gassiot*, W. N. (01) 23; 70 L. J. Ch. 242.

Property held by a corp. in trust for the particular benefit of the freemen: *Prestney v. Corp. of Colchester*, 21 Ch. D. 111; but see *Goodman v. Saltash* and other cases, *sup.* pp. 1291, 1292.

WHAT GIFTS BY WILL ARE VOID.

Gifts on trusts for *private* objects extending beyond the limit allowed by the rule against perpetuities, as for a private museum, &c.: *Thomson v. Shakespear*, 1 D. F. & J. 399; or library: *Carne v. Long*, 2 D. F. & J. 75; or building fund of mechanics institution: *Re Dutton*, 4 Ex. D. 547; or for the encouragement of yacht racing: *In re Nottage, Jones v. Palmer*, (1895) 2 Ch. 649, C. A.; tombs, &c. not in a church: *Hoare v. Osborne*, 1 Eq. 585 (*secus*, when in a church, and gift for both was good *pro tanto*, *S. C.*); *Hunter v. Bullock*, 14 Eq. 45; *Dawson v. Small*, 18 Eq. 114; to ten poor clergymen, to be selected by A.: *Thomas v. Howell*, 18 Eq. 198; and see *Nash v. Morley*, 5 Beav. 177, and cases there cited. *Secus*, where the subject of the gift can be dealt with by the members of a society as they please: *Re Clarke, C. v. C.*, (1901) 2 Ch. 110. And a gift to a parish can only be good as a charity: *A. G. v. Webster*, 20 Eq. 483.

Gifts to charity generally are executed *cy-près* when the particular object fails, or is uncertain: *v. sup.* p. 1291. But where it is not clear that the gift is to charity, it fails on the ground of uncertainty: *Aston v. Wood*, 6 Eq. 419; *Re Hewitt, Mayor of Gateshead v. Hudspeth* ("hospitality or charity"), 53 L. J. Ch. 132; 49 L. T. 587; *Re Jarman, Leavers v. Clayton*, 8 Ch. D. 584; *Scott v. Brownrigg*, 9 L. R. Ir. 246 ("missionary purposes"); *Re Culli-*

more's Trusts, 27 L. R. Ir. 18 (for the benefit &c. of the families of the testator's late workmen); *Hunter v. A. G. and Hood*, (1899) A. C. 309, H. L., reversing C. A., (1897) 2 Ch. 105, and restoring Romer, J., (1897) 1 Ch. 518 (bequest to trustees to expend the income or any portion of the trust funds "in grants for or towards the purchase of advowsons or presentations").

A gift to a charity, with a gift over to another charity on an event which might be beyond the limit of perpetuities (e.g., upon failure by the trustees of the first charity to keep the testator's family vault in repair), is good: *Re Tyler*, (1891) 3 Ch. 252, C. A.; *Christ's Hospital v. Grainger*, 1 M. & G. 460.

A bequest (valid if standing alone) coming after a bequest of uncertain amount, and void in mortmain, fails with the prior gift: *Chapman v. Brown*, 6 Ves. 404; *A. G. v. Hinzman*, 2 J. & W. 270; and cases there; *Limbrey v. Gurr*, 6 Madd. 151; *Re Taylor, Martin v. Freeman*, 58 L. T. 538; W. N. (88) 32; Lewin, 116; but is valid where the prior gift is of a fixed sum: *Hunter v. Bullock*, 14 Eq. 45; or can be ascertained: *Hoare v. Osborne*, 1 Eq. 585; *Fisk v. A. G.*, 4 Eq. 521; *Waite v. Webb*, 6 Madd. 71; *Re Vaughan, V. v. Thomas*, 33 Ch. D. 187; and where 600*l.* was given invalidly, and residue to charity, the charity took the whole: and see *A. G. v. Fishmongers' Co.*, 2 Beav. 151; 5 My. & C. 11; *Dawson v. Small*, 18 Eq. 114; *Re Vaughan, sup.*; *Re Rogerson, Bird v. Lee*, (1901) 1 Ch. 715; see also *Re Jeaffreson*, 2 Eq. 276; *Fowler v. F.*, 33 Beav. 616; Tudor, 42—46.

A devise to A. and his heirs on condition that he convey to charity is good, but the condition void: *Poor v. Mial*, 6 Madd. 32.

A bequest to aid in the discharge of persons committed for non-payment of fines under the game laws was void on the ground of illegality: *Thrupp v. Collett*, 26 Beav. 125; 5 Jur. N. S. 111. But a legacy to trustees on trust to promote therewith prosecutions for cruelty to animals was held valid, and not void on the ground of champerty: *Re Vallance, V.-C. H.*, 31 March, 1876.

And a gift for endowment of a church on the condition "that the black gown shall be worn in the pulpit, unless there shall be any alteration in the law rendering it illegal," was upheld: *Re Robinson, Wright v. Tugwell*, (1892) 1 Ch. 95.

A bequest for a particular institution which ceases to exist in the testator's lifetime fails by lapse: *Re Rymer, R. v. Stanfield*, (1895) 1 Ch. 19, C. A.

As to the enforcing of secret, but not illegal, trusts as between c. g. t. and trustee, see *McCormick v. Grogan*, L. R. 4 H. L. 82; *Norris v. Frazer*, 15 Eq. 318. Such trusts, though charitable, are not within the exemption from legacy duty in Ireland under 56 G. III. c. 56; 5 & 6 V. c. 82; 8 & 9 V. c. 76; *Cullen v. A. G. (Ir.)*, L. R. 1 H. L. 190; and see *Re Maddock*, 70 L. J. Ch. 660.

For cases in which legacies have been held void as for superstitious uses, see *A. G. v. Fishmongers' Co.*, 5 M. & C. 11; 2 Beav. 151; 1 Jarm. W. 163; Wms. Ex. 7th ed. 1055; 9th ed. 901; Tudor, Char. 18—25; and that such legacies (e.g., for masses for repose of a soul) are void, though the legatee resides in a country by the law of which they would be valid, see *Re Elliott, E. v. Johnson*, 39 W. R. 297; W. N. (91) 9.

For an inquiry directed as to the legality of a trust, see *Russell v. Jackson*, 10 Ha. 204; for the law applicable to cases of alleged secret trust, see *Wallgrave v. Tebbis*, 2 K. & J. 313; *Tee v. Ferris, Ib.* 357; *Sweeting v. S.*, 12 W. R. 239; Lewin, 62 *et seq.*; *Re Maddock, sup.*; and that the onus is on those impeaching the devise to show that the trust was communicated to and expressly or tacitly accepted by the devisees, see *Jones v. Badley*, L. R. 3 Ch. 362 (reversing *S. C.*, 3 Eq. 635); *Carter v. Green*, 3 K. & J. 591; *Philpott v. St. George's Hosp.*, *ubi sup.*; *Rowbotham v. Dunnett*, 8 Ch. D. 430; and that any intention to withhold rights from the public must yield to a dominant intention to benefit them: *Re Pitt Rivers*, (1901) 1 Ch. 352; and as to the distinction in the case of gifts to joint tenants, between a bequest made on the faith of an antecedent promise by one that he will carry out the testator's wishes, in which case both are bound, and a bequest under a will left unrevoked on the faith of a subsequent promise by one, in which case he alone is bound, see *In re Stead, Witham v. Andrew*, (1900) 1 Ch. 237; citing *Russell v. Jackson, sup.*; *Jones v. Badley, sup.*; *Burney v. Macdonald*, 15 Sim. 6; *Moss v. Cooper*, 1 J. & H. 352.

A gift to trustees, with a real discretion to apply it with or against the law is valid: *Re Ovey, Broadbent v. Barrow*, 31 Ch. D. 113; *S. C.*, 35 Ch. D.

472, C. A.; see *Re Clark, Husband v. Martin*, 54 L. J. Ch. 1080; 52 L. T. 406; 33 W. R. 516; W. N. (85) 59; *Sorresby v. Hollins*, 9 Mod. 221; 18 Beav. 318; *Edwards v. Hall*, 6 D. M. & G. 74; 11 Ha. 1; *Graham v. Paternoster*, 31 Beav. 30; *Re Beaumont*, 32 Beav. 191; and where trustees are directed to apply the fund to "such charitable institutions and objects" as they may determine, if and so far as they select charitable institutions and objects exempted from the operation of 9 G. II. c. 36, the names of the charitable institutions and objects selected will be read into the will, and the gift will be a good charitable gift in their favour: *Re Piercy*, (1898) 1 Ch. 565, following *Lewis v. Allenby*, 10 Eq. 668; *Mayor of Faversham v. Ryder*, 5 D. M. & G. 350; *University of London v. Yarrow*, 1 De G. & J. 72; and *Carter v. Green*, 3 K. & J. 591. Thus a bequest of a residue to trustees for "erecting or endowing" a church took effect as to pure personality: *Sinnett v. Herbert*, 7 Ch. 232; but one for "building and endowing" a church failed, the purchase of land not being prohibited by the will: *Re Lee's Trusts*, 21 W. R. 168; 27 L. T. 308. A gift otherwise good was not void because coupled with the object of repairing a particular tomb: *Re Vaughan, V. v. Thomas*, 33 Ch. D. 187. And the validity of a charitable gift is not affected by the trustees exercising an option to invest in real security: *Re Hamilton, Cadogan v. Fitzroy*, (1896) 2 Ch. 617, C. A.

In such cases, the illegal application of the fund may be restrained by the Court: *Carter v. Green*, 3 K. & J. 591; and in *Lewis v. Allenby*, 10 Eq. 668, trustees with a power of selection were directed to submit to the Vice-Chancellor in Chambers the names of the charities proposed by them to be benefitted. But in *Univ. of London v. Yarrow*, 24 Beav. 472, the fund was paid out, without any direction, to trustees having an option to apply it in a legal or illegal manner.

And though an exor was entitled to exercise his own discretion in selecting charities, the Court would not order payment of the fund to him without an affidavit by him stating how he meant to apply it: *Hagan v. Duff*, 25 L. R. Ir. 516.

And an absolute gift by a testator to his wife, and a letter saying he hoped she would carry out his intentions, but no agreement or trust, stood: *Lomax v. Ripley*, 3 Sm. & G. 48, 73, 81, n.; and see *Wheeler v. Smith*, 1 Giff. 300, 6, 9.

A legacy to a charity is not bad because the application of it to some of the objects of the charity would be within the statute: *Wilkinson v. Barber*, 14 Eq. 96; but if the application is specified, and is illegal, the fact that it could be legally applied by the charity will not validate it: *Denton v. Manners*, 2 D. & J. 675.

As to cases in which, the particular charity failing, the gift is executed *cy-près*, v. *sup.* p. 1291.

BEQUESTS FOR THE PURPOSE OF BUILDING, PURCHASING LAND, ETC.

As to bequests for purpose of building hospitals, &c. generally, see Tudor, Char. 409 *et seq.*; Wms. Exors. (9th ed.) 914 *et seq.* Previously to the Mortmain and Charitable Uses Act, 1891, they were *primâ facie* invalid: *Giblett v. Hobson*, 3 My. & K. 517; *Tatham v. Drummond*, 4 D. J. & S. 484; *Philpott v. St. George's Hosp.*, 21 Beav. 134; *S. C.*, 6 H. L. C. 338.

A gift of a sum of money to be invested in freehold securities, and the income paid to a charity, was void: *Aston v. Wood*, 22 W. R. 894; 43 L. J. Ch. 715; 31 L. T. 293. See, however, 33 & 34 V. c. 34, *sup.* 1327.

As regards gifts for building, "the rule of the Court is now well settled, that in order to validate a gift of this kind you must find in the will a reference to an existing site on which the building contemplated shall be erected, or you must find words expressly excluding the application of the money given in the purchase of land": Wickens, V.-C., in *Pratt v. Harvey*, 12 Eq. 544.

Where after a devise of a piece of land in N. to A., a testator gave a sum of money to A. and three other trustees to build and found a charity, if anyone within a year of his decease, at his or her expense, should purchase or give a suitable piece of land in N. as a site, and within the year A. conveyed the piece of land to four trustees for the purposes of the will: the gift was

held good: *Philpott v. St. George's Hosp.*, 6 H. L. C. 338; 3 Jur. N. S. 1269; 22 L. J. Ch. 70; and see *Cawood v. Thompson*, 1 Sm. & G. 409, 414.

A devise, after one failing in mortmain, was held good, and not affected by trustees' acts: *Warren v. Rudall*, 4 K. & J. 603, 606, 619, n.; and see *Monypenny v. Dering*, 2 D. M. & G. 145; 7 Ha. 568.

A bequest of pure personalty to the Church Building Society, which has no power to purchase land, is good: *Church Building Soc. v. Barlow*, 3 D. M. & G. 120; the gifts under the Gifts for Churches Act, 1803 (43 G. III. c. 108), must be for the purposes there mentioned: *Same v. Coles*, 5 D. M. & G. 324, 330; 1 K. & J. 145; and a gift to be applied in the "endowment" of existing churches, &c., and, *semble*, of future, is good: *Edwards v. Hall*, 6 D. M. & G. 74, 78, 79; 11 Ha. 1, 6, 16, 22; *Tatham v. Drummond*, 4 D. J. & S. 484; *Sinnett v. Herbert*, 7 Ch. 232; *Hawkins v. Allen*, 10 Eq. 246; *Dent v. Allcroft*, 30 Beav. 335; 31 L. J. Ch. 211; 10 W. R. 184; a sum of consols standing in testatrix's and another's name, and balance at bank in her own name, all collected by her to build a church, but no trust thereof being declared, passed by her will: *Girdlestone v. Creed*, 10 Ha. 480.

A gift of articles of vertu, for the purpose of forming an art museum, was held good, and an inquiry (as in *Sinnett v. Herbert*, 7 Ch. 232) directed: *Re Holburne*, 53 L. T. 213.

A gift for the purpose of providing poor women with lodgings was not void as involving the acquisition of land: *Re Robson, Emley v. Davidson*, 19 Ch. D. 156, C. A.

But bequests for paying off charges, though merely equitable, on land in mortmain, are void: *Waterhouse v. Holmes*, 2 Sim. 162; *Re Lynall's Trusts*, 12 Ch. D. 211.

If testator "recommends" (*A. G. v. Davies*, 9 Ves. 546), or uses other mandatory words as to purchasing lands (*Grieves v. Case*, 4 Bro. C. C. 67; 2 Cox, 301), the gift is void.

Legacy for building a parsonage is valid if there is any glebe on which to build it, or land bought as a site, though not actually dedicated, before the will: *Sewell v. Crewe-Read*, 3 Eq. 60; *Champney v. Davey*, 11 Ch. D. 949; a gift for "supporting or founding" free or ragged schools, in a place where a free school supported by the testator already existed, was held, on the alternative construction, a good charitable gift: see *Re Hedgman, Morley v. Croxon*, 8 Ch. D. 156.

And see *Sinnett v. Herbert*, 7 Ch. 232, *et sup.* p. 1337; *Re Lee*, 21 W. R. 168; *Re White's Trusts*, 51 L. J. Ch. 830; 47 L. T. 248; 30 W. R. 837; *Re Holburne*, 53 L. T. 213; and 43 G. III. c. 108, *sup.* p. 1337.

In the case of testators dying after 5th August, 1891, a legacy to be applied in purchasing land is payable to the charity, but the direction to purchase land is void: Mortmain and Charitable Uses Act, 1891, s. 7, *sup.* p. 1338. The Court or the Charity Commrs are, however, empowered (sect. 8, *sup.* p. 1338) to authorize the application of the legacy in the purchase of land where the land is required for actual occupation by the charity.

The effect of this provision on gifts for the purpose of building and other like purposes seems to be that, in every case, the charity must receive the benefit of the gift, and that the direction to build, &c., is rendered void only if and so far as it involves the purchase of land; subject to that limitation, the direction seems to be valid and binding: *Bristowe, Mortmain and Charitable Uses Act*, 1891, p. 87 *et seq.* As to the application of the legacy, see *ibid.* p. 90.

PROPERTY WHICH COULD NOT, PREVIOUSLY TO THE MORTMAIN AND CHARITABLE USES ACT, 1891, BE GIVEN TO CHARITIES BY WILL.

Land of any tenure, or money to be laid out in the purchase of land (in England, but not in Ireland or abroad: *Campbell v. E. Radnor*, 1 Bro. C. C. 271; *Beaumont v. Oliveira*, 4 Ch. 309); Charitable Uses Act, 1736 (9 G. II. c. 36); and as to leaseholds, see *Johnston v. Swann*, 3 Madd. 457.

Land devised to trustees for sale and conversion: *British Museum v. White*, 2 S. & S. 595; or which testator had agreed to sell, but the sale was not completed: *Harrison v. H.*, 1 Russ. & M. 71; but see *Middleton v. Spicer*, 1 B. C. C. 201, *contrâ*. A legacy due to the testator as his share of a residue

of real and personal estate directed to be sold: *Brook v. Badley*, 3 Ch. 672; and it could not be apportioned: *Ib.*; *Lucas v. Jones*, 4 Eq. 73; but in *Re Hill's Trusts*, 16 Ch. D. 173, a legacy, payable out of the proceeds of conversion of residuary real and personal estate, and bequeathed by the legatee, was apportioned.

The interest of the testator in partnership property, so far as it comprised money arising from the sale of land: *Ashworth v. Munn*, 15 Ch. D. 363, C. A.

Money due to the estate as unpaid purchase-money of lands sold by the testator: *Edwards v. Hall*, 6 D. G. M. & G. 74; *Harrison v. H.*, 1 Russ. & M. 71; but see cases *contra*, *inf.* p. 1347.

Money secured by mortgage of freeholds, copyholds, or leaseholds: *A. G. v. E. Winchelsea*, 3 Bro. C. C. 373; 2 Cox, 364, Form 5, *sup.* p. 1330; *Miles v. Harrison*, 9 Ch. 316; 22 W. R. 441; or due on promissory note or bond and secured by deposit of title-deeds: *Lucas v. Jones*, 4 Eq. 73; *Alexander v. Brame*, 30 Beav. 153; and so also a mortgage of a life interest under a will in a sum invested partly on mortgage of real estate: *Re Watts, Cornford v. Elliott*, 29 Ch. D. 947, C. A., reversing *S. C.*, 27 Ch. D. 318, and explaining *In re Harris, Jacson v. Queen Anne's Bounty*, 15 Ch. D. 561.

The proceeds of growing crops: *Symonds v. Marine Soc.*, 2 Giff. 325, 332, 333; mortgages of borough rates: *Thornton v. Kempson*, Kay, 592; *Chandler v. Howell*, 4 Ch. D. 651.

Money charged on harbour tolls: *Ion v. Ashton*, 28 Beav. 379; or on profits from lighthouse tolls: *A. G. v. Jones*, 1 Mac. & G. 574; a bond assigning tolls levied by harbour trustees for passage over bridges: *Re David, Buckley v. Royal National Lifeboat Institution*, 43 Ch. D. 27, C. A.; 41 Ch. D. 168 (*secus*, as to harbour duties, the receipt of which was in no way dependent upon the vessels using any land: *Re Christmas, Martin v. Lacon*, 33 Ch. D. 332, C. A.); arrears of interest on mortgage of realty; debentures (in form of assignments of dock dues) by Dock Commrs: *Alexander v. Brame*, 30 Beav. 153; mortgages of turnpike tolls and railway undertakings: *Ashton v. L. Langdale*, 4 D. & S. 413; shares in the New River Co.: *Drybutter v. Bartholomew*, 2 P. W. 127; *Davall v. New River Co.*, 3 D. & S. 394; Bath Navigation shares: *House v. Chapman*, 4 Ves. 542; Grand Junction Canal shares: *Ware v. Cumberlege*, 20 Beav. 503; but see *Edwards v. Hall, sup.*; money to be invested in "mortgage security," and held on trust to pay the income to charity: *Baker v. Sutton*, 1 Ke. 224; money of testator duly invested on mortgage pursuant to the will during the life of a tenant for life: *Re Corcoran, C. v. Riddell*, 62 L. J. Ch. 267, W. N. (92) 182; £3½ p. c. Cons. Stock of the Met. Board of Works: *Cluff v. C.*, 2 Ch. D. 222; or Met. Cons. £3½ p. c. Stock, issued under the Met. Board of Works (Loans) Act, 1869 (32 & 33 V. c. 102): *Re Crossley, Birrell v. Greenhough*, (1897) 1 Ch. 928 (*secus*, money borrowed by justices of the peace under 2 & 3 V. c. 93, and 3 & 4 V. c. 88, and charged upon county police rates: *Re Harris, Jacson v. Queen Anne's Bounty*, 15 Ch. D. 561; or bonds under the Metropolis Local Management Act, 1855, secured on rates on occupiers of land, and leviable by distress, if necessary, on their goods and chattels: *Jervis v. Lawrence*, 22 Ch. D. 202).

Shares in a co. manufacturing iron from its own lands: *Morris v. Glynn*, 27 Beav. 218; but see *Myers v. Perigal*, 2 D. M. & G. 599, 620; *Entwistle v. Davis*, 4 Eq. 272.

Right, under grant from Crown, to moor vessels in the Thames: *Negus v. Coulter*, Amb. 367.

Immoveable property in India (if the testator has near relations), except by a will executed twelve months before death, and deposited according to the Indian Succession Act, 1865: *Macdonald v. M.*, 14 Eq. 60. As to property in Canada, see *Abbott v. Fraser*, L. R. 6 P. C. 96, *et inf.* p. 1348.

Proceeds of land in England could not be given for benefit of a charity in Scotland: *Curtis v. Hutton*, 14 Ves. 537.

Where a testator charged debts, &c. on funds not applicable to charitable legacies, and then on pure personalty, his balance at his bank was subject to set-off for sums due to the bank, and rent in agent's hands for commission due to him: *Thomas v. Howell*, 18 Eq. 198; but arrears of rent of leaseholds were not liable to deduction for ground rent, &c.: *Ib.*

PROPERTY WHICH, INDEPENDENTLY OF THE MORTMAIN AND CHARITABLE USES ACT, 1891, MAY BE GIVEN TO CHARITIES BY WILL.

Railway debentures (not being mortgages), shares in railway, canal, waterworks, and banking cos.' scrip shares in projected railways: *Ashton v. L. Langdale*, 4 D. & S. 402, 413; *Re Langham*, 10 Ha. 446; *Myers v. Perigal*, 2 D. M. & G. 599—622; 16 Sim. 533 (and see *S. C.*, and *Forbes v. Steven*, 10 Eq. 178, 189, as to partnership assets consisting of realty &c.): *Edwards v. Hall*, 6 D. M. & G. 74, 90—94; 11 Ha. 6.

Debenture stock created under the Cos. Clauses Act, 1863 (26 & 27 V. c. 118): *Re Mitchell's Estate, M. v. Moberly*, 6 Ch. D. 655; *Attree v. Hawe*, 9 Ch. D. 337, C.A. (overruling *Chandler v. Howell*, 4 Ch. D. 651; *Ashton v. L. Langdale*, 4 D. & S. 402); and money secured on the county police rates by bonds given by the justices: *Re Harris, Jacson v. Queen Anne's Bounty*, 15 Ch. D. 561.

Debentures in the form given in Schedule C. to the Cos. Clauses Act, 1845, made by a railway or waterworks co.: *Holdsworth v. Davenport*, 3 Ch. D. 185. The distinction is between cases in which the debenture or mortgage gives a right to an interest in the land itself, and those in which it is in substance a charge on the general undertaking only; as to this, see *Gardner v. L. C. & D. Ry.*, 2 Ch. 201; *Re Panama, &c. Co.*, 5 Ch. 318; *Re General S. Amer. Co.*, 2 Ch. D. 337, C. A.; *Re Parker, Wignall v. Park*, (1891) 1 Ch. 682; *Re Hollon, Forbes v. Hardcastle*, W. N. (93) 111.

Mortgages by corps. charged on the borough fund, although such fund arises in part from rents of land: *Re Thompson, Bedford v. Teal*, 45 Ch. D. 161, C. A.; or the district fund, at all events where the corp. has no surplus lands: *S. C.*; and see *Re Holmes, H. v. H.*, W. N. (90) 169; 60 L. J. Ch. 267; 63 L. T. 477.

Corporation Debenture stock charged on "the rates and revenue of all landed and other property of the corp.:" *In Re Pickard, Elmsley v. Mitchell*, (1894) 3 Ch. 704, C. A.; 2 Ch. 88.

Mortgages by a corp. as waterworks authority under local Acts: *Re Parker, sup.*

Shares in a railway which had leased its line at a fixed rent: *Taylor v. Linley*, 2 D. F. & J. 84; shares in gaslight or dock cos.: *S. C.*; *Sparling v. Parker*, 9 Beav. 450, 459, n.; *Hilton v. Giraud*, 1 D. & S. 183; *Walker v. Milne*, 11 Beav. 507; bonds secured by assignment of canal rates: *S. C.*; local rates: *Jervis v. Lawrence*, 22 Ch. D. 202, *sup.* p. 1346; harbour duties: *Re Christmas, Martin v. Lacon*, 33 Ch. D. 332, C. A., *sup.* p. 1346; shares in mining cos. on cost-book principle: *Hayter v. Tucker*, 4 K. & J. 243; tenants' fixtures: *Johnston v. Swann*, 3 Madd. 457; shares in a co. for purchasing and improving lands, and selling or letting them: *Entwistle v. Davis*, 4 Eq. 272.

Purchase-money of lands which testator had agreed to sell: *Middleton v. Spicer*, 1 B. C. C. 201, *contra*, *Edwards v. Hall, Harrison v. H.*, *sup.* p. 1346; policies: *March v. A. G.*, 5 Beav. 433 (but as to this case, see *Ashworth v. Munn*, 15 Ch. D. 363, 371, 375, C. A.); shares in foreign mines: *Baker v. Sutton*, 1 Ke. 230, 233; arrears of rent: *Edwards v. Hall, sup.*; *Thomas v. Howell*, 18 Eq. 198; *Brook v. Badley*, 4 Eq. 106; instalments of a sum payable for leave to get minerals on demised land: *Ib.*; *S. C.*, 3 Ch. 672.

An interest in part of the proceeds of land directed to be sold was held not within the Charitable Uses Act, 1735 (9 G. II. c. 36), though a person held the land for life: *Marsh v. A. G.*, 2 J. & H. 61; but see *Brook v. Badley*, 3 Ch. 672; *Ashworth v. Munn, sup.*; and see *Aspinall v. Bourne*, 29 Beav. 462.

A legacy payable out of proceeds of conversion of residuary real and personal estate: *Re Hill's Trusts*, 16 Ch. D. 173; but *v. sup.* p. 1346.

The mortmain rules do not apply to land in Ireland: *A. G. v. Power*, 1 Ball & B. 145; *Campbell v. Radnor*, 1 B. C. C. 271 (see 7 & 8 V. c. 97; nor to land in Scotland: 9 G. II. c. 36, s. 6; *Macdonald v. M.*, 14 Eq. 60; nor to land abroad: *Beaumont v. Oliveira*, 6 Eq. 534; 4 Ch. 309; nor to land in the colonies: *Whicker v. Hume*, 7 H. L. C. 124; 1 D. M. & G. 506; 14 Beav. 509, 526; *M. of Lyons v. E. I. Co.*, 1 Moo. P. C. 175; *M. of Canterbury v. Wyburn*, (1895) A. C. 89, P. C.; and see *M. of Lyons v. Adv. Gen. of Bengal*,

1 App. Ca. 91; but land abroad is not "pure personality": *Beaumont v. Oliveira*, 6 Eq. 534; 4 Ch. 309.

Pecuniary bequest by testator dying domiciled in Scotland, possessed of moveables and immoveables in India, was paid in full out of the moveables: *Maddonald v. M.*, 14 Eq. 60; moveable property in Canada may be bequeathed for charitable purposes: *Abbott v. Fraser*, L. R. 6 P. C. 96, *et sup.* p. 1346.

GIFTS TO CHARITIES BY WILL UNDER THE MORTMAIN AND CHARITABLE USES ACT, 1891.

For the provisions of the Act, see *sup.* p. 1338.

It applies only where the testator has died since 5th August, 1891.

By virtue of sect. 3 (*sup.* p. 1338), altering the definition of "land" in the Mortmain and Charitable Uses Act, 1888, every kind of property which fell within the old definition, and is excluded from the new, may be assured to charity, either by will or *inter vivos*, without restriction of any kind: *Bristowe*, Mortmain and Charitable Uses Act, 1891, p. 33; and for a detailed examination of the effect of the section on the different kinds of property which were within the old definition, see *ibid.* pp. 32 *et seq.*

As regards property still remaining within the definition of "land" (*viz.*, lands, tenements and hereditaments, corporeal and incorporeal, of any tenure), the effect of the Act is that such property (sect. 5, *sup.* p. 1338), and personality directed to be laid out therein (sect. 7), may lawfully be given to charity by will; but in the one case the property so given must be sold (sects. 5 and 6), and in the other case the direction to purchase land is void (sect. 7). In every case the charity retains the full benefit of the gift.

It would seem that the exception of personal estate arising from or connected with land contained in sect. 3 of the Act (*v. sup.* p. 1338) is not restricted to such personal estate belonging to the testator at his death, but includes land which by his will is directed to be converted into money, and that therefore, where a will contains a direction for sale, the sale must be carried out under the will, and the direction for sale contained in sect. 5 of the Act does not apply: *Bristowe*, Mortmain and Charitable Uses Act, 1891, pp. 35, 54, 63; and see *Marcy*, Forms of Originating Summons, pp. 57, 58; *In re Wilkinson*, *Esam v. A. G.*, Jan. 12, 1900, *sup.* pp. 1338, 1339.

CHARITIES ENABLED TO TAKE LAND GIVEN BY WILL.

The following institutions are empowered by special or private Acts to take and hold land given by will:—

The British Museum, 26 G. II. c. 22, s. 14: *British Museum v. White*, 2 S. & S. 594; 3 Moo. & P. 689. The Middlesex, the St. George's, and the Westminster Hospitals: see 6 & 7 W. IV. c. vii. s. 4; 4 & 5 W. IV. c. xxxviii. s. 1; 6 & 7 W. IV. c. xx. s. 6; *Wigg v. Nicholl*, 14 Eq. 92; *Perring v. Traill*, 18 Eq. 88. Foundling Hospital, 17 G. II. c. 29. Bath Infirmary, 19 G. III. c. 23. Royal Naval Asylum, 51 G. III. c. 105. Queen Anne's Bounty, 43 G. III. c. 107. Oxford and Cambridge Universities, and Eton, and Winchester, and Westminster Schools, 9 G. II. c. 36, s. 2, with a limitation of the number of advowsons that may be held. But the gift must be *bonâ fide* for the college, &c., not on trust for other purposes: *A. G. v. Tancred*, 1 Ed. 10; *A. G. v. Whorwood*, 1 Vez. 534; and see *A. G. v. Munby*, 1 Mer. 327. As to the Female Orphan Asylum, and the School for the Indigent Blind, see *Nethersole v. School for Indigent Blind*, 11 Eq. 1; and as to them and the Deaf and Dumb Asylum, see *Chester v. C.*, 12 Eq. 444, *et inf.*

A charity empowered by a private Act to take, hold, receive, and retain any sums of money "bequeathed or devised," cannot take a bequest of impure personality: *Nethersole v. School for Indigent Blind*, 11 Eq. 1; *Chester v. C.*, 12 Eq. 444; but one empowered to hold lands can: *Perring v. Traill*, 18 Eq. 88; *contra*, *Brit. Museum v. White*, 2 S. & S. 595; and see *Mogg v. Hodges*, 2 Vez. 52; *Luckcraft v. Pridham*, 6 Ch. D. 205.

To these may be added the Ecclesiastical Commrs, to whom hereditaments,

goods or chattels, may be granted or left by will, by 6 & 7 V. c. 37: see *Baldwin v. B.*, 22 Beav. 419.

A gift of residue (pure and impure) to trustees, to divide among such charities as they should in their uncontrolled discretion think fit, was held good: *Lewis v. Allenby*, 10 Eq. 668; *v. sup.* p. 1344.

As to churches, see Gifts for Churches Act, 1803 (43 G. III. c. 108), *et sup.* p. 1337.

Land in the city of London may be devised in mortmain by citizens and freemen: *A. G. v. Fishmongers' Co.*, 1 Keen, 495; *Middleton v. Cater*, 4 Bro. C. C. 409.

By the Gifts for Churches Act, 1811 (51 G. III. c. 115), s. 2, five acres, or less, of the waste of a manor may be conveyed for a church, churchyard, or glebe: see *Forbes v. Eccles. Commrs.*, 15 Eq. 51; as to restriction on the powers of this Act, see the Commons Act, 1899 (62 & 63 V. c. 30), s. 22.

MARSHALLING.

The Court will not marshal assets in favour of charities: *Williams v. Kershaw*, 1 Keen, 275, n.; as between realty and personalty, nor mixed and pure personalty; nor where the bequest is residuary: *A. G. v. E. Winchelsea*, 3 Bro. C. C. 373; nor where it is particular: *Hobson v. Blackburn*, 1 Keen, 273; and see *Aldrich v. Cooper*, 2 L. C. Eq. (4th ed.) 103; *Tudor, Char.* 58 *et seq.*

Formerly it was otherwise: *A. G. v. Graves*, Amb. 158; *A. G. v. Tomkins*, Amb. 217.

Now, where there is a bequest to a charity out of a mixed fund, the Court appropriates the fund as if no legal objection existed to applying any part of it to charities, and then holds that so much as would thus come out of the prohibited funds fails; and the gift is void, *pro tanto*, in the proportion which the prohibited fund bears to the whole property applicable to the legacy: *Williams v. Kershaw*, 1 Keen, 275, n., according to their values respectively at the testator's decease: *Re Clark, Husband v. Martin*, 33 W. R. 516; 54 L. J. Ch. 1080; 52 L. T. 406; *Sparling v. Parker*; *Williams v. Kershaw*, *sup.*; and not at the time of apportioning: *Calvert v. Armitage*, 1 H. & M. 446; correcting *Robinson v. London Hosp.*, 10 Ha. 19, 29. Nor can the duty on charitable legacies, given free of duty, be paid out of impure personalty: *Wilkinson v. Barber*, 14 Eq. 96; and a legacy in pursuance of a covenant is in the same position: *Fox v. Lownds*, 19 Eq. 453.

But where a testator had by his will distinguished between leaseholds and personalty, a direction in a codicil to pay a legacy out of personalty was held to mean pure personalty: *Wilson v. Thomas*, 3 My. & K. 679; and see *Nickisson v. Cockill*, 3 D. J. & S. 622.

Where, however, the exor has admitted assets for payment of the charitable bequests, the assets may be marshalled in favour of the charity: *Campbell v. E. Radnor*, 1 B. C. C. 271.

A testator may himself marshal his assets, so that the whole of the pure personalty may be reserved for paying the charitable legacies: *Robinson v. Geldard*, 3 Mac. & G. 735; *Nickisson v. Cockill*, 3 D. J. & S. 622; *Taylor v. Linley*, 1 Giff. 67; 2 D. F. & J. 84; *Lewis v. Boetefeur*, W. N. (78) 21; (79) 11; 38 L. T. 93.

Where testator simply directed pecuniary legacies to charities to be paid out of pure personalty, which was sufficient, and gave other general pecuniary legacies to individuals which the impure personalty was sufficient to satisfy, it was held that the charitable legacies were so far in the nature of demonstrative legacies that the others must be paid out of the impure personalty: *Robinson v. Geldard*, 3 Mac. & G. 735; but in such a case the pure personalty must bear its proportion of debts, funeral and testamentary expenses, and costs of suit, rateably with the impure personalty: *Tempest v. T.*, 7 D. M. & G. 470; *Baumont v. Oliveira*, 4 Ch. 309.

Where, however, lands were given to trustees to sell and pay debts, &c. and legacies, and the whole of the personalty to pay the remainder of debts, &c. and legacies, and the residue of the personalty was bequeathed to charities, with a proviso that residue should only include pure personalty, it was held that the debts, &c. and legacies were thrown primarily on the land, and, secondly, on the impure personalty: *Wills v. Bourne*, 16 Eq. 487; and

so where a residue was given to charities with a direction that the pure personality should be reserved for satisfying the gift: *Miles v. Harrison*, 22 W. R. 441; 9 Ch. 316; *Taylor v. Bogg*, 5 Jur. N. S. 137.

And a direction for payment of charitable legacies "exclusively" out of pure personality was held equivalent to a direction that the residue should consist exclusively of pure personality: *Re Arnold, Ravenscroft v. Workman*, 37 Ch. D. 637; and see *Re Pitt, Lacy v. Stone*, 53 L. T. 113; 33 W. R. 653; but a gift to a charity of the residue of personal estate, "save and except such parts thereof as cannot by law be appropriated by will to charitable purposes," did not operate as a direction to marshal in favour of the charity, and the impure personality passed to the next of kin: *In re Somers-Cocks, Wegg-Prosser v. Wegg-Prosser*, (1895) 2 Ch. 449.

The rules as to marshalling appear to be inapplicable where the testator had died since 5th August, 1891: see *Bristowe, Mortmain and Charitable Uses Act*, 1891.

Marshalling directed by testator in favour of one charitable gift will not take effect so as to throw other charitable legacies, given by the same will, entirely on impure personality, and so defeat them; for marshalling only takes effect as against those who have two funds: *Id.*; *secus*, of course, as to charities which *can* take land: *Wigg v. Nicholl*, 14 Eq. 92.

In *Sinnett v. Herbert*, 7 Ch. 232 (followed in *Champney v. Davey*, 11 Ch. D. 949), on gift of mixed residue for "erecting or endowing" a church, 500*l.* was paid out of impure personality under 43 G. III. c. 103 (*sup.* p. 1337), to aid the bequest, and all the residuary pure personality held applicable.

The rule against marshalling does not apply to the bequest by a Scotchman of property in India: *Macdonald v. M.*, 14 Eq. 60.

COSTS AND CHARGES—APPORTIONMENT.

In case of a residuary or particular bequest to a charity, under the law previous to the Mortmain and Charitable Uses Act, 1891, the Court will apportion the debts and legacies and the costs of the action between such parts of the fund primarily liable as are applicable to charity legacies, and such parts as are not, whether such fund consists of pure and impure personality: *A. G. v. Winchelsea*, 3 B. C. C. 373, *et sup.* Form 5, pp. 1330, 1331; or real and personal estate forming a mixed fund: *Curtis v. Hutton*, 14 Ves. 540; *Roberts v. Walker*, 1 Russ. & M. 752, and cases in notes there; *Fourdrin v. Gowley*, 3 My. & K. 383; *Williams v. Kershaw*, 1 Ke. 274, n.; *Paice v. Abp. Canterbury*, 14 Ves. 364; *Crosbie v. Corp. Liverpool*, 1 Russ. & M. 761, n.

And a specific legacy in favour of a charity will abate rateably with other specific gifts according to their respective values at the testator's death: *Halse v. Rumford*, 47 L. J. Ch. 559; W. N. (78) 66.

Some of contested devises failing in mortmain, costs of suit as to realty were paid from that descended, and as to personality from undisposed-of residue: *Sanders v. Miller*, 25 Beav. 154; *Row v. R.*, 7 Eq. 414; and see *Harrison v. H.*, 8 Ch. 342.

In cases falling within the Mortmain and Charitable Uses Act, 1891, no apportionment is required.

The heir unsuccessfully disputing the gift was allowed costs only as between party and party: *Whicker v. Hume*, 14 Beav. 528; *S. C.*, 1 D. M. & G. 506; 7 H. L. C. 124; no improper point being raised for the next of kin, they are allowed costs as between solicitor and client: *Carter v. Green*, 3 K. & J. 591, 608; *contra*, *Wilkinson v. Barber*, 14 Eq. 96.

A charge of "testamentary expenses," it is now settled, includes the costs of an action: *Miles v. Harrison*, 22 W. R. 441; 9 Ch. 316; *et v. inf.* p. 1423; and estate duty, *Re Clemow*, (1900) 2 Ch. 182.

Costs of all parties to a successful action to set aside deeds as not duly executed and enrolled were paid out of the estate: *Wickham v. Bath*, 1 Eq. 17.

Where a testator gave a specific fund to A. upon trust to pay, *inter alia*, certain charitable anns which were held void, and the residue of the fund to A., and his general residue to B., the accretion from failure of the charitable

gifts went to A.: *Aston v. Wood*, 22 W. R. 893; 43 L. J. 715; 31 L. T. 293.

By the 16 & 17 V. c. 51, ss. 16, 27, property, on becoming subject to a trust for charitable or public purposes, is liable to succession duty: see *Hanson*, 639, 673.

As to charities being liable to poor-rate, see *St. Thomas's Hosp. v. Stratton*, L. R. 7 H. L. 477; *Greig v. Univ. of Edinb.*, L. R. 1 Sc. 348; *Mersey Docks v. Cameron*, 11 H. L. C. 443; Tudor, Char. 367; and as to allowances in respect of income tax on property held for "charitable purposes" under the Income Tax Act, 1842 (5 & 6 V. c. 35), s. 61, see *Commlrs for Income Tax v. Pemsel*, (1891) A. C. 531.

CHAPTER XLIII.

ACCOUNT.



SECTION I.—GENERAL ACCOUNT—ORIGINAL JUDGMENT.

1. *Judgment or Order for Account.*

[*If so*, The Plt by his writ of summons, or statement of claim, or counsel submitting to account and to pay what, if anything, upon taking the account hereby directed, shall be certified to be due to the Deft from him]; Let an account be taken of all dealings and transactions between the Plt and the Deft (from the — day of —); And Let what, upon taking the said account, shall be certified to be due from either of the parties to the other of them, be (within one month after the date of the Master's certificate) paid by the party from whom to the party to whom the same shall be certified to be due; [*or*, And the further consideration of this action is adjourned].—Liberty to apply.

For order referring it to a district registrar to take the accounts directed by the decree, see *Corp. of Aberavon v. Momus*, M. R. at Chambers, 10 Dec. 1875, A. 1913.

2. *Judgment for Inquiries and Accounts in Action by Building Contractor against his Employer and the Architect.*

LET the following &c.: 1. An inquiry whether the Plt [*builder*] has executed for the Deft D. [*employer*] any and what works, which are not included in the contract dated &c., in the pleadings mentioned; 2. An inquiry whether the Plt has executed for the Deft D. under the said contract any and what works, the price of which is not included in the said contract, or has made and executed, by and under the direction of the Deft W. [*architect*], any and what variations in the works included in the said contract; 3. An account of what, if anything, is due from the Deft D. to the Plt in respect of the matters mentioned in the said inquiries Nos. 1 and 2 respectively; 4. An account of what, if anything, is due from the Deft D. to the Plt in respect of the contract price mentioned in the said contract dated &c.;

5. An inquiry whether there have been any and what omissions on the part of the Plt in the performance of the said contract; 6. An account of what, if anything, is due from the Plt to the Deft D. in respect of any such omissions.—Adjourn &c.—Liberty to apply.—*Kimberley v. Dick*, M. R., 3 Nov. 1871, A. 2887; 13 Eq. 22.

For declaration in suit by the contractors for the restoration of a church against the employer and the architect that Plts were entitled to be paid for all quantities of work done beyond the quantities specified; but not to any allowance for the extra price paid for stone; with inquiry what was due to Plts in respect of such work or quantities of work done, and declaration as to other allowances, and inquiry what remains due to Plts in respect of the work done under the contract, with costs of suit to Plts up to the hearing, see *Kemp v. Rose*, 1 Gif. 269, V.-C. S., 5th June, 1858, A. 1125.

In this case, as in *Kimberley v. Dick*, *sup.*, there was an agreement between the architect and employer which was unknown to the builder, and was held to disable them from enforcing their rights against him, but in general the builder is bound by the quantities, unless he can show that, in taking them out, the architect was the employer's agent, or that the employer guaranteed their accuracy: *Scrivener v. Pask*, L. R. 1 C. P. 715; and even where the builder is not bound by the quantities, he must, if he wishes to dispute them, stop at once on discovering their inaccuracy: *Kimberley v. Dick*, 13 Eq. 20.

3. *Inquiry as to Amount due to Railway Contractor for Works and Materials.*

“LET the following &c.—An inquiry whether anything, and what, remains due to the Plt in respect of works executed, and materials supplied, or otherwise, under the several contracts in the pleadings mentioned, having regard to the terms of such contracts respectively, and to the circumstances under which the Plt carried on and executed the said works.”—Adjourn &c.—*McIntosh v. G. W. Ry.*, V.-C. S., 30 May, 1855, B. 963; S. C., 3 Sm. & G. 146.

4. *Account of what remains due to Railway Contractor, with Directions as to the Allowance or Disallowance of particular Items.*

“DISCHARGE judgment without prejudice to any question; and instead thereof, Declare that the Plt is entitled to be allowed, in the account hereinafter directed, the sums of £4,000 and £2,000 claimed by him in respect of the bonuses agreed to be paid by the Defts, the co., for the extra despatch, increased expenses, and extraordinary means used and employed in expediting and completing the works of those parts of the railway which are in the pleadings in that behalf mentioned; and the said sums of £4,000 and £2,000 are to be allowed to the Plt in taking the said account accordingly; But also Declare that the Plt is not entitled to be allowed the sum of £1,800, or any part thereof, claimed by him; and is not entitled to any allowance in respect of any loss or damage sustained by delays in giving possession of lands, as in the pleadings mentioned; And Let the following &c., an account of what, if anything, remains due to the Plt in respect of the several

works and matters included in the final account or final bill, and in the accounts of day work, delivered by the Plt to the Defts, the co., as in the pleadings mentioned; and in taking such account any items in the said accounts delivered which may be found to have been settled are not to be disturbed; And Let, for the purposes of such account, all such inquiries be made as may be necessary for the purpose of ascertaining to what, if anything, the Plt and his co-contractors, or the survivor of them, have become entitled, or the Plt is now entitled in respect of accidents or damages arising from mining operations; and what, if anything, the Plt shall be found to be entitled to in respect thereof is to be allowed to him in taking the said account."—Dismiss the action against one of the co-Defts with costs, without prejudice to recovery thereof against the co., and without costs as to other Defts.—All questions of interest and of the other costs reserved.—Adjourn &c.—By consent, fund in Court to be paid out to Defts without prejudice.—Liberty to apply.—[*Add Payment Schedule.*]*—Hill v. South Staff. Ry.*, L.JJ., 21 Jan. 1865, A. 340; S. C., 11 Jur. N. S. 192.

For decree for an account of the landing rents received by Deft for landing coals from the mines of other coal owners, or otherwise, through a shaft constructed for the purpose of working coals, of which the Plt and Deft were tenants in common of undivided moieties; such shaft having been constructed upon land of which Deft was exclusive owner; and an account of what is due in respect of the Plt's share of such rents, with declarations as to the rights of the parties, see *Clegg v. C.*, 3 Giff. 336, V.-C. S., 13 Nov. 1861, A. 2377.

5. Account of Uncommuted Tithes.

LET an account be taken of all sums of money due and owing to the Plt as dean or vicar of B. from the Defts D., K., and N., respectively, in respect of the several dwelling-houses, buildings, and lands, situate within the town and parish of B., in the county of S., occupied by them respectively for or on account of vicarial tithes, dues, and oblations, since the 16th March, 1870, to be calculated at and after the rate of two shillings in the pound of the yearly rent or value of such dwelling-houses, buildings, and lands respectively, deducting twopence for every acre of the lands of such occupiers respectively sown with wheat, and one penny halfpenny for every acre of the lands of such occupiers respectively sown with oats; and so in proportion for a greater or less quantity; And Let the said Defts D., K., and N., respectively, within one month from the date of the Master's certificate of the result of such account, pay to the Plt C. the respective amounts which shall be certified to be due from them, the Plt, by his counsel, waiving all penalties and forfeitures.—Defts D., K., and N. to pay Plt C.'s costs.—Liberty to apply.—*Crake v. Burgess*, V.-C. H., 2 June, 1877, A. 1134.

For decree for account of tithes against several Defts, ordering them respectively to pay what shall be due from them respectively, and the Plt's costs by them generally, see *Edaile v. Peacock*, John. 218.

6. *Leave to inspect Bankers' Books—Ex parte Order, 42 & 43 V.
c. 11, s. 7.*

UPON the application of the Plt, and upon hearing &c. for Plt and Deft, Let the Plt, his solrs and agents, be at liberty at all seasonable times, upon giving reasonable notice, to inspect and take copies of any entries in the books of Messrs. C. & Co., of &c., bankers, relating to the account of A. B. deceased, for the purpose of ascertaining what remittances were made by the said A. B. to the Deft during the years 1878 and 1879; But such order is to be served upon the said Messrs. C. & Co. three clear days before the same is to be obeyed.—*Henry v. Laurell, Hall, V.-C., 27 May, 1880, A. 1169.*

7. *The like Order.*

UPON the application of the Plt &c., It is ordered that the R. E. Bank, Ld. do at all seasonable times on reasonable notice produce at their head office, situate at No. —, — Street, in the City of London, their books containing the accounts of the Deft co., the A. B. F., Ld., and the Deft E. B. respectively as to the Deft E. B., from the 25 Oct. 1884, and as to the Deft co. from the 27 Oct. 1884, the date of the registration of the said co.; And that the applicant be at liberty to inspect and peruse the entries in the said books relative to such accounts, and to take copies and abstracts thereof and extracts therefrom at his expense, the R. E. Bank, Ld., by their counsel, not objecting to this order.—*Arnott v. Hayes, Kekewich, J., 13 June, 1887, A. 894; as altered by S. C., 28 June, 1887, A. 1047; affirmed by C. A., 29 July, 1887; 36 Ch. D. 731.*

8. *Leave to adopt Proceedings in former Action.*

AND in (making the inquiries and) taking the accounts hereby directed any proceedings had and taken in the cause of *Perry-Herrick v. Attwood* are, so far as the same may be applicable, to be adopted if the Judge shall think fit.—*Lloyd v. Attwood, L. JJ., 18 Feb. 1859, B. 1075; and see Moss v. Gregory, M. R., 9 March, 1860, Form 7, inf. p. 1381; Barr v. Willis, V.-C. S., 10 March, 1871, A. 760.*

For form of order continuing proceedings against the represves of an accounting party, *v. sup.* Vol. I., p. 114.

For forms of orders directing additional accounts and inquiries, *v. sup.* Vol. I., p. 193.

NOTES.

SUBMITTING TO ACCOUNT—ACCOUNT AGAINST PLAINTIFF OR CO-DEFENDANT.

The original order sometimes contains a direction for payment of the amount which may be found due. If not, further consideration is adjourned.

By O, XXXIII, 7, directions for accounts are to be numbered, Form 2, *sup.*

Vol. I., p. 317; but where only one account or inquiry is directed this is unnecessary.

It was usual and proper for a claim for an account to contain a submission by the Plt to account himself, and such submission should be recited in the order. The omission of it in the bill did not make it demurrable: *Clarke v. Tipping*, 4 Beav. 588; *Toulmin v. Reid*, 14 Beav. 505; because the submission was implied: *Kennington v. Houghton*, 2 Y. & C. C. 630; or might be made a condition precedent to the making the decree: *Fowler v. Wyatt*, 24 Beav. 237; and after a decree or judgment for account the Plt may always be ordered to pay the sum found due from him where the liability to pay is mutual: *Clarke v. Tipping*, *Toulmin v. Reid*, *sup.*; *Stowell v. Cole*, 2 Vern. 296; *Horwood v. Schmedes*, 12 Ves. 316; and see *Stainton v. Carron Co.*, 24 Beav. 346; but not where the amount found due is not a personal liability on the part of the Plt: *Hollis v. Bulpett*, 13 W. R. 492; 12 L. T. 293; *Bodkin v. Clancy*, 1 Ba. & B. 216. It is for this reason that a Deft could, after an order for an account, revive against the Plt: *Anon.*, 3 Atk. 691; *Stowell v. Cole*, *Horwood v. Schmedes*, *sup.*; and that a writ of *ne exeat* may be obtained against a co-Deft by a Deft in an action for account: *Done's Case*, 1 P. Wms. 263; *Sobey v. S.*, 15 Eq. 200, *et sup.* Vol. I., p. 517.

The judgment should contain a submission by the Plt to account, whether the statement of claim does so or not: *Fowler v. Wyatt*, 24 Beav. 237; and see *Hollis v. Bulpett*, 4 March, 1863, Reg. Min. 187; 13 W. R. 494, *et sup.*, in which neither the bill nor the decree (V.-C. K., 10 Nov. 1862, A. 2361) contained any submission.

The assignee of a patent suing the licensee for an account must put himself in the place of the assignor by offering to pay anything which may be due from the latter: *Bergmann v. Macmillan*, 17 Ch. D. 423.

Under the new practice, the power of making such judgments as may be necessary for doing complete justice is extended by Jud. Act, 1873, s. 24; and by O. XXI, 17, where in any action a set-off or counterclaim is established against the Plt's claim, the Court may give judgment for the Deft if the balance is in his favour.

This, however, applies to the balance which results upon the hearing of the action: *Rolfe v. Maclaren*, 3 Ch. D. 106.

An order for an account cannot (otherwise than on counterclaim) be made against a Plt: *S. C.*, *Toulmin v. Reid*, 14 Beav. 500, 505.

Accounts between co-Defts may be directed in a proper case: *Chamley v. L. Dunsany*, D. P., 2 Sc. & L. 718; but only where a case is made on the pleadings and proved: *Goodwin v. Clewley*, 2 Beav. 30; *Eccleston v. L. Skelmersdale*, 1 Beav. 396.

Declaration of right between co-Defts should be made on further consideration: *Bate v. Hooper*, 5 D. M. & G. 338; and as to declaring rights and determining questions between co-Defts, *v. sup.* Vol. I., p. 165.

PAYMENT INTO COURT.

After a judgment for account, the Deft, upon his admission, or when it has been sufficiently ascertained that a balance is due from him, may be ordered, without certificate, to bring the amount into Court: *London Syndicate v. Lord*, 8 Ch. D. 84; and see *Freeman v. Cox*, *Ib.* 148; but see, *contra*, *Nesbitt v. Baldwin*, 7 L. R. Ir. 134.

And in general, where an account has been rendered, and the Court has before it the parties to the account, and evidence as to items in dispute, the Court will look into the facts of the case, and if, in the fair exercise of its judicial discretion, it can arrive at a conclusion that a sum will be due to the Plt on the taking of the account, it will order payment by the Deft of that amount into Court: *London Syndicate v. Lord*, 8 Ch. D. 84, 90; *Wanklyn v. Wilson*, 35 Ch. D. 180, 186; and see *Porrett v. White*, 31 Ch. D. 52, C. A.; *Dunn v. Campbell*, 27 Ch. D. 254, n.

RIGHT TO ACCOUNT GENERALLY.

By Jud. Act, 1873, s. 34 (3), all causes and matters for taking of partnership or other accounts are assigned to the Ch. Div.

By O. III, 8, in all cases of ordinary account, where the Plt in the first instance desires to have the account taken, the writ of summons is to be indorsed with a claim that such account be taken.

By O. xv, 1, the Plt then, if the Deft fails to appear (*v. sup.* Vol. I., p. 172), or appears but cannot show that there is a preliminary question to be tried, is entitled to an order for the account claimed with all usual directions. By r. 2, such application is to be made in Chambers.

As to the powers of the Court to refer questions of account arising in any cause or matter requiring a prolonged examination of accounts to a special or official referee, *v. sup.* Vol. I., p. 415.

By Jud. Act, 1873, s. 66, accounts may be ordered to be taken in the office of or by a district registrar, and his written report may be acted upon by the Court as to the Court shall seem fit; and as to taking accounts in district registries, see O. xxxv, 13, *sup.* p. 176; and that an official referee is not bound to take accounts and inquiries in the strict way usually adopted before the Master in Chambers, see *Re Taylor, Turpin v. Pain*, 44 Ch. D. 128, *sup.* p. 419.

By O. xxxiii, 2, the Court or a Judge may at any stage of the proceedings in a cause or matter direct any necessary inquiries or accounts to be made or taken, although there is some special or further relief sought for, or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

The rule does not authorize the Court to refer to Chambers the whole of the questions in a cause, but only to direct before trial accounts which would otherwise have been directed at the trial: *Garnham v. Skipper*, 29 Ch. D. 566, C. A.; and see *Blake v. Harvey*, 29 Ch. D. 827, C. A.; *Clover v. Wills and Berkshire B. B. Soc.*, 50 L. T. 382; 53 L. J. Ch. 622; 32 W. R. 895.

In general, a Plt is not entitled to apply by summons for the determination of the question at issue, which will properly be decided at the trial: *Borthwick v. Ransford*, 28 Ch. D. 79.

By O. xxxii, 6, any party may, at any time, apply by motion for such order as he is entitled to upon the admissions in the pleadings: see *Rumsey v. Reade*, 1 Ch. D. 643; *sup.* Vol. I., p. 180.

An admission of the accounting relationship is enough, although Deft allege that the balance is due to him: *Turquand v. Wilson*, 1 Ch. D. 85 (and see *Lockett v. L.*, 4 Ch. 340, *et sup.* Vol. I., p. 87), in which case he may have to pay costs if the balance is found against him: *Fry v. F.*, 10 Jur. N. S. 983.

As to what is a refusal to account, see *Pince v. Beattie*, 11 W. R. 979; 9 Jur. N. S. 1119; 9 L. T. 315.

As to giving leave to defend where there is a question of account, *v. sup.* Vol. I., p. 24.

The taking of accounts having been assigned to the Chancery Division by Jud. Act, 1873, s. 34 (3), cases in which a bill for an account would have lain previously should now be brought in the Chancery Division, and cases (not involving the taking of an account) in which an action at law would have been the proper remedy (as, for instance, actions for debt or a balance due, or for liquidated damages, or mere cases of set-off or cross-demands), may be assigned to any Division of the High Court, including the Chancery Division.

This being so, it will still be desirable to notice the distinctions between the jurisdiction at Law and in Equity under the old practice, except cases (*v. inf.*) in which the only ground for coming into Equity was, that there was some question of equitable rights of which a Court of Law could take no notice (*e.g.*, where there was an equitable set-off), or that some relief which Equity alone could give (*e.g.*, discovery) was required.

Prior to the Jud. Acts, a creditor's usual remedy for a legal debt was at Law, and mere inability to enforce it there did not give a remedy in Equity: *Kirk v. Bromley Union*, 2 Ph. 640, 648; *Crampton v. Varna Ry.*, 7 Ch. 562. Where the remedy was concurrent, the question of transferring the matter into or dealing with it in Equity was one of convenience in each particular case: *Hill v. S. Staff. Ry.*, 11 Jur. N. S. 192; 12 L. T. 63; *Foley v. Hill*, 2 H. L. C. 28; *Shepard v. Brown*, 4 Giff. 208; *Southampton Dock Co. v. Southampton Harb. and Pier Co.*, 11 Eq. 254; and see *S. C.*, 14 Eq. 595.

Suits for account were entertained in Equity where complete justice could

not be done between the parties in one ordinary action at Law: *Foley v. Hill*, 2 H. L. C. 28; *O'Connor v. Spaight*, 1 Sch. & L. 309; see *Dabbs v. Nugent*, 14 W. R. 94; 11 Jur. N. S. 943; 13 L. T. 396; or only by means of an action of account: *Kennington v. Houghton*, 2 Y. & C. C. 620.

The powers given to the Common Law Courts by the C. L. P. Act, 1834, of compelling discovery, granting equitable relief, and of referring matters of account (*v. sup.* p. 416), did not oust the jurisdiction of the Court of Chancery, that Court being provided with machinery enabling it to deal with complicated accounts by its own officers and under its own constant supervision: *Croskey v. Europe, &c. Co.*, 1 J. & H. 108 (where the injunction was granted on the application of some only of the Defts); and see *Edwards-Wood v. Baldwin*, 9 Jur. N. S. 1280; 9 L. T. 474.

A bill for an account would lie in Equity:—

1. Where there were "mutual accounts," by which are meant not where one only of two parties has received money and made payments on account of the other, but where each of two parties has received and paid on account of the other: *Phillips v. P.*, 9 Ha. 473; *N. E. Ry. v. Martin*, 2 Ph. 758; *Padwick v. Hurst*, 18 Beav. 579; *Fluker v. Taylor*, 3 Drew. 191, 192; *Darthez v. Clemens*, 6 Beav. 165 (merchants and their foreign correspondents); *Kennington v. Houghton*, 2 Y. & C. C. 620; and see the decree, *ib.* 630; *Edwards-Wood v. Baldwin*, 9 Jur. N. S. 1280; 9 L. T. 474, in which an action on a bond given as security for what might be due on mutual and unsettled accounts was restrained.

2. Where the accounts although not "mutual" were too complicated to be properly adjusted in a Court of Law, or could only be settled by a multiplicity of actions, or could be better dealt with in Equity: *O'Connor v. Spaight*, 1 Sch. and L. 305, 309; *Kennington v. Houghton*, 2 Y. & C. C. 620 (lessees of farms against their landlords); *Taff Vale Ry. v. Nixon*, 1 H. L. C. 111 (one of two contractors against the railway, and the bankrupt assignee of the other); *McIntosh v. G. W. Ry.*, 2 Mac. & G. 74; 2 Dr. & S. 758; 3 Sm. & G. 146, reviewed in *Scott v. Corp. Liverpool*, 3 D. & J. 364; *Ranger v. G. W. Ry.*, 5 H. L. C. 72 (contractors against railway); *Corp. Carlisle v. Wilson*, 13 Ves. 276 (against owners of stage coach for account of town dues); *Hill v. S. Staff. Ry.*, 11 Jur. N. S. 192; 12 L. T. 263 (contractors against railway); *Kemp v. Rose*, 1 Giff. 258; 4 Jur. N. S. 919; *Kimberley v. Dick*, 13 Eq. 1, *et sup.* p. 1353 (builders against employers); *D. Marlborough's Case*, 1 Bro. P. C. 175; *Harrington v. Churchward*, 6 Jur. N. S. 576; 29 L. J. Ch. 521; 8 W. R. 302 (servant with salary dependent on profits against his master, there being no partnership).

A mere general allegation that the accounts were voluminous and intricate was not sufficient to avoid demurrer: *Padwick v. Hurst*, 18 Beav. 575; *Bliss v. Smith*, 34 Beav. 508. *Secus*, when there was enough to show that the statement was true: *Darthez v. Clemens*, 6 Beav. 165; *S. E. Ry. v. Brogden*, 3 Mac. & G. 8, 22, 23.

In the following cases injunctions to stay actions at law were refused because the accounts were not sufficiently complicated: *Dinwiddie v. Bailey*, 6 Ves. 136 (insurance broker against his principal); *N. E. Ry. v. Martin*, 2 Ph. 758 (a railway against its surveyors and engineers); *S. E. Ry. v. Brogden*, 3 Mac. & G. 8 (a railway and its contractor); *O'Mahoney v. Dickson*, 2 Sch. & L. 400, 410 (tenant against landlord); *Foley v. Hill*, 2 H. L. C. 28; 1 Ph. 399 (customer against banker); *Moses v. Lewis*, 12 Pri. 502 (lessee of colliery against lessor, for account of rent, royalties, and bill transactions); *Ambrose v. Dunmow Union*, 9 Beav. 508 (bankrupt builder's assignees against the employer who, on default of the bankrupt, had completed the work).

3. A bill lay where there was a fiduciary relation between the parties—such as Agency, *inf.* p. 1374; Trusteeship, *sup.* p. 1131 *et seq.*; Solr and Client, p. 1100; Exorship, *inf.* Chap. XLIV., "ADMINISTRATION," pp. 1476, 1477; and see Chap. XLIX., "PARTNERSHIP."

But all agents are not in such a fiduciary relation to their principals: *Foley v. Hill*, 2 H. L. C. 28 (bankers); *Moxon v. Bright*, 4 Ch. 292 (agents for making and selling patented machines).

4. That Plt required discovery, which could not then be obtained at law, was in some cases held to give jurisdiction in equity: *Story*, Eq. J. §§ 455, 458; *Shepard v. Brown*, 4 Giff. 208; and see *Barry v. Stevens*, 31 Beav. 258, 268, *contra*; but this can hardly affect the question now. In the preceding

three classes of cases the action ought now to be brought in the Chancery Division: Jud. Act, 1873, s. 34 (3), *sup.* p. 1356.

5. Where there was fraud. As where the architect, or engineer, and employer colluded against the builder or contractor: *Kimberley v. Dick*, 13 Eq. 1; Form 2, *sup.* pp. 1352, 1353; *Kemp v. Rose*, 1 Giff. 258; 4 Jur. N. S. 919, *et sup.* p. 1353; *Bliss v. Smith*, 34 Beav. 508; *M'Intosh v. G. W. Ry.*, 2 Mac. and G. 74; 2 Dr. & S. 758; 3 Sm. & G. 146; *Ranger v. G. W. Ry.*, 5 H. L. C. 72; but the fact that the engineer was a shareholder was not enough: *S. C.*

In cases within any of the first three classes it would seem that if the action be brought in any other Division it may in general be transferred to the Chancery Division on a Deft's application: Jud. Act, 1873, ss. 34 (3), 36; Jud. Act, 1875, s. 11, *sup.* pp. 827 *et seq.* But it was not in every case in which it would have entertained jurisdiction over the case, if it had been brought into Equity in the first instance, that the Court of Chancery would withdraw it from a Court of Law by stopping an action already commenced: *S. E. Ry. v. Brogden*, 3 Mac. & G. 8, 23; *N. E. Ry. v. Martin*, 2 Ph. 758; *Scott v. Corp. Liverpool*, 3 D. & J. 334, 358.

The Court of Chancery could make a decree for account in an information, at the instance of the Crown, against a subject the paid agent of the Crown: *A. G. v. Edmunds*, 6 Eq. 381; and see *A. G. v. Corp. London*, 8 Beav. 270; 1 H. L. C. 440, 447, 469, 470.

A decree for account in a foreign Court is no bar to a suit here: *Pietroni v. Transatlantic Co.*, 17 L. T. 303.

Several Plts whose rights are adverse cannot join in an action for account: *Ward v. Sittingbourne, &c. Co.*, 9 Ch. 488.

SPECIAL DIRECTIONS—EVIDENCE.

By O. xxxiii, 3, "the Court or a Judge may, either by the judgment or order directing an account to be taken, or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched, and, in particular, may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as *primâ facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised."

Under the Chancery Procedure Act, 1852 (15 & 16 V. c. 86), s. 54 (for which this rule is substituted), special directions were not, in general, given at the hearing, but subsequently on summons in Chambers: *A. G. v. Attwood*, 9 Ha. lvi.; *Hardwick v. Wright*, 15 W. R. 953; though they might be given at the hearing: *Stainton v. Carron Co.*, 24 Beav. 363; or in Court by motion: *Ewart v. Williams*, 7 Dec. 1854, A. 188; 3 Drew. 21; or petition: *Browne v. Collins*, 12 Eq. 586. As to giving directions with reference to settled accounts, *v. inf.* p. 1383. For form of summons, see D. C. F. 612.

Except in partnership cases (as to which *v. inf.* Chap. XLIX., "PARTNERSHIP") a special direction is necessary to make books *primâ facie* evidence of accounts: *Cookes v. C.*, 3 N. R. 97; 9 Jur. N. S. 843; 11 W. R. 871; and see *Newberry v. Benson*, 2 W. R. 648; 23 L. J. Ch. 1003.

The intention is that such special directions as to evidence may be given where vouchers have been lost, or there has been great lapse of time, not where the ordinary evidence can be had, nor merely to save expense: *Lodge v. Prichard*, 3 D. M. & G. 906; *Ewart v. Williams*, 7 D. M. & G. 68.

Trust accounts which had been open to inspection by all the *ca. q. t.*, and examined by some of them, were ordered to be *primâ facie* evidence: *Banks v. Cartwright*, 15 W. R. 417.

Under special circumstances, entries in books, accounts between master and servant, tradesmen and shopmen, and bankers and customers, from necessity and for general convenience, are admitted as evidence for the person who kept them: *Symonds v. Gas Co.*, 11 Beav. 283.

Accounts taken in a suit in Jamaica against the exors, who proved the will there, were ordered to be taken as *primâ facie* evidence in a suit against them here, with leave to Plt to surcharge and falsify: *Sleight v. Lawson*, 3 K. & J. 292.

The Court may give special directions where accounts are ordered against a

person who has been in possession believing himself entitled: *Lupton v. White*, 15 Ves. 443; and with leave to state specially in case of lapse of time, loss of documents or evidence, or other difficulty: *Rouley v. Adams*, 7 Beav. 395, 415; *Re Watts*, 7 Beav. 491; *Alfrey v. A.*, 1 Mac. & G. 87; 10 Beav. 353, 361.

Or where the accounts and vouchers are alleged to be beyond the control of the accounting party: *Turner v. Corney*, 5 Beav. 517; *Kirkman v. Booth*, 11 Beav. 273, 283; *secus*, where it appears that there never were any vouchers: *Stainton v. Carron Co.*, 24 Beav. 346, 361; *et inf.* p. 1380.

As to the provisions of the Bankers' Books Evidence Act, 1879 (42 V. c. 11), in reference to the admissibility of entries in bankers' books as *prima facie* evidence, *v. sup.* Vol. I. p. 111; and for forms, *v.* Vol. I. p. 61, *sup.* p. 1355.

As to the effect of past practice as evidence of an agreement that accounts shall be taken in a particular manner, see *Re Frank Mills Mining Co.*, 23 Ch. D. 52, C. A.

As to special directions for taking accounts by the Court of Chancery in Ireland, see 30 & 31 V. c. 44, s. 159; *Alford v. Clay*, Ir. Rep. 9 Eq. 219.

At the original hearing the Court generally confines itself to determining whether an account ought to be directed, and what, if any, special directions ought to be given for taking the account: *Hill v. S. Staff. Ry.*, 11 Jur. N. S. 193.

It does not, as a rule, deal with or admit evidence on any questions except so far as required for deciding on the right to an account, *v. sup.* Vol. I. p. 87, and will not do anything which will have the effect of taking the account in part: *Hornby v. Hunter*, 1 Russ. 89; 5 Russ. 149; *Law v. Hunter*, 1 Russ. 102; *Walker v. Woodward*, 1 Russ. 110; *Tomlin v. T.*, 1 Ha. 236, 248; but can do so where necessary, and if the particular items are put forward in the pleadings: *Hill v. S. Staff. Ry.*, 11 Jur. N. S. 192, 193; 12 L. T. 63; *Smith v. Wilkinson*, L. C., 9 Feb. 1798, B. 363; *Abbey v. Fetch*, 6 Jur. 433; 11 L. J. Ch. 124; 1 Y. & C. C. C. 258; and see the decree in *Joy v. Campbell*, 1 Sch. & L. 347; 3 Bli. N. S. 110, 111.

Plt was bound to state specifically the errors on which he relied in the accounts rendered by the Deft, his agent: *Shepherd v. Morris*, 4 Beav. 252; and could not at the hearing give any evidence as to particular errors not so stated: *Forsyth v. Ellice*, 2 Mac. & G. 209; and see *Hill v. S. Staff. Ry.*, 11 Jur. N. S. 192; 12 L. T. 63; *et sup.* pp. 1353, 1354; nor before the hearing require discovery as to particular items not relevant to the question then to be decided—the right to call for an account: *Adams v. Fisher*, 3 My. & C. 526, as explained by Wigram, V.-C., in *A. G. v. Thompson*, 8 Ha. 115; *Tomlin v. T.*, 1 Ha. 236.

By O. xxxiii, 4A, "upon the taking of any account, the Court or a Judge may direct that the vouchers shall be produced at the office of the solicitor of the accounting party, or at any other convenient place, and that only such items as may be contested or surcharged shall be brought before the Judge at Chambers." As to the object of this rule, see *Re Fish*, *Bennett v. B.*, (1893) 2 Ch. 413, 427, C. A.

WILFUL DEFAULT.

A bailiff at Common Law was answerable for what he might have made of the lands but for his wilful default. But a tenant in common (who when he had received more than his share was liable, under 4 & 5 A. c. 16, s. 27, to an action of account by his co-tenant) was not answerable for wilful default: *Wheeler v. Horne*, Willes, 208.

In giving an account of rents and profits against a deceased steward and agent, and his surviving partner, also his exor, where losses had occurred through his sub-agents, the account was to embrace what "without their wilful default might have been received thereout": *E. Abingdon v. Way*, 29 Jan. 1787, A. 697.

In what cases, and under what circumstances, and in what form and stage of the proceedings, parties are liable to account, as for wilful default, *v. sup.* pp. 1162 *et seq.*, Chap. XLIV., "ADMINISTRATION," and Chap. XLVII., "MORTGAGES."

As to account between tenants in common of coal mines, &c., see *Clegg v. C.*, 3 Giff. 322; 10 W. R. 75, *et sup.* p. 1354; *Job v. Potton*, 20 Eq. 84; and

that one tenant in common of a house who expends money in ordinary repairs has no right of action against his co-tenant for contribution, see *Leigh v. Dickeson*, 15 Q. B. D. 60, C. A.; *Hill v. Hickin*, (1897) 2 Ch. 579; and that there is no fiduciary relation between tenants in common of land prohibiting one from acquiring an outstanding incumbrance for his own benefit, see *Kennedy v. De Trafford*, (1896) 1 Ch. 762, C. A.; and one co-patentee cannot call on the other for an account of profits made by him by working the patent or using the invention in his business: *Steers v. Rogers*, (1893) A. C. 232; and so in the case of co-owners of a secret process: *Heyl-Dia v. Edmunds*, 81 L. T. 579; 48 W. R. 167.

Losses occasioned by the agent's neglect of duty may be set off against him: *G. W. Ins. Co. v. Cunliffe*, 9 Ch. 525; and an agent charging premiums on insurances not effected may, after a loss happens, be charged as himself the insurer: *Tickel v. Short*, 2 Vez. 239; and of course, where no loss has occurred, the amount of premiums is disallowed: *Clarke v. Tipping*, 9 Beav. 284.

PROCEEDING UNDER THE ORDER.

As to bringing the judgment or order into Chambers and prosecuting it, see O. LV, 32.

By O. LV, 33, on a copy of the judgment or order being left, a summons to proceed is to be issued, upon the return of which the Judge, all necessary parties having been served with notice of the judgment or order, is to give directions as to the manner of taking each account, the evidence in support thereof, the parties to attend, and the time within which each proceeding is to be taken, and a day or days may be appointed for the further attendance of the parties, and all such directions may afterwards be varied or added to as may be found necessary.

By O. XXXIII, 2, the Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

For forms of orders directing additional accounts and inquiries, *v. sup.* p. 193.

Such further accounts must not be inconsistent with the judgment: *Partington v. Reynolds*, 4 Drew. 253; 6 W. R. 388, *et sup.* p. 1162; nor such as to vary the account itself, as by directing annual rests: *Nelson v. Booth*, 3 D. & J. 120; 6 W. R. 845.

For form of account and affidavit verifying it, see D. C. F. 597.

By O. LV, 19, the Judge in Chambers may, in such way as he thinks fit, obtain the assistance of accountants, &c.: *v. sup.* p. 324; but they are not the officers of the Court: *Re Agricult. Cattle Co.* 7 Jur. N. S. 590; 9 W. R. 682.

The bankruptcy rule as to their scale of charges was adopted in Chambers: *Meymott v. M.*, 33 Beav. 590.

By O. XXXIII, 4, the accounting party is, unless the Judge otherwise directs, to make out his account, and verify the same by affidavit, and the items are to be numbered, and the account referred to by the affidavit as an exhibit, and left at Chambers.

By r. 5, any party seeking to charge him beyond what is so admitted, is to give him notice, stating, so far as he is able, the amount sought to be charged, and the particulars, shortly and succinctly.

By O. LV, 68, the Master's certificate is to state the result of the account, not set it out by schedule, but refer to it, verified by the affidavit filed, and specify, by the numbers of the items, those disallowed or varied, and state any additions by surcharge, and to refer to the fair transcript, if any, and it and the accounts are to be filed, but copies need not be taken. For forms of Master's certificates, see R. S. C., Appx. L. *et sup.* p. 331.

The principle of the account may be settled on motion: *Robertson v. Norris*,

1 Giff. 428, 433; or upon petition: *Broune v. Collins*, 12 Eq. 586; or adjourned summons: *Riehton v. Grissell*, 5 Eq. 326.

The accounting party is liable to be cross-examined on his affidavit, but is entitled to notice of the particular items and points on which he is to be cross-examined: *Wormsley v. Sturt*, 22 Beav. 398; *Re Lord*, 2 Eq. 605; even before the account is vouched: *Meacham v. Cooper*, 16 Eq. 102; and a general notice that all items but one were objected to was not sufficient: *McArthur v. Dudgeon*, 15 Eq. 102.

This rule applies equally where the account is brought in by Plt seeking to charge Deft: *Bats v. Eley*, 1 Ch. D. 473.

It is competent for the Judge to adopt a practice in Chambers excluding further evidence by a party after cross-examining on the evidence on the other side: *Re Davies, Issard v. Lambert*, 44 Ch. D. 253, C. A.

The accounting party may also, by leave of the Court, be interrogated: *Alfrey v. A.*, 12 Beav. 292; and now see O. xxxi, 1. A Deft who had omitted all receipts and payments for a certain period, during which Plt proved he had received moneys, could not bring in additional accounts, or give evidence of payments in discharge: *Maddeford v. Austwick*, 11 Sim. 209; and after the evidence has been completed, further evidence can only be allowed under special circumstances: *Winpenny v. Courtney*, 5 Sim. 554; *Parker v. Peet*, 1 Dr. & S. 217; nor can there be any cross-examination after the certificate has been approved by the Judge: *Darwins v. Morton*, 10 W. R. 339.

The Master's certificate must show what sums he has allowed and what he has disallowed, so that the judgment of the Court may be taken on any particular item in it: *Mackintosh v. G. W. Ry.*, 1 D. J. & S. 443; but the certificate can only be varied on the ground of clear mistake, or for reasons sufficient for setting aside the verdict of a jury: *S. C.*, 6 N. R. 336.

The account may be carried on as long as the suit is depending between the parties: *Bell v. Read*, 3 Atk. 592; *Barfield v. Kelly*, 4 Russ. 359.

Though judgments for account do not contain future words, sums received after judgment must be accounted for: *Bulstrode v. Bradley*, 3 Atk. 582.

The Master may state special circumstances without a direction for that purpose: *Williamson v. Jeffreys*, 9 Ha. lvi.

Leave being given by consent to submit to arbitration any questions on the account, the Court gave the Master leave to adopt the conclusions, but would not, even by consent, make it compulsory: *Scale v. Fothergill*, 8 Beav. 361.

As to the principles to be adopted in working out an inquiry as to damages by unlawful detention where the judgment is varied, but the inquiry allowed to stand, see *Dreyfus v. Peruvian Guano Co.*, 43 Ch. D. 316, C. A., and as to whether in such a case the inquiry can be satisfied by giving nominal damages, see *S. C.*

As to the principles applicable where a Plt sues a Deft in this country for an account upon a contract to pay in a foreign currency, see *Manners v. Pearson*, (1895) 1 Ch. 581, C. A., where the account being directed in respect of continuous transactions Plt was not entitled to have the foreign currency turned into English money until the balance due on the whole account was ascertained.

For the mode of prosecuting and acting on the result of accounts and inquiries in Chambers, *v. sup.* pp. 328 *et seq.*

As to accounts against executors, *v. inf.* Chap. XLIV., "ADMINISTRATION."

ALLOWANCES.

By O. xxxiii, 8, "in taking any account directed by any judgment or order all just allowances shall be made without any direction for that purpose."

Formerly decrees directed that in taking the account all just allowances should be made.

The Court will not usually determine, in the first instance, what is a just allowance: *Brown v. De Tastet*, Jac. 294; but see *Cook v. Collingridge*, Jac. 621, 623; *E. 1. Co. v. Keighley*, 4 Madd. 23.

In a suit against a solr as steward or agent, he could not have costs

taxed and set off as just allowances: *Joliffe v. Hector*, 12 Sim. 398; *Waters v. Shaftesbury*, 2 Ch. 231; 14 W. R. 572; Form 4 and note, *inf.* p. 1372.

In *E. I. Co. v. Keighley*, 4 Madd. 23, an allowance was to be made for loss through exchange of Sicca for Sonant rupees.

As to allowances in account between mortgagor and mortgagee, *v. inf.* Chap. XLVII., "MORTGAGES"; and as to trustees' allowances, *v. sup.* p. 1173.

As to allowances in taxation of costs, *v. sup.* Vol. I. pp. 258 *et seq.*

SET-OFF.

Procedure.—By O. XIX, 3, "a Deft in an action may set off, or set up, by way of counter-claim against the claims of the Plt, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a Judge may, on the application of the Plt before trial, if in the opinion of the Court or Judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the Deft to avail himself thereof."

The rule is only a rule of procedure, and does not alter rights: *Mersey Steel and Iron Co. v. Naylor*, 9 Q. B. D. 648, C. A.; *S. C.*, 9 App. Ca. 434; *Pellas v. Neptune Marine Ins. Co.*, 5 C. P. D. 34, C. A.; *Re Milan Tramways Co.*, *Exp. Theys*, 22 Ch. D. 122; *S. C.*, 25 Ch. D. 587, C. A.

Thus, in answer to a claim for loss on a marine policy, a claim to set off a debt is no more a "defence," under 31 & 32 V. c. 86, s. 1, than it was before the rule was made: *Pellas v. Neptune Marine Ins. Co.*, *sup.*

But, under sect. 10 of the Jud. Act, 1875, applying the rule in bankruptcy to the winding-up of cos. and admon of insolvent estates, rights are affected as well as procedure: *v. inf.* Chap. XLIV., "ADMINISTRATION."

A Deft may set up separate counter-claims for damages against several Plts if they can be conveniently disposed of in the action: *Manch. &c. Ry. v. Brooks*, 2 Ex. D. 243.

Under the old practice, a client could set off against his solr a claim for negligence: *Piggott v. Williams*, 6 Madd. 95; where it went directly to impeach the solr's demand: *Russon v. Samuel*, Cr. & P. 180; but in general an unsettled claim or amount could not be set off against an ascertained debt: *S. C.*

By O. XXI, 10, a Deft seeking to rely upon any facts as supporting a right of set-off or counter-claim, must, in his statement of defence, state specifically that he does so by way of set-off or counter-claim: see *Rolfe v. Maclaren*, 3 Ch. D. 106.

A third party properly brought in is entitled to set up against the Plt any defence which would have been available to the Deft: *Cullender v. Wallingford*, 53 L. J. Q. B. 569; 32 W. R. 491.

Equitable rights of Deft will be given effect to, though not raised by counter-claim: *Eyre v. Hughes*, 2 Ch. D. 148; *Breslauer v. Barwick*, 24 W. R. 901; 36 L. T. 52.

A doubtful question of set-off should be made the subject of a special inquiry: *Lord v. Wightwick*, 2 Ph. 110.

Right of Set-off generally.—Equitable set-off was derived from the civil law: *Freeman v. Lomas*, 9 Ha. 109; *Middleton v. Pollock*, *Exp. Nugee*, 20 Eq. 34; and was exercised long before any legislation on the subject: *Exp. Stephens*, 11 Ves. 27; *Peat v. Jones*, 8 Q. B. D. 147.

Set-off at law was founded on statutes: see 2 G. II., c. 22; 8 G. II., c. 24; 23 & 24 V. c. 126 (C. L. P. Act, 1860), s. 20, as to which see Chit. Stat., tit. "Set off;" *Smith v. Hodson*, *Rose v. Hart*, 2 Sm. L. C. 143, 288.

A Deft cannot set off a debt which is not actionable, such as a statute-barred debt: *Remington v. Stevens*, 2 Str. 1271; *Francis v. Dodsworth*, 4 C. B. 202; 9 G. IV. c. 14, s. 4; or an infant's debt: *Rawley v. R.*, 1 Q. B. D. 460, C. A.; and see *Rhymney Railway Co. v. Rhymney Iron Co.*, 25 Q. B. D. 146, C. A.; but a debt which is due before but not payable until

after, notice of assignment may be set off: *Christie v. Taunton, &c. Co.*, (1893) 2 Ch. 175; and as to set-off in respect of sums wrongly credited in account, see *Daniell v. Sinclair*, 6 App. Ca. 181, referring to *Skyring v. Greenwood*, 4 B. & C. 281.

Limitations on Right: Claims en autre droit.—Set-off rests on personal demand on both sides: *Jenner v. Morris*, 7 Jur. N. S. 375; 9 W. R. 29, 391; and there is no set-off if the claims are in different rights: *Gale v. Luttrell*, 1 Y. & J. 180; *Stammers v. Elliott*, 3 Ch. 199; *Exp. Morier, Re Willis, Percival & Co.*, 12 Ch. D. 491, C. A. And this is the same under the new practice: *Newell v. Nat. Prov. Bk. of E.*, 1 C. P. D. 496.

Thus an admor could not set off a debt due to him personally against a legacy: *M'Mahon v. Burchell*, 2 Ph. 127; and other cases, *inf.* "ADMINISTRATION," Chap. XLIV. For the same reason there is no set-off between a debt to a testator's estate arising after his death and one due before his death: *Shipman v. Thompson*, Willes, 103, and cases there cited; *Bishop v. Church*, 3 Atk. 691; *Re Gregson, Christison v. Bolam*, 36 Ch. D. 223; *Newell v. Nat. Prov. Bk. of E.*, 1 C. P. D. 496; nor can a creditor of an intestate, purchasing part of his goods from the admor, set off his debt against the purchase-money: *Lambarde v. Older*, 17 Beav. 542; nor a mortgagee of a policy having, after the mortgagor's death, received the policy money in satisfaction of the mortgage, retain any balance in respect of a simple contract debt due to him by the deceased: *Re Gregson, Christison v. Bolam*, 36 Ch. D. 223; following *Tulbot v. Frere*, 9 Ch. D. 568; and disapproving *Re Haselfoot*, 13 Eq. 327; *Exp. National Bank*, 14 Eq. 507; *Spalding v. Thompson*, 26 Beav. 637; nor a Plt set off costs which he has been ordered to pay to exors personally against a debt due to him from their testator's estate: *Re Dickinson, Marquis of Bute v. Walker*, W. N. (88) 94; nor a person taking a transfer of a mortgage a sum due from him to the solr of the transferor, who holds the executed transfer expressing that the money has been paid: *Coupe v. Collyer*, 62 L. T. 927; and to an application by an exor, respondent to an appeal, for security for costs, it is no answer that a sum for costs is due from his testator's estate to the appellant: *Re Knight, K. v. Gardner*, 38 Ch. D. 108, C. A.

Nor can the exor (also a residuary legatee) of A. set off a debt due from B. to A.'s estate against one due by the exor to B.: *Bishop v. Church*, 3 Atk. 691; *Middleton v. Pollock, Exp. Nugee*, 20 Eq. 29; unless he has, by division of the estate or otherwise, become entitled to treat the residue as his beneficially as well as in the character of exor: *Jones v. Mossop*, 3 Ha. 568, 575; *Bailey v. Finch*, L. R. 7 Q. B. 34; so that a Court of Equity, if some other person were exor, would, without any terms, or any further inquiry, compel such other person to transfer to the beneficiary: *Exp. Morier, Re Willis, Percival & Co.*, 12 Ch. D. 491, C. A.; Lewin, 853.

And as a pension payable to a retired incumbent, under the Incumbents' Resignation Act, 1871, is not a debt due from his successor, though recoverable as such, nor transferable either at law or in equity, a judgment debt, due from the retiring incumbent to his successor, cannot be set off by the latter against arrears of the pension: *Gathercole v. Smith*, 17 Ch. D. 1, C. A.; nor can such judgment debt be pleaded by way of counter-claim: *Gathercole v. Smith*, 7 Q. B. D. 628, C. A.; but see the Incumbents' Resignation Act, 1887 (50 & 51 V. c. 23), s. 6, under which a set-off of such a pension against a sum due for dilapidations may now be made to the extent of one half the year's pension, or more with the consent of the bishop.

Nor can a debt due to A. from a trader, who makes a general assignment to trustees to carry on his trade for the benefit of creditors, be set off against claims of the trustees upon A., arising out of transactions subsequent to the assignment: *Hunt v. Jessel*, 18 Beav. 100.

There is no set-off between a debt due from A. and one payable to the trustees of A.'s settlement: *Jenner v. Morris*, 6 W. R. 29; 2 N. R. 479. As to whether it is different in the case of one payable to trustees for A. absolutely, see *Middleton v. Pollock, Exp. Nugee*, 20 Eq. 29, 36. There was none at law: *Isberg v. Bowden*, 8 Ex. 852; *Holmes v. Tutton*, 5 E. & B. 65; 2 Sm. L. C. 401; 9th ed. 437. But a trustee's rights as mortgagee of the trust estates or of the interest of one c. q. t. in it are liable to set-off for any sums due by him as trustee: *Dodd v. Lydall*, 1 Ha. 333; and for instances of the principle that a trustee can take nothing from the trust estate until

he has made good to the estate his own debt or default, *v. sup.* p. 1134. Advances by tenant for life (A.) to B., a bankrupt, could be set off against debts to B. charged on the estate, but for which A. was not personally liable: *Baillie v. Edwards*, 2 H. L. C. 74; and where trust moneys were paid by a customer into a bank, but the bank had no notice of the trust, they could set off a claim of their own: *Union Bank of Australia, Ltd. v. Murray Aynsley*, (1898) A. C. 693, P. C.; but sums which insurance brokers have received since the bankruptcy of their customer, an underwriter, as salvage in respect of losses paid by him before the bankruptcy being in the nature of trust moneys are part of the bankrupt's estate, and not subject to set-off in their hands: *Elgood v. Harris*, (1896) 2 Q. B. 491.

After an admon order, rights of set-off cannot be altered by assignment: *Middleton v. Pollock, Exp. Nugee*, 20 Eq. 29, 33.

In a partition action the mortgagee of a share was not affected by a set-off against his mortgagor in respect of an occupation rent chargeable against the latter: *Hill v. Hickin*, (1897) 2 Ch. 579.

The cost of an action at law and suit for discovery in equity could not be set off: *Wright v. Mudie*, 1 S. & S. 266; and as to set-off of costs generally and the effect of the solr's lien in preventing such set-off, *v. sup.* pp. 266, 1095.

In general, a joint debt could not be set off against a separate debt, nor a separate debt against a joint one, either at law (*Grant v. Roy. Ex. Assur. Co.*, 5 M. & S. 439; *Morley v. Inglis*, 4 Bing N. C. 58; *France v. White*, 6 Bing N. C. 33; *Vulliamy v. Noble*, 3 Mer. 618; but see *Standeven v. Murgatroyd*, 27 L. J. Ex. 425; *Cochrane v. Green*, 9 C. B. N. S. 448) or in equity: *Middleton v. Pollock, Exp. Knight*, 20 Eq. 515; *Bowyear v. Pawson*, 6 Q. B. D. 540; unless the joint debt was merely a security for the separate one: *Exp. Hanson*, 12 Ves. 346; 18 Ves. 232; 1 Rose, 156.

As to set-off by and against partners, *v. Chap. XLIX.*, "PARTNERSHIP," Lindl. 299 *et seq.*

Set-off in bankruptcy is now regulated by the Bankruptcy Act, 1883, s. 38: see Lindl. 671 *et seq.*; *Lee & Wace*, 209 *et seq.*; *Thornton v. Maynard*, L. R. 10 C. P. 695; *Palmer v. Day and Sons*, (1895) 2 Q. B. 618; *Watkins v. Lindsay*, W. N. (98) 22; *Re Daintrey*, (1900) 1 Q. B. D. 546, C. A.

Winding-up of Co.—The Cos. Act, 1862, s. 101, governs set-off between a co. being wound up and its contributories: see Buckley, 313 *et seq.*; *Barnett's Case*, 19 Eq. 449; and as to the right of set-off by the co. against the assignees of debentures, see *James' Case*, 8 Eq. 225; *Lishman's Claim*, 23 L. T. 40.

The effect of sect. 10 of the Jud. Act, 1875, is to make the rule in bankruptcy as to debts and liabilities provable, and the mode of proving them, applicable to cos. which are being wound up: *Mersey Steel and Iron Co. v. Naylor*, 9 App. Ca. 434; 9 Q. B. D. 648, C. A.; so that unliquidated damages due from the co. for breach of contract may, in accordance with the practice in bankruptcy, be set off against payments due under the contract to the co.: and see *Peat v. Jones*, 8 Q. B. D. 147, C. A., and *Jack v. Kipping*, 9 Q. B. D. 113, where set-off was allowed in respect of fraudulent representation made on the sale of a chattel; and *Palmer v. Day and Sons*, (1895) 2 Q. B. 618, where, under sect. 38 of the Bankruptcy Act, 1883, the deposit of pictures with authority to sell them and receive the proceeds was held to constitute a giving of credit by the depositor to the depositors.

But the section has not affected the rule precluding a contributory from setting off a judgment debt due to him by the co. against calls in the winding-up: *Re General Works Co., Gill's Case*, 12 Ch. D. 755; *Re Pyle Works*, 44 Ch. D. 534, C. A.; *Hoby v. Birch*, 59 L. J. Q. B. 247; 62 L. T. 404 (the case of a voluntary winding-up); and see *Re Auriferous Properties, Ltd.*, (1898) 1 Ch. 691; *S. C.*, No. 2, (1898) 2 Ch. 428; and the price of goods (not specific) sold by the co. before, but not delivered until after, the commencement of the winding-up, cannot be set off against an antecedent debt due to the co. from the purchaser: *Ince Hall, &c. Co. v. Douglas Forge Co.*, 8 Q. B. D. 179.

Sect. 75 of the Cos. Act, 1862, does not convert a shareholder's liability to contribute into a debt *ab initio*, but only from the time of the winding-up, and therefore there can be no set-off by the co. in respect of a call made in the

winding-up as against an assignee who gave notice to them before the winding-up: *Christie v. Taunton, &c. Co.*, (1893) 2 Ch. 175.

A director of a co. cannot set off a debt due to him by the co. against his liability for breach of trust: *Re Anglo-French Co-operative Soc.*, 21 Ch. D. 492, C. A.; *Flitcroft's Case*, 21 Ch. D. 549, C. A.; or on qualification shares wrongfully accepted by him from the promoter: *Re Carriage Co-operative Supply Assoc.*, 27 Ch. D. 322.

In applying the rule in bankruptcy under sect. 38 of the Bankruptcy Act, 1883, the line is drawn at the time of the winding-up, and the rights of parties are not to be varied by subsequent transactions: *Re Milan Tramways Co., Exp. Theys*, 25 Ch. D. 587, C. A.; *Re Gillespie, Exp. Reid & Co.*, 14 Q. B. D. 963; *Elliott v. Turquand*, 7 App. Ca. 79.

But sect. 38 is only applicable where the claims on each side are such as result in pecuniary liability: *Eberle's Hotel and Restaurant Co. v. Jonas*, 18 Q. B. D. 459, C. A.; and there must be mutuality, and therefore a set-off cannot be established in the winding-up of a co. against a balance of the co.'s moneys retained by the payee, after answering specified purposes, unless he can show that it was retained with the consent of the co.: *Re Mid-Kent Fruit Factory*, (1896) 1 Ch. 567.

A mortgage *intra vires* of uncalled capital cannot be treated as a mere grant of a right of set-off: *Re Pyle Works*, 44 Ch. D. 534, C. A.

As to the effect of sect. 25 of the Cos. Act, 1867 (30 & 31 V. c. 131), now repealed by the Cos. Act, 1900 (63 & 64 V. c. 48), s. 33 (see Buckley, Supplement, 42), requiring payment of shares "in cash," on the right of set-off as between the co. and the shareholders, see Buckley, 600; *Re Jones, Lloyd & Co.*, 41 Ch. D. 159.

Equitable Set-off.—Set-off was allowed in equity:—

Between a judgment debt due to a husband who had deserted his wife and advances made to her for necessaries: *Jenner v. Morris*, 3 D. F. & J. 45; 9 W. R. 29, 391; 7 Jur. N. S. 375; and between a bond debt and a debt due from an assignee of the bond: *Cavendish v. Geaves*, 24 Beav. 163, 173; 5 W. R. 615; and between a debt due from A. and a debt due to B. upon a simple trust for A. absolutely: *Exp. Morier, Re Willis, Percival & Co.*, 12 Ch. D. 491, C. A.; *Bailey v. Finch*, L. R. 7 Q. B. 34; *Bailey v. Johnson*, L. R. 6 Ex. 279; 7 Ex. 263. See now Jud. Act, 1873, s. 25 (6), *sup.* Vol. I. p. 503; and where there was anything from which an agreement for set-off could be implied: *Jeffer v. Wood*, 2 P. Wms. 128; *Whitaker v. Rush*, Amb. 407; from the mode of keeping the account: *Laing v. Campbell*, 36 Beav. 3; or from mutual credit being given: Story, Eq. 1436; and where the person seeking set-off contracted the joint debt in ignorance of the debt against which it is sought to be set off: *Exp. Stephens*, 11 Ves. 24, as explained in *Middleton v. Pollock, Exp. Knight*. 20 Eq. 519. But fraud is no ground of set-off: *S. C.*

And see further as to equitable set-off, Story, Eq.

Where there were cross demands, one of which was equitable, but which, if both had been legal, would have been subject of set-off, equity enforced the set-off: *Clark v. Cort*, Cr. & P. 154; and see *Alcoy & Gandia Ry. Co. v. Greenhill*, 76 L. T. 452; but the mere existence of cross demands is not enough; the party seeking the benefit of set-off must show some equitable ground for being protected against his adversary's claim: *Rawson v. Samuel*, Cr. & P. 178; *Fisher v. Baldwin*, 11 Ha. 352; *Middleton v. Pollock, Exp. Nugee*, 20 Eq. 36.

A mortgagee purchased the mortgaged estate, and took possession, but did not pay the purchase-money; after several years an agreement was presumed to set off the purchase-money against the mortgage at the time possession was taken: *Wallis v. Bastard*, 4 D. M. & G. 251.

Assignee, how affected by Set-off.—An assignee of a chose in action "takes subject to all rights of set-off and other defences which were available against the assignor, subject only to this exception, that after notice of assignment the debtor cannot, by payment or otherwise, do anything to take away the rights of the assignee as they stood at the time of the notice": *Roxburghe v. Cox*, 17 Ch. D. 520, C. A., per James, L. J. (in which case assignees of an officer's commission took subject to the army agent's right of set-off).

An equitable set-off was enforced against a judgment at law: *Smith v. Parkes*, 16 Beav. 115.

In an action by an assignee of a policy of marine insurance the insurers cannot set off a debt incurred by them with the assured after the assignment: *Pellas v. Neptune Marine Ins. Co.*, 5 C. P. D. 34, C. A.; but a claim for unliquidated damages may be set off against an assignee if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment: *Government of Newfoundland v. Newfoundland Ry. Co.*, 13 App. Ca. 199; and see *Peat v. Jones*, 8 Q. B. D. 147.

A landlord is not entitled, as against the tenant's trustee in liquidation, to set off rent accrued due before the appointment of the trustee against allowances due to him as continuing tenant for tillages, on the expiration of the lease: *Alloway v. Le Steere*, 10 Q. B. D. 22.

Sect. 25, sub-sect. 6, of the Jud. Act, 1873, conferring powers of assignment of debts and choses in action, does not prevent the ultimate assignee from suing in the name of the original creditor free from any equities which attach only on the intermediate assignee; where, therefore, a debt proved against a co. was assigned by A. to B., and by B. to C., the liquidator could not set off against C. a debt due to the co. by B.: *Re Milan Tramways Co., Exp. Theys*, 25 Ch. D. 587, C. A.

In bankruptcy, in cases of mutual dealings (which are ascertained as at the date of the receiving order, see *Re Daintrey*, (1900) 1 Q. B. 546, C. A.) the title of the trustee in bankruptcy to money credited in account does not accrue until the holder of the money has notice of the act of bankruptcy, and therefore a right of set-off accruing to him before such notice is given is available against the trustee: *Elliott v. Turquand*, 7 App. Ca. 79.

Notice of the existence of debentures constituting a floating security, is not such notice of an assignment as to prevent a set off against the co. from binding the debenture holders: *Biggerstaff v. Rowatt's Wharf, Ltd.*, (1896) 2 Ch. 93, C. A. A set-off between co. and registered holder of debentures prevailed over an equitable deposit of the debentures: *Re Smith & Co.* (1901), 1 I. R. 73.

As to the right of an exor or admor to set off a legacy, or the share of a next of kin indebted to the estate, against the debt, though statute-barred, see Chap. XLIV., "ADMINISTRATION."

Principal and Agent.—A person who buys goods from an agent as a principal, not knowing him to be an agent, may set off a debt due to him from the agent against the price of the goods: *George v. Clagett*, 7 T. B. 359; *Borries v. Imp. Ottoman Bank*, L. R. 9 C. P. 38; although he had means of knowing the agency: *S. C.*; and though the agent acted contrary to his instructions in not disclosing the agency: *Exp. Dixon, Re Henley*, 4 Ch. D. 133; and see *Thackeray v. Ferguson*, 25 W. R. 307; *Stevens v. Biller*, 25 Ch. D. 31, C. A.

But the rule does not apply where the person dealing with the agent knows that he has a principal whose name is not disclosed: *Maspons v. Mildred*, 9 Q. B. D. 530, C. A.; *S. C., nom. Mildred v. Maspons*, 8 App. Ca. 874; and such a sub-agent insuring the goods consigned to him for sale on behalf of all parties, has no lien on the policy moneys except for his charges in respect of the insurance: *Ibid.*

And the mere fact that the agent sold in his own name is not sufficient, if the circumstances attending the sale were not such as to induce in the mind of the buyer a reasonable belief that the agent was selling on his own account; and where the buyers knew that the sellers were in the habit of selling both for principals and on their own account, and had no belief on the subject whether they made the particular contract on their own account or not, the set-off could not be sustained as against the actual principal: *Cooke v. Eshelby*, 12 App. Ca. 271.

And in general a man dealing with an agent knowing or having reason to believe that he is an agent, must inquire as to the extent of his authority, and if he does not, may be taken to be affected with knowledge of it: *Sheffield v. London Joint Stock Bank*, 13 App. Ca. 333; *Levy v. Richardson*, W. N. (89) 25; *Jacobs v. Morris*, (1901) 1 Ch. 261.

And, on the other hand, a person who clothes an agent with apparent general authority, but restricts it by secret instructions, is bound, if the other party chooses to hold him so, to one who, in ignorance of the restrictions, contracts on the faith of the agent having the authority which he seems to have: *Miles v. M'Ivorath*, 8 App. Ca. 120; *Freeman v. Cooke*, 2 Ex. 654, 663; *Montaignac v. Shitta*, 15 App. Ca. 357.

A sub-agent selling goods for a factor, and having notice before the goods are delivered and the price paid that the goods are the property of the factor's principal, cannot retain the price in discharge of a general balance due to him from the factor and not protected under the Factors Acts: *Kaltenbach v. Lewis*, 10 App. Ca. 617; but if the notice is not given until after the retainer has been *bond fide* effected, the money cannot be followed, as the broker is not in a fiduciary position towards the ultimate principal: *New Zealand, &c. Co. v. Watson*, 7 Q. B. D. 374, C. A.

But a sub-agent who believes, and is justified in believing, that his employer is a principal can set off as against the real principal: *Montagu v. Forwood*, (1893) 2 Q. B. 350, C. A.

As to agents and brokers being personally liable, and customs of trade affecting their liability, see *Humsfrey v. Dale*, 7 E. & B. 266; E. B. & E. 1004; *Cropper v. Cook*, L. R. 3 C. P. 194; *Fleet v. Merton*, L. R. 7 Q. B. 126; *Hutchinson v. Tatham*, L. R. 8 C. P. 482.

As to election to treat the agent as the debtor after the undisclosed principal has been discovered, see *Calder v. Dobell*, L. R. 6 C. P. 486; *Curtis v. Williamson*, 10 Q. B. 57; and that in order to discharge a principal from his liability for a debt contracted by his agent, the principal must show that the creditor has misled him, to his prejudice, into believing that the creditor was giving exclusive credit to the agent, and that mere delay in enforcing payment from the agent will not suffice, see *Davison v. Donaldson*, 9 Q. B. D. 623, C. A.; *Irvine v. Watson*, 5 Q. B. D. 102, 414.

A. abroad, having directed B. in England to treat all consignments to B. as belonging to A.'s son in England, and to act entirely under his guidance, it was held that an agreement between B. and the son to set off a debt due by B. to A. against one due from B. to the son bound A.: *Pariente v. Lubbock* 20 Beav. 589; 8 D. M. & G. 8.

As to an agent's power to settle accounts and pay money, see *Pole v. Leask*, 6 Jur. N. S. 1104; *Perry v. Holl*, *ib.* 661; 2 D. F. & J. 38; 8 W. R. 291, 570.

And as to factor's liens and charges, *v. inf.* Chap. XLVII., "MORTGAGES."

As to the effect of ratification and acquiescence, and that after ratification by the principal, interim withdrawal by the other party is ineffectual, see *Bolton Partners v. Lambert*, 41 Ch. D. 295, C. A.; *Re Portuguese Consolidated Mines, Exp. Badman*, 45 Ch. D. 16, C. A.; *La Banque Jacques Coutier v. La Banque D'Epargne*, 13 App. Ca. 111; *Re Tiedemann and Ledermann Frères*, (1899) 2 Q. B. 66; *Keighley, Muirhead & Co. v. Durant*, (1901) A. C. 240, H. L. (reversing *S. C.*, (1900) 1 Q. B. 629, C. A., *nom. Durant v. Roberts*, and holding ratification ineffectual, where agent contracting did not purport to act as agent).

APPROPRIATION OF PAYMENTS.

On paying money to his creditor, the debtor may, at the time of payment, appropriate it to any particular debt (although the creditor says he takes it in payment of another debt: *Anon.*, Cro. Eliz. 68); if the debtor does not, the creditor has the option of appropriating it as he pleases: *Clayton's Case*, 1 Mer. 605; *Thompson v. Hudson*, 6 Ch. 328. Vin. Ab. tit. "Payment." M.: *Re Hamilton, Exp. Smith*, 25 W. R. 760; and see *Kinnaird v. Webster*, 10 Ch. D. 139.

A creditor may appropriate payments to statute-barred debts: *Mills v. Fowkes*, 5 Bing. N. C. 455; *Waller v. Lacy*, 1 Sc. N. R. 186; 1 M. & Gr. 54; *Nash v. Hodgson*, Kay, 650; 6 D. M. & G. 474; but the remainder of the debts will not be thereby taken out of the statute: *S. C.*

If no express appropriation be made by either, it may be implied. Thus, payments to and drawings against a running account are to be attributed to the earliest items on the opposite side of the account: *Clayton's Case*, 1 Mer. 608; *Pennell v. Deffell*, 4 D. M. & G. 384, 390, *et sup.* p. 1133; *Laing v. Campbell*, 36 Beav. 3; and a security for an overdrawn account at a bank, as "the balance," was lost by sums being subsequently paid in and drawn out: *Re Medewe*, 26 Beav. 588, 592; but the rule in *Clayton's Case* does not apply to a case where there is no account current between the parties, nor where from an account rendered or other circumstances it appears that the creditor intended, not to make any appropriation, but to reserve the right: *Cory Brothers & Co. v. Owners of Steamship "Mecca"*, (1897) A. C. 286, H. L.

As between trustee and *c. q. t.* the rule is modified, and so long as the trustee has money standing to his account, drawings by him will be attributed to his own money, leaving the trust money intact; but as between different trusts the general rule will prevail: *Re Hallett, Knatchbull v. H.*, 13 Ch. D. 696, C. A.; *Hancock v. Smith*, 41 Ch. D. 456, C. A.; *Re Ulster Building Soc.*, 25 L. R. Ir. 24, 29; *Re Murray*, 57 L. T. 223; *In re Stenning, Wood v. Stenning*, (1895) 2 Ch. 433; *Mutton v. Peat*, *inf.*; Lewin, 1096; and in order that the modified rule should apply, there must be something specific which is capable of being identified as that into which the money has been converted, and not a mere transaction carried out by set-off in account so that no cheque, note, or coin has passed or existed in specie; *Re Hallett & Co.*, (1894) 2 Q. B. 237, C. A.; and see *Ex parte Hardcastle*, 44 L. T. 523; 29 W. R. 615.

The rule may be excluded by closing an account and re-opening a new one: *Re Sherry, London and County Bkg. Co. v. Terry*, 25 Ch. D. 692, 702, C. A.; or by the mode of keeping the account: *City Disc. Co. v. McLean*, L. R. 9 C. P. 692; or the language and conduct of the parties: *Henniker v. Wigg*, 4 Q. B. 792, and it does not apply in the case of a partner's fraudulent overdrawings, concealed by fictitious entries in the books: *Lacey v. Hill*, 4 Ch. D. 537, C. A.

Where two accounts were kept with a bank, and the bank appropriated the proceeds of securities, deposited with them by way of security, to answer the amount due to them on one of the accounts, leaving the other account free, *ca. q. t.*, whose rights were prejudiced by the appropriation, were held not to be entitled to have the two accounts treated as one, so as to defeat the right of another *c. q. t.*, whose money had been paid into the free account, to follow it into that account: *Mutton v. Peat*, (1899) 2 Ch. 556; reversed, (1900) 2 Ch. 79, C. A., on the ground that the two accounts ought, under the circumstances, to be treated as one.

Instalments of a composition for several debts (secured and unsecured) must be attributed to them rateably, though the composition afterwards fails by the debtor's default: *Thompson v. Hudson*, 6 Ch. 320.

Payment of interest generally to the holder of three notes, two of which were barred, was appropriated to the other: *Nash v. Hodgson*, 6 D. M. & G. 474.

The rule by which interest is presumed to be paid before principal is not applicable in the case of interest on an overdrawn account which, according to the practice of bankers, has been from time to time converted into principal: *Parr's Banking Co. v. Yates*, (1898) 2 Q. B. 460, C. A.

As to appropriation of payments made to a broker (since insolvent) by a principal for goods bought for him, see *Favenc v. Bennett*, 11 East, 36; and of sums recovered from a defaulting trustee between capital and income, *Re Grabowski*, 6 Eq. 12.

As to what is sufficient evidence after the death of the debtor of non-appropriation by him, see *Louther v. Heaver*, 41 Ch. D. 248, C. A.

STATUTE OF LIMITATIONS.

By 21 Jac. I. c. 16, s. 3, all actions of accounts and for simple contract debts must be brought within six years after the cause of action; and see sect. 7 as to disabilities.

Actions of account between merchants were excepted: see *Webber v. Tivill*, 2 Wms. Saund. 6th ed., p. 127; although there had been no item on either side for more than six years: *Robinson v. Alexander*, 2 Cl. & F. 717; 8 Bli. N. S. 352; overruling *Barber v. B.*, 18 Ves. 286.

But the statutes always ran from the settlement of the account: *Sandys v. Blodwell*, W. Jo. 401; *Farrington v. Lee*, 1 Mod. 268; though the balance of a stated account may of course become an item in a following open one: *S. C.*, 2 Mod. 311; *Chievly v. Bond*, 4 Mod. 105; the object was not to divide the account where it was a running account, part of which began long before the time fixed by the statute, and, the accounts never having been settled, there had been dealings since: *Welford v. Liddel*, 2 Vez. 400.

Time does not begin to run under 21 Jac. I. against a person who has entrusted money to another for safety till demand, though it was contem-

plated that the bailee might use the money in business: *Re Tidd, T. v. Overall*, (1893) 3 Ch. 154.

By the Mercantile Law Amendment Act, 1856 (19 & 20 V. c. 97), s. 9, the exception of merchants' accounts was put an end to, so that by the joint effect of that Act, and the 21 Jac. I. c. 16, *sup.*, all actions of account, or for simple contract debts, must be brought within six years after the settlement of the account, or the time when the cause of action arose, or the last acknowledgment or part payment, as to which see Chap. XLIV., "ADMINISTRATION," Sect. V.

Under 21 Jac. I. c. 16, s. 3, a verbal acknowledgment was enough to take a debt out of the statute: *Willis v. Newham*, 3 Y. & J. 518; but Lord Tenterden's Act, the Statute of Frauds Amendment Act, 1828 (9 G. IV. c. 14) required the acknowledgment to be in writing, the effect of which was to prevent the adoption of the later items of an account from amounting to a new promise to pay the whole balance due on the account: see *Inglis v. Haigh*, 8 M. & W. 780, 781; and in the case of actions of debt or assumpsit, where there is an open account, the earlier items become barred by time, although there are others which are not barred: *Inglis v. Haigh*, 8 M. & W. 769; *Jackson v. Ogg*, Joh. 397; Shelf. R. P. St. 210, 213.

But this does not apply to actions for an account, when there are items on both sides and the account is open: see *Foster v. Hodgson*, 19 Vez. 185; unless it is a mere question of debt and set-off, as in *Williams v. Griffiths*, 2 Cr. M. & R. 45, where rent was due on one side and wages on the other; and in an action of assumpsit the balance for the previous six years only could be recovered: *S. C.*; and where a partnership is determined by death, but the accounts are carried on into a new partnership without interruption, the Statute of Limitations is no bar to the taking of the account antecedently to the death: *Betjemann v. B.*, (1895) 2 Ch. 474, C. A.; and see *Friend v. Young*, (1897) 2 Ch. 421.

And where there have been no fresh items within the six years the right to an account may be barred unless there has been an acknowledgment: *France v. Symptom*, Kay, 678; *Quincey v. Sharpe*, 1 Ex. D. 72; or there is a fiduciary relation: *Burdick v. Garrick*, 5 Ch. 233; *Re Sharpe, Masonic Ass. Co. v. S.*, (1892) 1 Ch. 154, 167; *Teed v. Beere*, 5 Jur. N. S. 381; 7 W. R. 394; *Heath v. Henley*, 1 Ch. Ca. 20; *Sheldon v. Weldman*, *lb.* 26.

An agent of an owner in fee who, after the death of the owner, continues to receive rents, pays them into a separate account at his own bank, and states that he is acting as agent and receiver for the person next entitled, thereby constitutes himself a trustee, and cannot set up the Statute of Limitations when his acts are ratified by the true owner: *Lyell v. Kennedy*, 14 App. Ca. 437, 457.

The acknowledgment must be such as will lead the Court to infer a promise to pay: *Green v. Humphreys*, 26 Ch. D. 474, C. A.; and when there is a clear acknowledgment, such a promise will be inferred: *S. C.*, *Tanner v. Smart*, 6 B. & C. 603, 606; *Quincey v. Sharpe*, 1 Ex. D. 72; *Duke of Buccleuch v. Eden*, 61 L. T. 360; and an unqualified admission that an account was pending was held to imply a promise to pay the balance on settlement: *Banner v. Berridge*, 18 Ch. D. 254, 274; but such a promise will not be inferred where the language used is ambiguous: *Green v. Humphreys, sup.*; *Re Bethell, B. v. B.*, 34 Ch. D. 561.

And a conditional promise is of no avail unless there is proof of substantial fulfilment of the condition: *Meyerhoff v. Froehlick*, 4 C. P. D. 63, C. A.

Payments at certain specified rates imposed by a statute in respect of tithes were held to be "annuities or periodical sums of money charged upon land" within the Real Property Limitation Act, 1833 (3 & 4 W. IV. c. 27), s. 1, as amended by the Real Property Limitation Act, 1874 (37 & 38 V. c. 57): *Payne v. Esdaile*, 13 App. Ca. 613; and as to the right to tithes in Ireland being barred by non-payment and lapse of time, see *Irish Land Commission v. Grant*, 10 App. Ca. 14.

As to the period of time during which the Court upon recovery of an estate will direct an account of mesne rents and profits, see Lewin, 1086.

Where a balance of debt consists of several items, payments proved to have been made specifically in respect of particular advances will not prevent the general balance from being barred by the statute: *Re Bainsforth, Gwynn v. G.*, 49 L. J. Ch. 5.

An account of royalties under a mining lease may be carried back for twenty years according to the principle of *Hunter v. Nockolds* (1 M. & G. 640), 37 & 38 V. c. 57, s. 8, not being applicable: *Darley v. Tennant*, 53 L. T. 257.

And see further as to the Statutes of Limitations, Chap. XLIV., "ADMINISTRATION," notes to Sect. V.

SECTION II.—ACCOUNTS AGAINST AGENTS.

1. *Account against Confidential Solicitor of Intestate.*

(By consent.) Let the following &c.: 1. An account of all the receipts and payments of the Deft C. on account of the intestate D., or his estate, before and since his decease; 2. An account of all dealings and transactions by the said Deft as the confidential solr of the intestate.—Adjourn &c.—*Donaldson v. Corner*, M. R., 30 May, 1856, A. 1508; S. C., Form 1, *inf.* p. 1385.

2. *Account against Solicitor—Moneys received and paid—Dealings and Transactions—Costs.*

LET the following &c.: 1. An account of all sums paid or advanced by the Deft to or for the use or on account of the Plt; 2. An account of all sums of money received by or come to the hands of the Deft to or for the use of the Plt or otherwise, in respect of any such payments and advances as aforesaid; 3. An account of all dealings and transactions between the Plt and the Deft; And refer &c. to tax any bill of costs of the Deft which the Plt is liable to pay; And Let the amount of such costs, if any, when taxed, be included in the said accounts; And Let the balance due from either of the parties to the other of them, on taking the said account, be certified.—Adjourn &c.—See *Hickinbotham v. Bisgood*, V.-O. E., 22 March, 1848, A. 1019.

3. *Account against Confidential Agents and Solicitors—Interest allowed on both sides.*

AFFIRM the judgment, except so far as it directed the accounts with half-yearly rests with interest at £5 p. c. per ann., and payment—"And Let the said judgment as varied be as follows, that is to say,—1. An account of all dealings and transactions by the Defts D. G. and M. with or in relation to the real and personal estate of P. G. deceased under the power of attorney executed by the said P. G. to the said Defts; 2. An account of all moneys (received by or) come to the hands

of the said Defts or either of them for the use of the said P. G. or of (the Plt) his legal pers. represve or otherwise under the said power of attorney and of the application thereof.—And in taking such accounts the said Defts are to be charged with interest at the rate of £5 p. c. per ann. on all sums (received by them or) come to their hands as aforesaid, and to be allowed interest at the same rate on all sums paid by them to or on behalf of the said P. G. or his pers. represve under the said power from the date of such receipts and payments respectively.”—Amount due to Plt to be certified.—Defts within ten days from the date of the certificate to pay to Plt the amount certified to be due to her as administratrix.—Defts to pay Plts’ costs of suit and of appeal.—Liberty to apply.—See *Burdick v. Garrick*, L. C. & L. J. G., 24 Jan. 1870, A. 227; S. C., 5 Ch. 233.

4. *Account in Action by Principal against Steward.*

“Let the following &c.: 1. An account of all the rents and profits of the hereditaments in the pleadings mentioned received by the Deft, or by any other &c. from &c. to &c.; 2. An account of all the timber and other trees and underwood which during the said period have been cut upon the said lands, or any of them, and of the value thereof, and of the moneys arising from the sale thereof; 3. An account of all dividends and interest which during the period of the Plt’s being the holder of the said shares in the — Co. and in the A— turnpike road in the pleadings mentioned have been received by the said Deft, or by &c., and also of all sums of money for which the said Deft has had credit in account; 4. An account of the land tax which has accrued, or been payable to the Plt during the period of his being entitled to the same, and of the moneys received on account thereof by the Deft, or by &c.”—Settled account, if any, not to be disturbed.—Adjourn &c.—*Joliffe v. Hector*, V.-C., 20 Nov. 1832, A. 204; 12 Sim. 398, *sup.* p. 1363.

For decree in suit by the steward and agent of a landowner for an account of all dealings and transactions between them, with special direction that the Plt should be credited with all sums paid to him by the Land Drainage Commrs under certain contracts, and debited with all money supplied by the Deft, see *Waters v. E. of Shaftesbury*, V.-C. S., 17 March, 1866, A. 596; 14 W. R. 572; but upon appeal (2 Ch. 231) such direction was struck out, the decision below that the Plt was entitled to any profit on the contract being reversed.

5. *Agent to account for all Profits, &c. of Transactions excepting his Commission.*

DECLARE that the Deft H. was not entitled to receive for his own benefit and is not entitled to retain any profits, emoluments, or allowances for or in respect of the purchases and transactions made and entered into by him or his firm of H. & Co. as agents for the Govern-

ment of Canada &c., other than and except his commission; and that the Deft ought to account to the Plt, as representing the Government of Canada, for the sum of £10,040, and all other such profits, emoluments, or allowances as in the (bill) mentioned. Deft to pay Plt (the A. G. for Canada), on behalf of the Government of Canada, the sum of £10,040 received by him as in the (bill) mentioned in respect of profits upon shipments and upon rails manufactured by &c.; And Let the following &c., An account of the receipts and payments in respect of transactions other than those to which the said £10,040 relate, of the Deft and of his said firm as such agent as aforesaid, and in taking such account the Deft is to be charged with all profits, emoluments, and allowances made or received by him over and above his commission, with interest thereon at the rate of £5 p. c. per ann.—Deft to pay the Plt his costs of suit up to the hearing.—Adjourn &c.—*A. G. for Canada v. Haws*, M. R., 19 March, 1877, A. 555.

6. *Account against an Agent.*

AN account of all moneys received and of all payments made by the Deft on account of the Plt as the Plt's agent as in the (bill) mentioned. Liberty to either party to apply at Chambers as to any balance which may appear to be due to or from either of them, and as to the costs of the suit.—*Parsons v. Porter*, M. R., 8 Dec. 1874, B. 3574.

7. *Account against Managing Agent of Plaintiff's Business.*

"LET an account be taken of all sums of money received by the Deft H. on the behalf of the Plts, the — Co., since the — day of — &c. as their chief agent, having regard to the agreement dated &c."—Continue injunction.—Adjourn &c.—*Groux's Soap Co. v. Hayward*, V.-C. K., 5 July, 1858, A. 1582.

8. *Accounts between Principal and Stockbrokers.*

"DECLARE that the Plts [*the stockbrokers*] are entitled to the benefit of the securities in the pleadings mentioned, for what, if anything, shall appear to be due to them upon taking the account hereinafter directed."—Account of all dealings and transactions between the parties.—Balance due on such account to be certified.—Adjourn &c.—*Ewart v. Williams*, V.-C. E., 7 July, 1845, A. 2098; 7 D. M. & G. 68; 3 Drew. 21.

9. *Account of Remittances from India to Agent here.*

LET the following &c.: 1. An account of all sums of money, bills, or other effects remitted to England by S., deceased [*principal*], to H., deceased [*agent*], and of all other sums of money or effects of the said

S. in England, received by the said H. in his lifetime, or by the Defts, his exors, since his decease, or any of them, or by any other person &c.; 2. An inquiry when such sums of money, bills, or other effects were respectively received; 3. An account of all sums of money thereout paid by the said H., or the Defts, his exors, or any of them, by the order or for the use of the said S.; 4. An inquiry whether any and what sums, being the produce of the said money, bills, and effects were placed out at interest, and on what securities, and at what times, by the said H., or the Defts, his exors; 5. An inquiry what other sums of money were laid out by the said H. in his lifetime, or by the Defts, his exors, since his decease, and at what times, in the purchase of stocks or government securities subsequently to the — day of —. —Adjourn &c.—*Williams v. Ryley*, L. C., 4 May, 1775, B. 360.

10. Inquiry as to Sum due for Salvage, &c.

THIS action coming on for trial &c., in the presence of counsel for the Plts and Defts, Let an inquiry be made what sum is proper to be paid to the Defts for the salvage of the said cargo, and for their expenses in and about landing the said cargo, and transmission of the said cargo from the wreck to Port Elizabeth and to England respectively, for freight, and for the sale of the said cargo, and what moneys have been received by the Defts on account of the cargo taken out of the said ship.—*Atlantic Mutual Ins. Co. v. Huth*, M. R., 24 June, 1879, A. 3498; S. C., 16 Ch. D. 474, C. A.

NOTES.

RIGHT TO JUDGMENT.

An agent "is bound faithfully and diligently to account, at least when called upon," and always to be ready to do so: *Hardwicke v. Vernon*, 14 Ves. 510; *Pearse v. Green*, 1 Jac. & W. 135; *Clarke v. Tipping*, 9 Beav. 284, 292; *Collyer v. Dudley*, T. & R. 421; *Turner v. Burkinshaw*, 2 Ch. 491; and to do his best in the interests of his principal: *Clarke v. Tipping*, *sup.*; *Pariente v. Lubbock*, 20 Beav. 588; 8 D. M. & G. 8.

A bill for account would always lie against an agent where the matter could not be dealt with properly at law: *Foley v. Hill*, 2 H. L. C. 28, 35; *Mackenzie v. Johnston*, 4 Madd. 373; *King v. Rossett*, 2 Y. & J. 33. And no allegation of fraud or special circumstances was necessary (*Makepeace v. Rogers*, 4 D. J. & S. 649); but to obtain a judgment something more than the mere fact of agency must be shown, and the averment that Deft has received various sums of money for Plt, and has not accounted, is not enough: see *Phillips v. P.*, 9 Ha. 471; *Hemings v. Pugh*, 12 W. R. 44; 9 L. T. 283; 4 Giff. 456. But see *Sellar v. Griffin*, 11 W. R. 583; 9 Jur. N. S. 612; 33 L. J. Ch. 611; and requiring discovery also made a difference: *Mackenzie v. Johnston*, 4 Madd. 373.

An account was ordered at the suit of overseers against their predecessors' rate collector: *Sellar v. Griffin*, 11 W. R. 583; 9 Jur. N. S. 612; 33 L. J. Ch. 611; Form 5, *inf.* p. 1380.

A foreign government, as standing in the place and suing the agent of a rebel government, after the rebellion had been suppressed, could only have such an account as would have been taken between the agent and the rebel government, and with a submission to pay what, if anything, should be found due from them: *U. S. v. McRae*, 8 Eq. 69, 76; *Republic of Peru v. Dreyfus*,

38 Ch. D. 348; and that the acts of a *de facto* and recognized government by their duly authorized agents must be treated by the tribunals of this country as binding upon their *de jure* successors, see *Republic of Peru v. Peruvian Guano Co.*, 36 Ch. D. 489.

Where a revolutionary government has been recognized by the government of a foreign state, the restored government must treat a contract between the revolutionary government and a subject of the foreign state as valid: *Republic of Peru v. Dreyfus*, 38 Ch. D. 348.

Agents for a foreign loan, having advertised that "interest would be paid in full," and having funds in their hands remitted by the foreign government which were sufficient for the purpose, were held not to have constituted themselves trustees for the bondholders, nor specifically appropriated the money, and the government having afterwards changed its mind, they were not liable: *Henderson v. Rothschild*, 33 Ch. D. 459.

The Crown cannot be made to account as an agent: *Rustomjee v. The Queen*, 2 Q. B. D. 69, C. A.; and see *Kinloch v. Secretary of State for India*, 7 App. Ca. 619.

An agent was ordered to pay the balance appearing due on a particular account, although he alleged that the general balance would be in his favour: *Gordon v. Pym*, 3 Ha. 224.

Decrees for account have been made for an equal division between the oyster meters of London (*Thompson v. Daniel*, 10 Ha. 296), and against the owners of a privateer acting for themselves and the crew in sale of prizes: *Pearse v. Green*, 1 Jac. & W. 135.

An action may also be maintained against an agent for delivery of books and papers: *Makepeace v. Rogers*, 4 D. J. & S. 649; and see *A. G. v. Chesterfield*, 18 Beav. 600; and as to whether an action will lie for the sole purpose of enforcing production of documents to a particular person, see *Dadswell v. Jacobs*, 34 Ch. D. 278, C. A.

An account will be decreed against a confidential agent, though also acting as solr in the same matter: *Oddy v. Secker*, 2 Sm. & G. 193; *Burdick v. Garrick*, 5 Ch. 233, *et sup.* Form 3, p. 1371. And the estate of a solr who had acted as money scrivener, placing out his client's money on insufficient securities, and misrepresenting them, was liable in account after his decease: *Smith v. Pockocke*, 2 Drew. 197. But it must not be a mere demand for damages: *Brit. Mut. Investment Soc. v. Cobbold*, 19 Eq. 627.

An agent cannot sue his principal for an account on the ground of the relation between them. The right of the principal rests upon the trust and confidence reposed in the agent. The agent reposes no such confidence in the principal: *Padwick v. Stanley*, 9 Ha. 627; *Smith v. Leveaux*, 2 D. J. & S. 1.

An agent is liable to account to his principal alone, and not to persons for whom his principal is a trustee: *A. G. v. Chesterfield*, 18 Beav. 596; *Maw v. Pearson*, 28 Beav. 196, *et v. sup.* p. 1132; and *Lewin*, 204, 760.

A bill for account against an agent would not lie where he had rendered an account not shown to be incorrect, and had brought an action for the balance: *Barry v. Stevens*, 31 Beav. 258; *Fluker v. Taylor*, 3 Drew. 183; and the errors in the account must be specifically pointed out in the Plt's pleading: *Shepherd v. Morris*, 4 Beav. 252.

Nor where the account consisted of a few simple items easily dealt with in an action for the amount or balance: *Moxon v. Bright*, 4 Ch. 292; *Barry v. Stevens*, *sup.*; *King v. Rossett*, 2 Y. & J. 33; *Mare v. Lewis*, Ir. Rep. 4 Eq. 219; unless there is fraud: *Navulshaw v. Brownrigg*, 2 D. M. & G. 441; 1 Sim. N. S. 573.

Nor where, according to the custom of dealing between the parties, the accounts must be considered to have been settled: *Hunter v. Belcher*, 12 W. R. 121, 782; 10 Jur. N. S. 663; although only verbally: *Tindall v. Powell*, 6 W. R. 850; 4 Jur. N. S. 944; or there was no contract to keep any accounts other than such as have been furnished: *S. C.*; *Smith v. Leveaux*, 2 D. J. & S. 1; and *G. W. Ins. Co. v. Cunliffe*, 9 Ch. 525.

EXTENT OF AN AGENT'S LIABILITY.

For the principles on which accounts are to be taken at the suit of a manager with a salary varying according to the profits, see *Rishton v. Grissell*, 5 Eq. 326; 10 Eq. 393.

As to what constitutes agency between a merchant and his consignee for sale, see *Exp. White, Re Nevill*, 6 Ch. 397; *Exp. Dixon, Re Smith*, W. N. (77) 68, 158.

A principal whose goods his agent A. had sold to B. with other goods of his own was entitled to marshal the proceeds of the goods, and throw on the proceeds of A.'s own goods advances made to him by B., and so claim a balance due to A. in account with B.: *Broadbent v. Barlow*, 3 D. F. & J. 570.

A stockbroker who has an open account with his principal, on which there is a loss, may (in the absence of special agreement, see *Ellis v. Pond*, (1898) 1 Q. B. 426, C. A.) at once close the account and sell the stock on the insolvency or bankruptcy of the principal, without any authority from him, and may prove against his estate for the balance: *Lacey v. Hill, Scrimgeour's Claim*, 8 Ch. 921; 21 W. R. 857; *S. G., Crowley's Claim*, 18 Eq. 182; and if he fails to do so and enters into a fresh continuation, a subsequent loss will fall on him: *Re Overweg*, (1900) 1 Ch. 209. *Semble*, in such a case any damage resulting from the premature sale may be set off against the claim: *Scrimgeour's Claim, sup.* The stockbroker may also sell any securities in his hands on closing an account, whether deposited as security for a specific loan or not, and although the securities belong (without his knowledge) to third persons: *Jones v. Peppercorne*, Joh. 430.

A bank collecting bills for a customer is trustee of the proceeds: *Re Commercial Bank of South Australia*, W. N. (87) 44; and as to the right to follow trust moneys into the hands of agents in a fiduciary character, *v. sup.* p. 1133.

The relation of a commission agent and his principal is not that of vendor and vendee, and therefore the true measure of damages in respect of goods consigned, which were not of the description ordered, is the loss actually sustained by the principal by reason of the inferior quality of the goods: *Cassaboglow v. Gibbs*, 9 Q. B. D. 220.

Where a broker by mistake applied for shares on behalf of a solvent principal in a co. other than that which the principal intended, the broker was liable as for breach of warranty of authority, on the principle of *Collen v. Wright*, 7 E. & B. 301; 8 E. & B. 647; for the whole sum which the co. would have received from his principal: *Re National Coffee Palace Co., Exp. Panmure*, 24 Ch. D. 367, C. A.; but the doctrine of *Collen v. Wright* cannot be applied to a contract by a public servant acting on behalf of the Crown: *Dunn v. Macdonald*, (1897) 1 Q. B. 555, C. A.; (1897) 1 Q. B. 401; nor where the person purporting to contract as agent disclaims any present authority: *Halbot v. Iens*, (1901) 1 Ch. 344.

An agent who, in obedience to instructions, makes a payment which he knows will be an act of bankruptcy, is not liable to the trustee for the money in the subsequent bankruptcy of the principal, as the trustee's title could not attach until after the money left the agent's hands: *Exp. Hilder, Re Lewis*, 24 Ch. D. 339, C. A.

The paid manager of an estate was held liable for loss through the fraud of a solr, contributed to by the manager's negligence: *Re Mitchell, M. v. M.*, 54 L. J. Ch. 342; 52 L. T. 178.

A co. who allowed their manager and banker (who was a solr) to represent to mortgagees that their money was invested on the security of the co.'s property were held to be liable on the mortgage, though irregular: *London Freehold and Leasehold Property Co. v. Suffield*, (1897) 2 Ch. 608, C. A.

As to the liability of a valuer for negligence in making a valuation of property for the purpose of a contemplated mortgage, see *Cann v. Willson*, 39 Ch. D. 39.

An assignee of a share of profits (e. g., of a patent) is entitled to an account from the licensee, but the licensee is entitled to require that the account should be taken, once for all, in the presence of all the parties: *Bergmann v. Macmillan*, 17 Ch. D. 423.

The master of a ship cannot sell the cargo except in case of actual necessity, and it lies on the purchaser from him, claiming title to the cargo, to establish that such necessity existed: *Atlantic Mutual Ins. Co. v. Huth*, 16 Ch. D. 474, C. A.; *sup.* p. 1374.

An action will lie against an architect for improperly refusing to certify that he is satisfied with the works: *Ludbrook v. Barrett*, 25 W. R. 649; 46 L. J. C. P. 798; 36 L. T. 616.

As to the criminal liability of an agent misappropriating money or

securities intrusted to him, see the Larceny Act, 1861 (24 & 25 V. c. 96), s. 75; *Reg. v. Tatlock*, 2 Q. B. D. 157.

A fiduciary agent cannot bind his principal by a sale to him of such agent's property, where the principal has purchased without independent advice: *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392, C. A., per Rigby, L. J.

Secret Profit.—No underhand dealing with the property of his principal by an agent can stand: *Murphy v. O'Shea*, 2 J. & Lat. 422, 429. There must be good faith and full information to the principal: *Dunne v. English*, 18 Eq. 524, 534; and where an agent for A., in a contract with B., enters into a surreptitious sub-contract with B., that is a fraud giving A. the right to have the contract rescinded: *Panama, &c. Co. v. India Rubber, &c. Co.*, 10 Ch. 515, 526; or to obtain the profit made by the agent in the sub-contract: *De Bussche v. Alt*, 8 Ch. D. 286, C. A.

Similarly, a clause in a building contract making the architect arbitrator is made void by any agreement between the architect and employer affecting the architect's conduct, and unknown to the builder: *Kemp v. Rose*, 1 Giff. 258; 4 Jur. N. S. 919; *Kimberley v. Dick*, 13 Eq. 1; *S. C.*, Form 2, *sup.* p. 1352.

A purchaser's agent receiving commission from the vendor also must account for it to the purchaser: *Morison v. Thompson*, L. R. 9 Q. B. 480, and cases cited in the judgment; and any part of the agreed commission remaining in the vendor's hands can be recovered from him by the debts: *Grant v. Gold Exploration and Development Syndicate, Ltd.*, (1900) 1 Q. B. 233, C. A.; notwithstanding any further agreement between the offending parties reducing the amount of the commission *inter se*: *S. C. Secus* as to commission which the principal must be taken to know the agent receives: *G. W. Ins. Co. v. Cunliffe*, 9 Ch. 525; and see *Morgan v. Elford*, 4 Ch. D. 352, C. A.

An agent to whom tradesmen or insurance cos. allow a discount must give his principal the benefit of it: *Turnbull v. Garden*, 20 L. T. 218; 38 L. J. Ch. 331; *Q. Spain v. Parr*, 18 W. R. 110; 39 L. J. Ch. 73; 21 L. T. 555; unless he has acquiesced in the agent taking it: *G. W. Ins. Co. v. Cunliffe* *sup.*; *Baring v. Stanton*, 3 Ch. D. 502, C. A.; and an agent who has bribed a person to give a certificate cannot recover under a contract which depends on the validity of such certificate: *Shipway v. Broadwood*, (1899) 1 Q. B. 369, C. A.

If an agent is bribed to induce his principal to enter into a disadvantageous contract, the principal can not only recover the amount of the bribe as money had and received to his use, but can recover from the agent and the briber, jointly or severally, damages for the loss sustained, without deduction in respect of the bribe: *Mayor of Salford v. Lever*, 25 Q. B. D. 363; but until some judgment or order has been obtained the amount cannot be said to be the money of the principal, as *c. g. t.*, so as to entitle him to follow it into investments made by the agent: *Lister v. Stubbs*, 45 Ch. D. 1, C. A.

An agent cannot be allowed to take any private advantage, or make any profit out of a transaction with or on behalf of his principal, without the principal's knowledge: *Hichens v. Congreve*, 1 Russ. & M. 150, n; *Gluckstein v. Barnes*, (1900) A. C. 240; *Fawcett v. Whitehouse*, *Ib.* 132; *Imp. Merc. Assoc. v. Coleman*, 6 Ch. 558; 6 H. L. 189; *Kimber v. Barber*, 8 Ch. 56; *Dunne v. English*, 18 Eq. 524; *Harrington v. Vict. Graving Dock*, 3 Q. B. D. 549; *Story on Agency*, §§ 207, 211; and a contract in the agent's name may be shown to have been the principal's: *Waters v. E. Shaftesbury*, 2 Ch. 231; so as to entitle the principal to the profit made by the agent or sub-agent: *De Bussche v. Alt*, 8 Ch. D. 286, C. A.

So a solr who takes advantage of a defect in registration to defeat the interests of his client will not be entitled to the protection which registration would otherwise give: *Battison v. Hobson*, (1896) 2 Ch. 403.

An agent must disclose fully the nature of any transaction; and it is not enough for him to state that he has an interest: *Dunne v. English*, 18 Eq. 524, 535; so under an article of association that a director must disclose "his interest": *Imp. Merc. Assoc. v. Coleman*, L. R. 6 H. L. 189; and see *Costa Rica Rail. Co. v. Forwood*, (1900) 1 Ch. 756; (1901) 1 Ch. 746, C. A.

Directors, Promoters, &c.—Directors are in the position of agents, and to

some extent of trustees, towards the co.: *York & N. Midl. Ry. v. Hudson*, 16 Beav. 485, 505; *Great Luxembourg Ry. v. Magnay*, 25 Beav. 586; 4 D. & J. 422; 26 Beav. 473; *Imp. Merc. Assoc. v. Coleman*, L. R. 6 H. L. 189; *Gray v. Lewis*, 21 W. R. 925, 926; L. R. 8 Ch. 1035; *Moxham v. Grant*, (1900) 1 Q. B. 88, C. A.

Promoters also are in a fiduciary position: *Hichens v. Congreve*, 1 Russ. & M. 150, n; *Foss v. Harbottle*, 2 Ha. 489; *Bagnall v. Carlton*, 6 Ch. D. 371, C. A.; *New Sombrero Phosphate Co. v. Erlanger*, 3 App. Ca. 1218; 5 Ch. D. 73, C. A.; and cannot take a profit without informing the co. of the fact, and giving the co. a fair opportunity of declining to incur the expense involved: *Re Olympia, Ltd.*, (1898) 2 Ch. 153, C. A.; *S. C., Gluckstein v. Burnes*, (1900) A. C. 240, H. L.; or use their powers so as to obtain for themselves benefits over the other shareholders without making full disclosure, though otherwise acting *bonâ fide*: *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 56, C. A.; and they are accountable for all moneys secretly obtained by them just as though the relations of principal and agent, or trustee and c. q. t., had existed between them and the co., although the corrupt transaction is not rescinded; but in estimating the amount of such secret profit, allowance is to be made for legitimate expenses of bringing out the co., but not a sum expended in obtaining a guarantee for the taking of shares: *Lydney and Wigpool Iron Ore Co. v. Bird*, 33 Ch. D. 85, C. A.; *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918, C. A.

A secret profit taken by the promoter from the vendor gives rise to a demand arising by reason of contract, provable notwithstanding sect. 31 of the Bankruptcy Act, 1869, and the amount of it is a debt incurred by means of fraud or breach of trust within sect. 49 of the same Act (see Bankruptcy Act, 1883, ss. 30, 37): *Emma Silver Mining Co. v. Grant*, 17 Ch. D. 122; and the Court can give judgment before the discharge of the bankrupt, but not to be enforced until after: *S. C.; Ross v. Gutteridge*, 52 L. J. Ch. 280; 48 L. T. 117; but promoters are not trustees within the Debtors Act, 1869, s. 4 (3): *Phosphate Sewage Co. v. Hartmont*, 25 W. R. 743.

The meaning of the expression promoter is ambiguous: *Lydney, &c. Co. v. Bird*, *sup.*; and a judge is not bound to give the jury a definition of it: *Emma Silver Mining Co. v. Lewis*, 4 C. P. D. 396; and a solr acting for a co. in its earlier stages is not to be deemed a promoter: *Re Great Wheal Polgooth Co.*, 53 L. J. Ch. 42; 49 L. T. 20; 32 W. R. 107; and a syndicate who purchased a mine intending to work it themselves were held not to be promoters of a co. subsequently formed, with the same directors, to purchase it from them: *Re Lady Forrest Gold Mine*, (1901) 1 Ch. 582.

A person who, as clerk to a promoter, has performed work in relation to obtaining an Act of Parliament, but who has looked only to the promoter, cannot recover as against the co.: *Re Kent Tramways Co.*, 12 Ch. D. 312, C. A.

As to agreements entered into by promoters and directors in fraud of the co., see *inf.* Chap. LI., "SPECIFIC RELIEF"; and generally as to (1) the fiduciary relation between the promoters of a co. and its shareholders; (2) the validity of contracts between a co. and its directors as promoters; (3) the non-liability of directors for losses when acting *intra vires* and honestly; (4) the voidability of a contract for misrepresentation; and (5) the impossibility of rescinding a contract after a change of position, see *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392, C. A.

As to accounts between the projectors of an abortive co., see *Denton v. Macneil*, 35 Beav. 652.

Right to Indemnity.—An agent is entitled to be indemnified by his principal against liability as well as loss: *Lacey v. Hill, Crowley's Claim*, 18 Eq. 182, 191; but not against additional loss caused by his own insolvency: *Duncan v. Hill*, L. R. 8 Ex. 242; and at law the right to indemnity dated from actual payment: *Collinge v. Heywood*, 9 A. & E. 633. An agent may not deduct sums by way of indemnity without his principal's knowledge: *Clarke v. Tipping*, 9 Beav. 289—291; and the right is lost if the agent (e.g., a stockbroker on the London Stock Exchange) sells before the time agreed upon without the principal's authority: *Ellis v. Pond*, (1898) 1 Q. B. 426, C. A.

As to the right of a commission agent to be indemnified out of the proceeds of his principal's goods sold by him, see *Hood v. Stallybrass*, 3 App. Ca. 880;

as to the right of directors to indemnity from shareholders in respect of a *bond fide* distribution of money amongst them which was in fact *ultra vires*, see *Mozham v. Grant*, (1900) 1 Q. B. 88, C. A.; and see *Rhodes v. Forwood*, 389; and as to the right of a trustee to indemnity, *v. sup.* p. 1171.

Commission.—A contract by a co. to employ A. for five years as agent did not entitle A. to prove in the winding-up for prospective commission: *Re English, &c. Ins. Co., Exp. Maclure*, 5 Ch. 737; and see *Rhodes v. Forwood*, 1 App. Ca. 256; *Mair v. Himalaya Tea Co.*, 1 Eq. 411.

As to what amounts to finding a purchaser, so as to entitle the agent to a commission, see *Rimmer v. Knowles*, 22 W. R. 574; 30 L. T. 496; *Lumley v. Nicholson*, W. N. (86) 120; *Toulmin v. Millar*, 58 L. T. 96; 12 App. Ca. 746; or finding a mortgagee, *Green v. Lucas*, 33 L. T. 584; or introducing a lender, *Fisher v. Dowsett*, 48 L. J. Exch. 32; and see *Wilkinson v. Alston*, 48 L. J. Q. B. 733; 41 L. T. 394, C. A.; and that after a mortgage completed the agent is not entitled to commission on further advances: *Tribe v. Taylor*, 1 C. P. D. 505; and where the condition is that the title on a purchase should be approved by the solr, commission is not earned unless the solr approves or unreasonably refuses so to do: *Clack v. Wood*, 9 Q. B. D. 276, C. A.; nor is a shipbroker introducing a purchaser entitled to commission on subsequent purchases by him: *Re Humphrys, Exp. Chatteris*, 22 W. R. 289; nor is there any such custom: *S. C.*

An agent whose authority was withdrawn was held entitled by custom to half the commission: *Queen of Spain v. Parr*, 18 W. R. 110; 39 L. J. Ch. 73.

The payment by a limited co. of a reasonable amount of money to brokers by way of commission or brokerage for placing shares is not an act *ultra vires* the co.: *Coa. Act*, 1900; *Metropolitan Coal Consumers' Assoc. v. Scrimgeour*, (1895) 2 Q. B. 604, C. A.; and a reasonable salary to a managing director may be allowed in the absence of all concealment, although paid without the authority of any resolution of the co.: *Felix, Hadley & Co., Ltd., v. Hadley*, 77 L. T. 131.

SECTION III.—SETTLED ACCOUNT.

1. Usual Form of Direction not to disturb Settled Account.

AND in case it shall appear that any account has been settled between the said parties, the same is to stand [or not to be disturbed].—See *Speed v. Sorton*, M. R., 24 Nov. 1785, B. 189; *Chapman v. Gilbert*, V.-C. W., 28 Jan. 1853, A. 376.

2. Usual Form of Direction for Leave to Surcharge and Falsify.

BUT any of the parties are to be at liberty to surcharge and falsify any of the items and charges therein, as they shall be advised.—See *Speed v. Sorton*, *sup.*

3. Accounts to be conclusive, with Leave to show Errors.

LET the accounts &c., as between &c., be considered as *prima facie* conclusive, but with liberty to either party to show any error therein.—*English v. Baring*, penned by V.-C. K., 11 March, 1854, A. 1319.

4. *Release to stand as to Sums paid and Account stated—Leave to Surcharge and Falsify.*

DECLARE that the indenture of release of the — day of — shall stand only as a discharge for the several sums of money thereby stated to be retained by or paid to the several parties thereto as therein mentioned; And Declare that the account in the said indenture mentioned to be stated shall stand, with liberty to the Plts and Defts to surcharge and falsify the same.—Directions for account.—*Millar v. Craig*, M. R., 4 April, 1843, A. 1457; 6 Beav. 443.

For direction that if any accounts shall appear to have been settled the same are not to be disturbed, but reserving the question as to giving leave to surcharge and falsify, see *Ellice v. Goodson*, V.-C. K. B., 30 April, 1845, A. 1321, and that certain accounts be not taken as settled, *ib.*

5. *Account in Action by Overseers of the Poor against late Rate Collector—Settled Accounts not disturbed—Leave to Surcharge and Falsify.*

“LET an account be taken of all sums of money received by the Deft G. in respect of the rates in the Plts’ (bill) mentioned; And in case it shall appear, in taking the said account, that any account or accounts has or have been settled between the Deft and the Plts, or any former overseers of the poor of the parish of —, such settled account or accounts is or are not to be disturbed; But the Plts are to be at liberty to surcharge and falsify any of the items or charges in such account or accounts; And Let the Deft G. deliver up to the Plts, upon oath, the rate books, accounts, books of account, receipt books, and counterfoils of receipt books, and all other documents belonging to the said parish of —, or to the present or former overseers thereof, in his custody or power.”—Deft at all seasonable times and on reasonable notice to have full and complete access thereto, as the Judge shall direct, for the purpose of making out his account.—Deft to pay Plts’ costs of suit up to the hearing.—Adjourn &c.—*Sellar v. Griffin*, M. R., 11 April, 1863, B. 964; *S. C.*, 11 W. R. 583; 9 Jur. N. S. 612; 33 L. J. Ch. 611.

For decree for account of dealings and transactions of S. (deceased agent and partner and Plt’s testator), on behalf of and with the Deft co.; and in taking such account the books kept by S. and proved in the cause to be admitted as evidence on both sides; and the co. to deliver a list of such items in the books as they desired to have vouched or accounted for, and Plts, the exors, to be charged with such items, except so far as they shall properly discharge themselves therefrom, all just allowances to be made, and in all other respects the accounts appearing in the books to be treated as settled, with leave to either side to surcharge and falsify; no inquiry to be made as to the admitted amount; account of S.’s share in the co. and of amount due to him in respect of dividends and bonuses thereon; balances at the end of each year on either side to be certified, see *Stainton v. Carron Co.*, M. R., 25 July, 1857, B. 1675; *S. C.*, 24 Beav. 346.

6. *Special Directions as to Settled Accounts, and as to particular Items.*

USUAL admon accounts.—“And in taking the account regard is to be had to any account appearing to have been stated and settled between the Plt and the Deft, but with liberty to the Plt to surcharge and falsify any such stated or settled account; And Declare that in taking the said account the Deft is to be charged with the full sum of £— and not with the two sums of £— and £— appearing in the account in the pleadings mentioned as the amount of the valuation of the J. &c. estates.”—The balance of the Plt's moiety remaining unpaid at the execution of the release to be treated as a debt carrying interest at £4 p. c. per ann. from that time.—Adjourn &c.—*Taylor v. T.*, L. C. for M. R., 21 April, 1873, B. 1119; *S. C.*, 20 Eq. 155.

For decree that an account stated stand, with liberty to falsify or surcharge; and for general account of dealings and transactions from the foot of it; and an account of what is due for principal and interest on a bond given as security for the settled account; and if it appeared that the Deft was debtor to the Plt on the general account from that time, what was coming from the Deft to be applied first to pay the interest on the bond and then to sink the principal; with injunction, see *Wane v. Praed*, L. C., 11 Feb. 1746, B. 233.

7. *Accounts in former Action to be adopted, with leave to Surcharge and Falsify.*

And Let the accounts and inquiries taken and made in pursuance of the judgment in the action of *M. v. B.*, dated &c., and the accounts and inquiries directed to be taken and made by the judgment in the action of *A. v. B.*, dated &c., be adopted; But any of the parties to this action who are not parties to either of those actions are to be at liberty to surcharge and falsify any of the items and charges in such accounts, and to adduce evidence for the purpose of proving the incorrectness of any of the results of such inquiries, in the actions to which they are not parties respectively, as they shall be advised.—See *Moss v. Gregory*, M. R., 9 March, 1860, B. 413.—And for a like direction as to the accounts in *Moss v. Bainbrigg*, see *Alsop v. Bell*, M. R., 20 March, 1858, A. 684; and see *Lloyd v. Attwood*, Form 8, *sup.* p. 1355.

For decree declaring infants not bound by a decree, but the accounts taken under it to be adopted if beneficial, *v. sup.* p. 984, Form 2.

8. *Stated Accounts set aside—General Account.*

“DECLARE that the three stated accounts, dated &c., ought to be opened and set aside, and adjudge the same accordingly; And Let a general account be taken of all dealings and transactions between the Plts, or either of them, and the Deft; and also of the value of any timber &c.; And Let what shall be certified to be due upon the balance of the said account from any of the parties to the other or others of

them, be (within &c.) paid by the party or parties from whom to the party or parties to whom the same shall be certified to be due."—Deft to pay Plts' "costs of so much of the action as relates to the setting aside the said stated accounts, to be taxed &c."—[Forms, *sup.* Vol. I. pp. 248, 249.]—Reserve the consideration of the rest of the costs.—Liberty to apply.—See *Howarth v. Powell*, L. C., 4 July, 1743, A. 660.

For decree in suit between client and solr, with directions that bonds, notes, mortgage, &c. should not be evidence of debts, which were to be proved by extrinsic evidence, see *Lawless v. Mansfield*, 1 D. & War. 634, *et inf.* p. 1384.

NOTES.

FORM OF ORDER.

The direction as to not opening settled and stated accounts varies. In the older decrees it runs: "If the Master finds any account settled, or stated between the parties, he is not to ravel into or 'unravel,' or 'not to open and unravel' the same, or 'the same is to stand and not to be opened'": see *Todd v. Downes*, L. C., 8 May, 1742, B. 406; *Birkhead v. Manaton*, L. C., 25 Jan. 1748, A. 308; *Schute v. Reed*, L. C., 3 Feb. 1773, B. 97.

The Master could not allow settled accounts without an express direction in the decree: *Fitzpatrick v. Mahony*, 1 J. & Lat. 84; *Milford v. M.*, M'Cl. & Y. 156; and after the 15 & 16 V. c. 80, the direction was still obtained at the hearing. Such a direction was added on a petition of rehearing: *Buckeridge v. Whalley*, 12 W. R. 593; 3 N. R. 179; 10 L. T. 222. In *Newen v. Wetten*, 31 Beav. 315, it was said that in an admon suit, even without such a direction, settled accounts would not be disturbed. The practice, however, is not to insert the words in an order without the direction of the Court: see *Newmarch v. Harrison*, M. R., 18 Feb. 1874.

For form of surcharge and notice of it, see D. C. F. 611.

Where Deft sets up a settled account and Plt amends his pleadings (see *Dawson v. D.*, 1 Atk. 1), and though not disputing that there is a settled account, alleges generally that there are errors in it, the form of judgment is not merely to take the account, but to take it from the foot of the account so proved. But if in such a case Plt, without disputing, alleges and proves specific errors in the settled account so set up, the judgment directs the account to be taken on the footing of that account, with liberty to the Plt to surcharge and falsify: *Buckeridge v. Whalley*, 12 W. R. 593; 3 N. R. 179; 10 L. T. 222.

Where the Court at the hearing has reason to suppose that there are settled accounts, but none are proved, a general direction is inserted that any accounts found to be settled shall not be disturbed, and liberty to surcharge and falsify may be given without, of course, any errors being specifically proved: *Kinsman v. Barker*, 14 Ves. 579; *Connop v. Hayward*, 1 Y. & C. C. 35; *Fitzpatrick v. Mahony*, 1 J. & Lat. 84, 89; *Lawless v. Mansfield*, 1 D. & War. 604, 605; *Buckeridge v. Whalley*, *sup.*; *Sellar v. Griffin*, 11 W. R. 583, Form 5, *sup.* p. 1138. And see *Dawson v. D.*, West, 171, n.; 1 Atk. 1; *Beak v. B.*, 3 Swa. 627.

"Not disturbing settled or stated accounts" applies only to accounts stated between the parties, by which they would be bound *inter se*: *Milford v. M.*, M'Cl. & Y. 156; and between Plt and Deft, not between co-Defts: *Carmichael v. C.*, 2 Ph. 101.

WHAT IS A SETTLED ACCOUNT.

Settled accounts are sometimes spoken of as "stated" accounts. This, of course, means stated between the parties, or stated by one side and agreed to by the other; a mere statement by one side cannot make an account settled: see *Jackson v. Ogg*, Joh. 397.

The requisites for making an account "settled" depend on the circumstances of each case and the mode of dealing between the parties: *Hunter v. Belcher*, 2 D. J. & S. 194; 12 W. R. 121, 782; *Tindall v. Powell*, 6 W. R. 850; 4 Jur. N. S. 944.

That there has been a division is not conclusive that the account is settled: *Dawson v. D.*, 1 Atk. 1.

Signing the account or taking a security on the foot of it is sufficient: *Drew v. Power*, 1 Sch. & L. 192; but signing is not necessary, nor handing over the vouchers, though that being done is a strong point: *Willis v. Jernegan*, 2 Atk. 252. Mere proof of the delivery of the account and nothing more is not enough: *Irvine v. Young*, 1 S. & S. 333; but if the person to whom it is sent make no objection for a length of time (*Willis v. Jernegan*, *sup.*), or in the case of merchants, two or three posts (*Sherman v. S.*, 2 Vern. 276), or longer, according to the distance between them (*Tickel v. Short*, 2 Vez. 239; *Story*, Eq. § 526), the account is settled.

An account made out between partners in the usual way was binding on the represes of one who had died two months afterwards without objecting, but without signing: *Coventry v. Barclay*, 11 W. R. 892; 2 N. R. 375; 12 W. R. 500; 3 N. R. 224.

Books kept by A., but to which B. had free access, were *prima facie* evidence against B., with leave to him to surcharge and falsify: *Ogden v. Battams*, 1 Jur. N. S. 791; and as to accounts rendered being final or conclusive, see *Salter v. Adey*, Ib. 930.

Under an order for a general account by the treasurer of a building society obtained by members of the society, accounts duly audited under the rules of the society must be accepted as *prima facie* evidence in taking the account: *Holgate v. Shutt*, 27 Ch. D. 111, C. A.; and, in general, under such an order, it is competent to the accounting party to set up any settled account, subject to the right of the opposite party to impeach it on the ground of fraud or otherwise: *Holgate v. Shutt* (No. 2), 28 Ch. D. 111, C. A.

SURCHARGING AND FALSIFYING, AND OPENING SETTLED ACCOUNTS.

By O. XXXIII, 5, "any party seeking to charge an accounting party beyond what he has by his account admitted to have received, shall give notice thereof to the accounting party, stating, so far as he is able, the amount sought to be charged, and the particulars thereof, in a short and succinct manner."

The usual form of order is that settled accounts are not to be disturbed, and liberty to surcharge and falsify is given, as in Forms 1 and 2, *sup.* p. 1379.

But the language used by V.-O. K. in *English v. Baring*, Form 3, *sup.* p. 1379, seems more accurately to express what is intended.

In the absence of special directions, orders for a general account are treated as containing directions in the usual form: *Holgate v. Shutt*, *sup.*; *Kessell v. Le Sueur*, 1 May, 1893.

To "surcharge" means to show an omission for which credit ought to have been given: *Pit v. Cholmondeley*, 2 Vez. 565.

To "falsify" means to show that an item of charge has been wrongly inserted: *S. C.*; but to falsify accounts it must be shown that they contain charges in the nature of fraud or error, not merely charges which might be disallowed as being too large: *Heighington v. Grant*, 1 Ph. 601.

The *onus probandi* is on the party having liberty to surcharge and falsify: *Pit v. Cholmondeley*, 2 Vez. 565.

He may take advantage of errors in law as well as errors in fact: *Roberts v. Kuffin*, 2 Atk. 112.

Grounds for opening a settled account on which Plt sues may now be set up by defence or counter-claim: *Eyre v. Hughes*, 2 Ch. D. 148.

Pleading a release without making discovery of the accounts on which it was founded is not enough: *Brooks v. Sutton*, 5 Eq. 361; and such a plea by a trustee was held bad for not showing that the information asked for by the bill had been given or the right to it waived: *Clarke v. E. Ormonde*, Jac. 116, 121.

Unintentional errors and ignorance as to the exact value of shares, in dealing with them on the footing of accounts kept by other parties, is com-

paratively immaterial, where there is no unfair conduct: *Knight v. Majoribanks*, 11 Beav. 322, 354.

Where the settlement of the account is proved and no case made out for opening it, the action is of course dismissed with costs: *Endo v. Caleham*, 1 Yo. 306.

If there are only mistakes and omissions in a settled account, the party objecting is allowed no more than to surcharge and falsify; but where there has been fraud (e.g., overcharge deliberately made: see *Williamson v. Barbour*, 9 Ch. D. 529), or something in the nature of the errors proved, or the relation of the parties, or the way in which the settlement was obtained, to show that it ought not to be held binding, the whole account is opened: *Gething v. Keighley*, 9 Ch. D. 547; *Williamson v. Barbour*, *ib.* 529; *Clarke v. Tipping*, 9 Beav. 284; even in the case of an account of many years' standing, and after the death of the person guilty of the fraud, for the fraud makes it void *in toto*: *Vernon v. Paudry*, 2 Atk. 119; *Drew v. Power*, 1 Sch. & L. 182; *Chambers v. Goldwin*, 5 Ves. 837; 9 Ves. 265; *Wedderburn v. W.*, 4 My. & C. 41; *Allfrey v. A.*, 1 Mac. & G. 87; *Coleman v. Mellersh*, 2 Mac. & G. 309, 314; *Maund v. Allies*, 5 Jur. 860; *Oldaker v. Lavender*, 6 Sim. 239; *Holgate v. Shutt*, 27 Ch. D. 111, C. A.; 28 Ch. D. 111, C. A.; *Daniell v. Sinclair*, 6 App. Ca. 181; *Vagliano Bros. v. Bank of England*, 22 Q. B. D. 103; *Williamson v. Barbour*, 9 Ch. D. 529, at p. 533; but see *Brownell v. B.*, 2 B. C. C. 62; and the omission by solrs to inform residuary legatees that they were entitled to have a bill of costs, and to have it taxed or moderated is not of itself a sufficient ground for opening a settled account, no injustice, excessive charge, or error being shown to exist: *Re Webb*; *Lambert v. Still*, (1894) 1 Ch. 73, C. A.; and see *Re Fish*, (1893) 2 Ch. 413, C. A.; *Lewin*, 746; and *semble*, if mere errors shown in an account are sufficient in number and importance, the Court will open the account, although there is no element of fraud: see *Williamson v. Barbour*, 9 Ch. D. 529; but a single fraudulent item is sufficient to justify the opening of an entire account: *Gething v. Keighley*, 9 Ch. D. 547.

A Deft against whom an account is opened is not bound by any deductions he had agreed to make: *Osborne v. Williams*, 18 Ves. 383.

Where a fiduciary relation exists, the rule (against opening, unless there is fraud) is less strict: *Lawless v. Mansfield*, 1 Dr. & War. 557; *Williamson v. Barbour*, 9 Ch. D. 529; 50 L. J. Ch. 150. But even then a case must be averred and proved: *Chambers v. Goldwin*, 9 Ves. 254, 266; *Davis v. Spurling*, 1 Russ. & M. 64; *Blagrove v. Routh*, 2 K. & J. 509; 8 D. M. & G. 620; as to which, see *Morgan v. Higgins*, 1 Giff. 270; *Barry v. Stevens*, and other cases, *sup.* p. 1375.

The managing committee of an abortive co. having rendered their accounts, and paid over the money, without objection, the Court refused three or four years afterwards to direct an account against them: *Williams v. Page*, 24 Beav. 654, 662, 674; and see *Stupart v. Arrowsmith*, 3 Sm. & G. 176.

After the death of the manager of a co. his accounts for twenty-seven years, which had never been properly rendered or settled with the co., were treated as settled except as to certain sums, as to which no vouchers appeared ever to have existed: *Stainton v. Carron Co.*, 24 Beav. 346.

A settled account in which a trustee charged his c. q. t. with a bonus for great advantages gained was opened: *Barrett v. Hartley*, 2 Eq. 789.

And where, in a mortgage account, compound interest was charged under a common mistake as to the effect of the mortgage deed, the account was opened: *Daniell v. Sinclair*, 6 App. Ca. 181.

No weight is given to a release or discharge in full if it be founded on insufficient knowledge, or where the parties are not on equal terms: *Wedderburn v. W.*, 2 Keen, 722; 4 My. & C. 50 (where the release by A. was dated three days after his coming of age, and purported to have been given after an examination of complicated accounts); *Middleditch v. Sharland*, 5 Ves. 87; 30 Nov. 1799, Reg. Min.; *Millar v. Craig*, 6 Beav. 443, *at sup.* p. 1380, Form 4 (receipts in full ordered to be treated as conclusive evidence of payment of the sums named in them, but not as a general release); *Croft v. Graham*, 5 Giff. 1; 2 D. J. & S. 155, *et inf.* Chap. LI., "SPECIFIC RELIEF"; *Kennedy v. Broun*, 13 C. B. N. S. 677; and that general words in a release are necessarily limited to matters in contemplation

at the time when the release was given, see *L. & S. W. Ry. Co. v. Blackmore*, L. R. 4 H. L. 610; *Turner v. T.*, *Hall v. T.*, 14 Ch. D. 829.

Where a deed containing a release cannot be wholly set aside the judgments should be “notwithstanding” it: *Wedderburn v. W.*, 4 My. & C. 51, 52; but in general the release must be set aside before the account can be opened: *Pritt v. Clay*, 6 Beav. 503; *Fowler v. Wyatt*, 24 Beav. 232; affirmed by L. O., *v. Ib.* 238.

In *Eyre v. Hughes*, 2 Ch. D. 148, V.-C. B. held that a Deft in a foreclosure suit (in which issue was joined before Nov. 1875), making out a case by his answer, might, under Jud. Act, 1873, s. 24 (2, 3), have the account opened without having filed a cross bill.

For a judgment to open a settled account, or to surcharge and falsify, the particular errors complained of must be pointed out in the pleadings and proved: *Parkinson v. Hanbury*, L. R. 2 H. L. 1, 11, 19; *Taylor v. Haylin*, 2 Bro. C. C. 310; *Johnson v. Curtis*, 3 Bro. C. C. 266; *Drew v. Power*, 1 Sch. & L. 182; *Lindl.* 1026, 1027; 6th ed. 516.

Where fraud against an agent is alleged in general terms the Plt is not prevented by O. XIX, 6, from obtaining discovery before giving particulars of the alleged fraud: *Whyte v. Ahrens*, 26 Ch. D. 117, O. A.

Charging in the bill that no credit was given for rent of B., and that Defts ought to set out whether they had received any, was not enough: *Parkinson v. Hanbury*, L. R. 2 H. L. 1, 11.

Items and errors of which both sides were aware when the account was settled (*Maund v. Allies*, 5 Jur. 860; *Fowler v. Wyatt*, 24 Beav. 232), or which have been corrected before action brought (*Davis v. Spurling*, 1 Russ. & M. 64), are of no importance, and do not give any right to open the account.

When liberty is given to surcharge and falsify, the Plt will not be confined in date to the first item alleged in the pleadings and proved by the evidence in Court: *Mozley v. Cowie*, 26 W. R. 854; 47 L. J. Ch. 271; 38 L. T. 908; and the liberty will not be limited to errors appearing in the books: *Gething v. Keighley*, 9 Ch. D. 547.

SECTION IV.—GENERAL ACCOUNT—FURTHER CONSIDERATION.

LET the Deft [or Plt] A., within — from the date of this order, pay unto the Plt [or Deft] B. the sum of £—, being the balance appearing by the Master's certificate dated &c., to be due from him on taking the account directed by the said judgment; And Let the Deft [or Plt] A. also pay unto the Plt [or Deft] B. his costs of this action to be taxed &c.—See *Donaldson v. Corner*, M. R., 16 Feb. 1858, A. 562; *S. C.*, Form 1, *sup.* p. 1371.

Where the balance is found against the Plt, he may be ordered to pay it, *v. sup.* p. 1356.

NOTES.

COSTS.

The more usual course is to adjourn the further consideration, which includes the costs, till the account has been taken; but in simple cases the Court sometimes disposes of the costs, and directs payment of the balance by the original judgment.

Though 2,000*l.* was found due from Plt, he having succeeded substantially

was allowed costs of suit: *May v. Biggenden*, 24 Beav. 207. As to the principles on which they are regulated, see *Ib.* 213.

On decree for account of tithes, the costs could not be apportioned unless there were several defences: *Esdaile v. Peacock*, Joh. 216.

Costs up to and including the hearing were given by the decree against an agent who had denied Plt's right to an account: *Sellar v. Griffin*, 11 W. R. 583; 9 Jur. N. S. 612; and a Deft who had refused to account, but had after bill filed offered a sum equal to what was afterwards found due from him, had to pay all the costs: *Collyer v. Dudley*, T. & R. 421.

INTEREST.

An agent fraudulently retaining money may be charged with interest: *Mayor of Berwick v. Murray*, 7 D. M. & G. 497, 518; 5 W. R. 208 (5l. p. c.); *E. Hardwicke v. Vernon*, 14 Ves. 504 (4l. p. c.); and see *A. G. v. Alford*, 4 D. M. & G. 843, *et sup.* p. 1164; but not for merely retaining balances, without fraud: *Turner v. Burkinshaw*, 2 Ch. 488; or where the principal had acquiesced in the retainer: *Ld. Salisbury v. Wilkinson*, cited 14 Ves. 509.

In *Beaumont v. Boulbee*, 11 Ves. 358, the agent's reprieve, and in *Fry v. F.*, 10 Jur. N. S. 983, the agent, who had stated that the balance was in his favour, were charged with interest from the filing of the bill on the amount found due; and in *Turner v. Burkinshaw*, 2 Ch. 488, from the date of the chief clerk's certificate.

Interest was allowed upon the balance of a stated account: *Barwell v. Parker*, 2 Ves. S. 365; *Anon.*, 2 Eq. Ab. 8, n.; *D. Marlborough v. Strong*, 1 Mad. Ch. 143, n.

Interest at 4l. p. c. was given on sums payable under a railway contract, from the time when they ought to have been ascertained and paid by the Defts, though there was no express contract: *McIntosh v. G. W. Ry.*, 4 Giff. 683; 6 N. B. 336, 339; 2 De G. & S. 758; 2 M. & G. 74.

An agreement to pay subsequent interest at the same rate is not to be implied from an agreement to pay a sum with interest on a day certain, or to pay a sum with interest up to a day certain. In such a case subsequent interest may be given, but it is by way of damages: *Cook v. Fowler*, L. R. 7 H. L. 27. A debt secured by a deposit of a life policy, with no memorandum, bore interest at 4 p. c.: *Re Kerr*, 8 Eq. 331.

As to charging trustees with compound interest, *v. sup.* p. 1165.

In general, interest is not given unless:—

(1.) There is a contract to pay it either expressed or implied from the custom of dealing between the parties: *Exp. Champion*, 3 Bro. C. C. 436; *Provincial Bk. of Ireland v. O'Reilly*, 26 L. R. Ir. 313; *Caledonian Ry. Co. v. Carmichael*, L. R. 2 H. L. Sc. 56, 66; *Webster v. British Empire, &c. Co.*, 15 Ch. D. 169, C. A.; *Re Edwards*, *Williams v. Trench*, 61 L. J. Ch. 22; 65 L. T. 463; *Nichol v. Thompson*, 1 Camp. 52, n.; where it appeared that interest had been allowed on former balances.

Or from mercantile usage: *Higgins v. Sargent*, 2 B. & C. 348; *Juggomohun Ghose v. Manickchand*, 7 Moo. Ind. Ap. 263; 7 W. R. 715; *Page v. Newman*, 9 B. & C. 378; *Calton v. Bragg*, 15 East, 223, 228. This rule applied to bills of exchange and promissory notes, to which it is now extended by the codifying enactments of the Bills of Exchange Act, 1882 (45 & 46 V. c. 61), ss. 57, 89, under which interest is made payable from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case: see *Byles on Bills*, 16th ed. pp. 439, 440.

(2.) Interest is payable in cases within the Civil Procedure Act, 1833 (3 & 4 W. IV. c. 42), s. 28, which enacts that a jury may give interest on "all debts or sums certain payable at a time certain or otherwise" from the time when payable under some written instrument, or, if payable otherwise, then from the time when demand of payment shall have been made in writing, "so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment."

The written instrument must be that under which the debt is payable: *Taylor v. Holt*, 13 W. R. 78; 3 H. & C. 452.

Whether the section is not merely declaratory of the existing law, *quære*:

Webster v. British Empire, &c. Co., 15 Ch. D. 169, 178, C. A., per Theaiger, L. J.

By sect. 29, a jury may give damages in the nature of interest in all actions of trover or trespass for value of goods, and on policies of insurance: see *Atwood v. Taylor*, 1 Man. & G. 279; *Farr v. Ward*, 3 Mee. & W. 25; *McCalmont v. Rankin*, 2 D. M. & G. 403, 413.

Where a decree was made holding Defts liable for the market value of minerals at the pit's mouth, without allowance for getting or working them, and the suit was continued against their represes after their death, it could not be regarded as an action of trover or trespass within sect. 29: *Phillips v. Homfray*, 44 Ch. D. 694.

When Defts, after a demand under sect. 28, had paid the money into Court, they had to pay the interest: *Hull, &c. Ry. v. N. E. Ry.*, 5 D. M. & G. 872. The Court of Chancery in general adopted and enforced the provision of this section: *S. C.*; *Hyde v. Price*, 8 Sim. 578; C. P. Coop. 193, 208; and allowed on legal debts the same interest as that generally given by juries (5 p. c.): *Re Roberts, Goodchap v. R.*, 14 Ch. D. 49, C. A.; *Lord Rokeby v. Elliott*, 13 Ch. D. 277, C. A.; 7 App. Ca. 43; *Dreyfus v. Peruvian Guano Co.*, 42 Ch. D. 66; 43 Ch. D. 316, C. A.; *Knapp v. Burnaby*, 9 W. R. 765; *Upton v. L. Ferrers*, 5 Ves. 803; *Dornford v. D.*, 12 Ves. 129; and in general followed the law as to giving interest on legal debts: *Parker v. Hutchinson*, 3 Ves. 135; *Lowndes v. Collens*, 17 Ves. 27.

In one case interest at 4 p. c., instead of 5, was given upon the submission of the applicant with an expression of opinion that, in view of the present mercantile rate of interest, 4 p. c. was in general sufficient: *In re Metropolitan Coal Consumers' Assoc., Wainwright's Case*, 62 L. T. 30; 63 L. T. 429; 59 L. J. Ch. 281; but 5 p. c. must still be regarded as the regular mercantile rate in Courts of law, though (*semble*) the Court is not bound to give interest at that rate, but may follow the current rate: *L. C. & D. Ry. Co. v. S. E. Ry. Co.*, 40 Ch. D. 100; (1892) 1 Ch. 120, C. A.; and see *Peruvian Guano Co. v. Dreyfus*, (1892) A. C. 166.

Under a covenant to pay money at a time specified, with interim interest at a specified rate, interest after the specified time will be recoverable only as damages, and not at the specified rate: *Re Roberts, Goodchap v. R.*, 14 Ch. D. 49, C. A.; *Arbuthnot v. Bunsillall*, W. N. (90) 37; 62 L. T. 234; and a covenant for payment of interest, if merely incidental to the covenant for payment of the principal, will be merged in a subsequent judgment and carry interest at 4 p. c.: *Exp. Fewings, Re Sneyd*, 25 Ch. D. 338, C. A.; *Usborne v. Limerick Market Trustees* (1900), L. T. R. 85, C. A.; see 1 & 2 V. c. 110, s. 17; O. LV, 62, 63, 64; *secus*, if a covenant for payment of interest is so worded as to amount to an independent stipulation: *Popple v. Sylvester*, 22 Ch. D. 98; and as to interest on mortgage debts, *v. inf.* Chap. XLVII., "MORTGAGES."

Under the Bankruptcy Act, 1890 (53 & 54 V. c. 71), s. 23, interest upon a proved debt is, for the purposes of dividend, to be calculated at a rate not exceeding 5 p. c., without prejudice to the right of the creditor to receive out of the debtor's estate any higher rate to which he may be entitled after all the debts proved in the estate have been paid in full.

Interest being only payable as damages for wrongful detention of money, payment of it was not ordered where there was mere delay without fault: *A. G. v. Corp. Ludlow*, 1 H. & T. 216; or the delay was caused by the payee: *Bushnan v. Morgan*, 5 Sim. 635, where he had lost the policy; or by the neglect of the mortgagees of the policy to clothe himself with a legal title to the money: *Webster v. British Empire, &c. Co.*, 15 Ch. D. 169, C. A.

Before the Civil Procedure Act, 1833 (3 & 4 W. IV. c. 42), s. 28, *sup.*, money payable under a written contract upon demand, or upon a day certain, bore interest from the time of the demand made, or from the time fixed for payment both at law and in equity: *Lowndes v. Collens*, 17 Ves. 27; *Tunstall v. Trappes*, 3 Sim. 306; *Webster v. British Empire, &c. Co.*, *sup.*

For cases before the Act which would now be within it, see *Gordon v. Swan*, 12 East, 419; *Maberly v. Robins*, 1 Marsh. 258.

A day of payment depending on a future contingent event is not a time certain within 3 & 4 W. IV. c. 42, s. 28: *L. C. & D. Ry. Co. v. S. E. Ry. Co.*, (1892) 1 Ch. 120, C. A.; (1893) A. C. 429, H. L.; the certainty of both time and amount must appear from the contract: *S. C.*, following *Merchant*

Shipping Co. v. Armitage, L. R. 9 Q. B. 99, and not following *Duncombe v. Brighton, &c. Co.*, L. R. 10 Q. B. 371; nor can interest be given as damages for detention of a debt so payable: *L. C. & D. Ry. Co. v. S. E. Ry. Co.*, (1892) 1 Ch. 120, C. A.; (1893) A. C. 429, H. L. But a sum which a testator covenants that his represes shall pay within a specified time after his decease is a sum "payable at a certain time" within the section: *Re Horner, Fooks v. H.*, (1896) 2 Ch. 188, following *Knapp v. Burnaby*, 9 W. R. 765; and as to what is a sufficient demand under the section, see *S.C.C.*; *Geake v. Ross*, 23 W. R. 658; 32 L. T. 666; 44 L. J. C. P. 315; *Rishton v. Grissell*, 10 Eq. 393; and that a demand for more than double the amount which turned out to be due is not sufficient, *Hill v. S. Staff. Ry.*, 18 Eq. 154, 169, and cases there cited.

Nor is a creditor who has neglected to ascertain his claim entitled to interest upon it: *Caled. Ry. v. Carmichael*, L. R. 2 Sc. 56, 62, 66; see *Webster v. British Empire, &c. Co.*, *sup.*

In winding up cos. interest is payable on calls, the notice of which states that interest will be charged: *Barrow's Case*, 3 Ch. 784; *Lintott's Case*, 4 Eq. 184; independently of any provision in the articles: *Re Welsh Flannel, &c. Co.*, 20 Eq. 360.

A summons in Chambers in a winding-up was held a sufficient demand: *Alison's Case*, 15 Eq. 394; 9 Ch. 1, 8, 24; *secus*, the claim on the writ in an action for the debt: *Rhymney Rail. Co. v. Rhymney Iron Co.*, 25 Q. B. D. 146, C. A.; or a mere notification on a tradesman's bill that interest will be charged: *Re Edwards, Williams v. Trench*, 61 L. J. Ch. 22; 65 L. T. 543.

Money recovered in an action for money had and received does not carry interest from the time it came to Deft's hands, nor from the time of an express demand for it, except on proof of an express or implied promise to pay interest, or of Deft having made interest on the money himself: *De Havilland v. Bowerbank*, 1 Camp. 50; *De Bernales v. Fuller*, 2 Camp. 428; *Tappenden v. Randall*, 2 B. & P. 467, 472; *Fruhling v. Schroeder*, 2 Bing. N. C. 77; or that there was fraud: *Crockford v. Winter*, 1 Camp. 124, 129.

Interest was allowed on a claim in an admon suit for work from the date of the demand: *Mildmay v. Methuen*, 3 Drew. 91.

A stakeholder cannot be charged with interest—as in the case of an auctioneer: *Harington v. Hoggart*, 1 B. & A. 577; or agent or purchaser liable to be called on for immediate payment: *Ib.* 589; nor is interest allowed from the time of demand on a sum deposited with bankers, under an agreement that, during the continuance of the deposit, interest should not be paid: *Edwards v. Vere*, 5 B. & A. 282.

(3.) Interest is payable on money wrongfully, fraudulently, or vexatiously withheld: *Meredith v. Bowen*, 1 Keen, 270; *Caled. Ry. v. Carmichael*, L. R. 2 Sc. 66; *Webster v. British Empire, &c. Co. sup.*; *Craven v. Tickell*, 1 Ves. 63; *Pearse v. Green*, 1 Jac. & W. 135; as to which, see *Rishton v. Grissell*, 10 Eq. 393; *Turner v. Burkinshaw*, 2 Ch. 488.

And see *Martyn v. Blake*, 3 D. & War. 125; *Earl of Mansfield v. Ogle*, 4 D. & J. 38; *Blogg v. Johnson*, 2 Ch. 225.

But not where the party claiming interest is himself in default: *L. C. & D. Ry. Co. v. S. E. Ry. Co.*, *sup.*

The right of an agent to charge interest on sums paid by him may be shown by the course of dealing: *G. W. R. Ins. Co. v. Cunliffe*, 9 Ch. 525.

Notwithstanding the Gen. Ord. of 1862, r. 26, Buckley, 401 *et seq.*, which has been thought to be *ultra vires*, the creditors of a co. being wound up can only prove for capital and interest due at the date of the petition: *Re East of Eng. Bkg. Co.*, 4 Ch. 14; *Ebbw Vale Co.'s Case*, 5 Ch. 112; unless there is a surplus: *Re Humber, &c. Co.*, 4 Ch. 643; and no calls can be made for payment of interest on debts which do not carry interest: *Re Hadfield's Cask Co.*, 9 Jur. N. S. 997; 11 W. R. 971; 2 N. R. 502. But a creditor may hold his security (*Re Joint Stock Disc. Co.*, 10 Eq. 11), or prove against two companies for the same debt (*S. C.*, 5 Ch. 86) until he has received interest as well as principal.

Where a decree holding the Defts liable for the full value of minerals wrongfully gotten was silent as to interest, interest could not be given on further consideration: *Phillips v. Homfray*, 44 Ch. D. 694.

Upon a contract to indemnify, express or implied, interest by way of damages is allowed, on the ground that the person to be indemnified ought to

be put in the position in which he would have been if the other party had done what he contracted to do: *Exp. Bishop, Re Fox, Walker & Co.*, 15 Ch. D. 400, C. A.; *Petre v. Duncombe*, 2 L. M. & P. 107; *Hitchman v. Stewart*, 3 Drew. 271; *Lawson v. Wright*, 1 Cox, 275; *Re Swan's Estate*, Ir. Rep. 4 Eq. 209; *L. C. & D. Ry. Co. v. S. E. Ry. Co.*, (1892) 1 Ch. 120, C. A.; (1893) A. C. 429, H. L.

And on rescission of contract interest is given, not by way of damages, but of restoration of the Plt to his original position: *Re Met. Coal Assoc., Karberg's Case*, (1892) 3 Ch. 1, C. A.

As to interest on costs, *v. sup.* p. 267; on judgments, see Chap. XLVII., "MORTGAGES"; on arrears of annuity, *inf.* p. 1637; on debts proved in admon actions, *inf.* pp. 1425, 1426; on legacies, p. 1504; and as to interest in partnership and other cases, see the notes on the several subjects.

As to charging trustees and exors with interest on, or profits realised by, money in their hands, *v. sup.* pp. 1164—1166.

And see further as to interest being payable at law, Chit. Cont. 13th ed. 544 *et seq.*

CHAPTER XLIV.

ADMINISTRATION OF THE ESTATES OF DECEASED PERSONS.



SECTION I.—CREDITOR'S ACTION—ORIGINAL JUDGMENT OR ORDER.

1. *Administration of Personalty at the Trial, or on Summons under O. XV, 1, or O. LV, 3—Testacy or Intestacy.*

[*For preliminary parts, see sup. Vol. I., pp. 141 et seq., and 178 et seq.*].—Let the following accounts and inquiry be taken and made; that is to say—1. An account of what is due to the Plt and all other the creditors of the intestate [*or testator*] A.; 2. An account of the intestate's [*or testator's*] funeral expenses; 3. An account of the intestate's [*or testator's*] personal estate come to the hands of the Defts B., C., and D., the admors of his effects [*or exors of his will*], or of any [*or if two only, either*] of them, or to the hands of any other person or persons by the order or for the use of the said Defts, or any [*or either*] of them; 4. An inquiry what parts, if any, of the intestate's [*or testator's*] personal estate are outstanding or undisposed of.

And Let the intestate's [*or testator's*] personal estate be applied in payment of his debts and funeral expenses in a due course of admon; And [*if on summons under O. XV, 1, the Judge not requiring any trial of this action other than the hearing of this application*] Let the further consideration of this action be adjourned.—Liberty to apply.

For declaration that for the purposes of the suits, circumstanced as they were, there was a sufficient pers. represve, admor *ad litem* of the testator, a party thereto, see *Ellice v. Goodson*, V.-O. K. B., 30 April, 1845, A. 1321; 2 Col. 4.

For forms of grants of admon *ad litem*, see *S. C.*; *Jones v. Howell*, 2 Ha. 345, n.; *Davis v. Chanter*, 2 Ph. 549; and to attorney of exor resident abroad, *Chambers v. Bicknell*, 2 Ha. 537, n., cited by V.-O. K., 4 Drew. 272; and for notes as to admon *ad litem*, *v. inf.* p. 1398.

For orders in single creditors' suits, see Seton, 3rd ed. 136, 137.

2. *The like—Personalty and Realty—Testacy.*

[*Preliminary part, see sup. Vol. I., pp. 141 et seq.; 178 et seq.*].—Usual accounts of personal estate [Form 1, *sup.*].—And Let the

testator's personal estate be applied in payment of his debts and funeral expenses in a due course of admon; And Let, in case the testator's personal estate shall be insufficient for the payment of his debts and funeral expenses, the following further inquiries and account be made and taken, that is to say :—

5. An inquiry what real estate the testator was seised of or entitled to at the time of his death; 6. An inquiry what incumbrances if any, affect the testator's real estate, or any and what parts thereof; 7. An account of what is due to such of the incumbrancers, if any, as shall consent to the sale hereinafter directed in respect of their incumbrances; 8. An inquiry what are the priorities of such last-mentioned incumbrancers; And Let a sufficient part of the testator's real estate, to make good the deficiency of his personal estate, or, if necessary, the whole of such real estate, be sold, with the approbation of the Judge, free from the incumbrances, if any, of such of the incumbrancers as shall consent to the sale, and subject to the incumbrances of such of them as shall not consent.

And Let the money to arise by the sale of the testator's real estate be paid into Court to the credit of this action (*A. v. B.* 1900, *A.* 1003) to an account to be intituled, "Proceeds of Sale of Testator's Real Estates," subject to further order. And if such money, or any part thereof, shall arise from real estate sold with the consent of incumbrancers, the money so arising is to be applied, in the first place, in payment of what shall appear to be due to such incumbrancers according to their priorities.—Adjourn further consideration.—Liberty to apply.

For judgment directing accounts (at risk of Plt as to costs) of personal estate and of debts, adjourning further consideration, and omitting direction for admon, see *Re Barrett, Whitaker v. B.*, 28 Feb. 1888, *A.* 361; *S. C.*, 43 Ch. D. 70.

For account of rents of realty, see Form 16, p. 1455. It is not usually directed until further consideration. And see Sect. XXX. *inf.*

For order by consent, the assets being deficient, for the mortgagee to take a deficient security in full discharge, as if sold to him under the decree, with leave to apply for a grant of the legal fee from the Crown, see *Rogers v. Maule*, 1 Y. & C. C. 6.

For a decree in a creditor's admon suit, with a declaration that interests given by the will to the testator's widow were not to be disturbed during her life, under a special agreement by the Plt creditor not to sue during her or testator's life, see *Harman v. Richards*, 10 Ha. 81; and see *O'Brien v. Osborne*, 10 Ha. 92.

For form of summons for sale of real estate, see D. C. F. 633.

3. Administration of Realty and Personalty at the Trial, or under O. XV, 1—Intestacy.

USUAL accounts of intestate's personalty [Form 1, p. 1390]; And Let the intestate's personal estate be applied in payment of his debts and funeral expenses in a due course of admon; And Let, in case the intestate's personal estate shall be insufficient for the payment of his debts and funeral expenses, the following further inquiries be made, that is

to say [*If heir a necessary party*; 5. An inquiry who was the heir-at-law of the intestate &c. [Forms 9, 10, *inf.* p. 1394]; And if it shall appear that such heir-at-law or other the person now entitled to the intestate's real estate, is a party to this action &c.]. 6. An inquiry what real estate the intestate was seised of or entitled to at the time of his death; 7. An inquiry what incumbrances, if any, affect the intestate's real estate, or any and what parts thereof; 8. An account of what is due to such of the incumbrancers, if any, as shall consent to the sale hereinafter directed in respect of their incumbrances; 9. An inquiry what are the priorities of such last-mentioned incumbrancers;

And Let a sufficient part of the intestate's real estate to make good the deficiency of the intestate's personal estate, or (if necessary) the whole of such real estate, be sold, with the approbation of the Judge, free from the incumbrances, if any, of such of the incumbrancers as shall consent to the sale, and subject to the incumbrances of such of them as shall not consent.

And Let the money to arise by such sale be paid into Court &c., to the credit of this action &c., to an account to be intituled, "Proceeds of Sale of Intestate's Real Estates," subject to further order. And if such money &c. [Form 2, p. 1391].—Adjourn, &c.—Liberty to apply.

If the provisions of the Land Transfer Act, 1897 (*v. inf.* p. 1397), are applicable, or if they are inapplicable but the heirship is sufficiently proved at the hearing, omit inquiry 5, and vary the numbering of the subsequent directions accordingly.

4. *Payment of Plaintiff's Debt on Admission of Assets.*

AND the Deft B., the admor of the effects [*or exor of the will*] of the intestate A., by his statement of defence [*or counsel, or, if on summons, solr*] admitting assets of the intestate [*or testator*] for the purposes of this action [*If debt admitted*, And that the estate of the intestate *or* testator is indebted to the Plt as in the pleadings mentioned; *If amount admitted*, And that the sum of £— is now due to him for principal and interest in respect of his debt; Let the Deft B. on or before &c., pay to the Plt C. the said sum of £— with subsequent interest on the principal sum of £—, part thereof, at the rate of £— p. c. per ann., from the — day of — to the day of payment, less income tax; *If costs given*, And Let the Deft B. pay to the Plt C. his costs of this action, to be taxed &c.—Liberty to apply]. [*If debt or amount not admitted*, Let an account be taken of what is due to the Plt for principal and interest in respect of his debt in the pleadings mentioned.—Adjourn &c.]

For decree in suit to charge realty and personalty made on admission of Plt's debt by the exors and trustees, and by the other Defts who were *sui juris*, giving Plt leave to prove his debt, and that two Defts were out of the jurisdiction, and subject thereto to take the accounts, with leave to adopt accounts in previous suit as to the personalty, see *Hughes v. Eades*, 1 Ha. 486, 489, *et v. inf.* p. 1419.

5. *Administration—Creditor's Action commenced by Originating Summons—Proceedings not to be taken under Order without leave of Judge in person.*

UPON the application &c. by originating summons, of W., the surviving executrix of J., and upon hearing counsel for the applicant and for the Defts, and upon reading &c., Let &c. 1. Account of debts; 2. Account of funeral expenses; 3. Account of personal estate; 4. Inquiry as to outstanding personalty; And Let the testator's personal estate be applied in payment of his debts and funeral expenses in a due course of admon. But no proceedings are to be taken under this order beyond taking the account No. 1 without leave of the Judge in person.—Adjourn further consideration, with liberty to apply.—*Re Whetham, W. v. W.*, North, J., at Chambers, 28 March, 1892, B. 435.

6. *General Administration—Accounts &c. not to be prosecuted without leave of the Judge in person—O. LV, 15, 15A.*

UPON the application, by originating summons, of A. and B. &c., and upon hearing the solrs &c.; Let [Usual accounts and inquiries in an admon action of real and personal estate at the suit of exors and trustees, with direction for sale of real estate, &c.]. But no proceedings are to be taken under this order without the leave of the Judge in person.—*Re Greig, G. v. G.*, Stirling, J., 2 May, 1892, A. 689.

7. *Inquiry for the purposes of Administration in a Creditor's Action—Transfer of another Action from Queen's Bench Division—O. XLIX, 5.*

UPON the application of J., who claims to be a creditor upon the estate of E., and upon hearing &c., and upon reading &c.; Let, for the purposes of admon, the following inquiry be made, that is to say, an inquiry as to the debts due from the said E., deceased; And the parties are to be at liberty to apply in Chambers as they may be advised; And Let the action, *Re E., E. v. E.*, 1884, E. 13, in the Queen's Bench Division of this Court, be transferred to the Ch. Div. of this Court, and be assigned to Mr. Justice K.—*Re Evans, Jones v. E.*, Kay, J., at Chambers, 19 March, 1884, A. 571.

This order was made by Mr. Justice Kay in person.

8. *Order in Chambers for Account of Plaintiff's Debt on Admission of Assets.*

AND the Defts, by their solrs, admitting assets of the testator sufficient to answer any claim of the Plt which may be established against them as such exors; Let an account be taken of what is due to the

Plt as such creditor as aforesaid in respect of his debt.—Adjourn &c. —*Perrin's Estate, Court v. Perrin*, M. R., at Chambers, 23 March, 1875, B. 516.

For decrees for admon of personal and real estate of a woman married before 1883, see Seton, 4th ed. p. 804; and also Chap. XXXVII., "MARRIED WOMEN."

9. Inquiry as to Heir, or Real Representatives.

AN inquiry who was the heir-at-law of the testator [*or* intestate] at the time of his death, and whether such heir is living or dead, and if dead, who, by devise, descent, or otherwise, is entitled to such real estate (if any) of the testator [*or* intestate] as descended to such heir-at-law.—*Chetham v. Higinbotham*, V.-C. W., 11 Feb. 1860, A. 488; *Openshaw v. Davies*, V.-C. M., 2 May, 1874; 22 W. R. 680.

10. Inquiry for Customary Heir.

AN inquiry who was the heir of W., the testator [*or* intestate], according to the customs of the manors whereof his copyhold estates are respectively holden, living at the time of his death, and whether such customary heir is living or dead, and if dead, who, by devise, descent, or otherwise, is entitled to such copyhold estates as descended to such customary heir.—*Rees v. Drake*, M. R., 14 March, 1871, B. 572.

NOTES.

FORM OF ORDER OR JUDGMENT—FRAME OF ACTION.

Whether the order is founded on a summons in Chambers (O. LV) or not (*Eyre v. Cox*, 24 W. R. 317), all the proceedings are intituled in the matter of the estate which is to be administered.

Ordinary Accounts and Directions.—By O. XXXIII, 6, every judgment or order for a general account of the personal estate of a testator or intestate is to contain a direction for an inquiry what parts (if any) of such personal estate are outstanding or undisposed of, unless the Court or Judge otherwise directs.

By r. 7 the clauses of the judgment or order containing any directions to be prosecuted in Chambers should be numbered, so that the numbered paragraphs and the chief clerk's (Master's) certificate may correspond; the other paragraphs of the judgment or order are not numbered.

By O. LV, rr. 44 and 62, directions as to advertisements, interest and exclusion, are not now inserted in the judgment: see notes headed "INTEREST ON DEBTS," *inf.* p. 1425; "ESTABLISHING DEBTS OR CREDITS," *inf.* p. 1431.

The direction for an account of debts includes equitable as well as legal debts: *Paynter v. Houston*, 3 Mer. 302; and see *Baker v. Martin*, 5 Sim. 380.

It is not necessary to insert in the judgment in an action by creditors a declaration in the terms of the Jud. Act, 1875, s. 10 (as to which *v. inf.* p. 1460): *Re Murray, Woods v. Greenwell*, V.-C. H., 30 W. R. 283; not following *Re Hildick, Hipkins v. H.*, 29 W. R. 733 (Fry, J., 6 May, 1881).

In *Tomlin v. T.*, 1 Ha. 236, it was held that the Plt was not entitled to a declaration that a particular debt or sum formed an item in the account

to be taken, but that evidence to show Deft should be charged with it was admissible.

The direction to apply the assets in a due course of admon did not confine such application to a legal course, but was always taken distributively, and understood of legal or equitable assets, according to their nature: *Hartwell v. Chitters*, Amb. 308; *Bailey v. Ekins*, 7 Ves. 324; *Solley v. Gower*, 2 Vern. 62.

An order for accounts under O. xv, 1, without a judgment for admon does not prevent a creditor of the estate from suing the exor, or the exor from paying a debt due from the estate: *Re Barratt, Whitaker v. B.*, 43 Ch. D. 70.

Where an admon judgment is made after advertisements have been issued under 22 & 23 V. c. 35, no more are required, and they may be dispensed with without any special direction: *Cuthbert v. Wharmby*, W. N. (69) 12.

Where any accounts are to be taken as settled, a direction to that effect should be inserted in the order: *v. sup.* pp. 1382, 1383.

By O. xxxiii, 2, the Court or a Judge may at any stage of the proceedings in a cause or matter direct any necessary inquiries or accounts to be taken, notwithstanding that it may appear that there is some special or further relief sought for, or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

This rule does not authorize the Court to refer to Chambers the whole of the questions in a cause, but only to direct before trial accounts which would otherwise have been directed at the trial: *Garnham v. Skipper*, 29 Ch. D. 566, O. A.

Procedure.]—A creditor's admon judgment or order may be obtained:—

(1.) By the ordinary form of action commenced by writ.

(2.) The writ being indorsed under O. iii, 8, the ordinary order for an account may be made under O. xv, 1, 2 (on an application in Chambers at any time after the time for appearance has expired), if the Deft fails to appear (see Vol. I. p. 172), or after appearance, unless he satisfy the Court or a Judge, by affidavit or otherwise, that there is some preliminary question to be tried.

Under O. xv, 1, only the usual admon accounts and inquiries can be directed, and, having regard to O. lv, 10, even those will not be directed where, if the Plt's case is fully established at the hearing, accounts or inquiries would be required going over the same ground in part: *Re Gylhon, Allen v. Taylor*, 29 Ch. D. 834, O. A.; or where the Court, in the exercise of its discretion, considers that the exigency of the case will be met by giving judgment for particular items only: *Campbell v. Gillespie*, (1900) 1 Ch. 225.

(3.) By summons in Chambers under O. lv.

Frame of Action.]—Where a creditor desires to have the realty administered as well as the personality, he must sue on behalf of himself and all other the creditors: *Worraker v. Pryer*, 2 Ch. D. 109; *Ponsford v. Hartley*, 2 J. & H. 736; *Busby v. Seymour*, 1 J. & Lat. 527; *Bedford v. Leigh*, 2 Dick. 707; *Johnson v. Compton*, 4 Sim. 47; *May v. Selby*, 1 Y. & O. C. 235; *Chapman v. C.*, 13 Beav. 308.

And this is the same under the new practice: *Worraker v. Pryer*, 2 Ch. D. 109; *Re Boyle, Fryer v. B.*, 5 Ch. D. 540; *Adcock v. Peters*, W. N. (76) 139; *Re Greaves, Bray v. Tofield*, 18 Ch. D. 551, 554. If the writ does not show that the Plt is suing on behalf of all the other creditors, this fact ought to appear in the title of the statement of claim, and not merely in the body of it: *Re Tottenham, T. v. T.*, (1896) 1 Ch. 628 (explaining *Eyre v. Cox*, 24 W. R. 317).

Where, however, the whole realty was devised to trustees, who had power to sell and give receipts, an admon order including the realty could be made on summons under 15 & 16 V. c. 86, s. 45 (or, it seems, in a suit by bill: *Wooldridge v. Norris*, 6 Eq. 410), by a creditor, without it being stated that he sued for himself, &c.: *S. C.*, *Re McKeown*, 22 W. R. 292.

Leave was given in such cases to amend at the hearing by making the suit on behalf of all the creditors: *S. C. C.*; *Woods v. Sowerby*, 14 W. R. 9.

And see *A. G. v. Newcombe*, 14 Ves. 6; *Good v. Blewitt*, 13 Ves. 397; *Brocklehurst v. Jessop*, 7 Sim. 443; and after such an amendment depositions taken in the original suit might still be used: *Milligan v. Mitchell*, 3 My. & C. 72.

County Court.—Where the amount or value of the estate, "real or personal, or real and personal," does not exceed 500*l.*, the proceedings may be taken in the County Court of the district in which the deceased had his last place of abode, or in which the exors or admors, or any one of them, shall have their or his place of abode: County Courts Act, 1888 (51 & 52 V. c. 43), ss. 67, 75. See the County Court Rules, 1889. But a Plt could nevertheless proceed in Chancery, and was entitled to his ordinary costs: *Brown v. Rye*, 17 Eq. 343. But under 51 & 52 V. c. 43, s. 69, any action or matter which might have been commenced in a County Court may be transferred thither: see *Linford v. Gudgeon*, 6 Ch. 359, and *sup.* Vol. I. p. 842; and as to transfer from the County Court, *v. sup.* Vol. I. p. 843.

In *Birke v. Silverwood*, 14 Eq. 101, the amount of the property appearing to exceed the limit, the case was transferred to Chancery, under 28 & 29 V. c. 99, s. 9, and proceeded with in Chambers as on admon summons.

A County Court, before which an admon action is pending, has no jurisdiction to restrain proceedings in the High Court in respect of claims provable: *Cobbold v. Pryke*, 4 Ex. D. 315.

Advertisements by Exors, &c.—By 22 & 23 V. c. 35, s. 29, "where an exor or admor shall have given such or the like notices as, in the opinion of the Court in which such exor or admor is sought to be charged, would have been given by the Court in an admon suit for creditors and others" (which includes next of kin: *Newton v. Sherry*, 1 C. P. D. 246; and see *Clegg v. Rowland*, 3 Eq. 368) to send in their claims, he may afterwards distribute the assets, having regard to the claims "of which such exor or admor has then notice," and shall not be liable for claims of which he then had no notice. But nothing in the Act is to prejudice the right of any creditor or claimant to follow the assets, or any part thereof, in the hands of any person or persons who may have received the same respectively. This proviso is not applicable to real estate: *Re Cary and Lott*, 70 L. J. Ch. 653; 84 L. T. 859.

An exor is not freed from a claim of which he had notice by the claimant not having sent in his claim in answer to the advertisements: *Re Land Credit Co. of Ireland, Re Markwell*, 21 W. R. 135; *Scottish Eq. Life Ass. Soc. v. Beatty*, 29 L. R. Ir. 290.

As to what advertisements are required, see O. IV, 45, *et inf.* p. 1431.

There is no absolute rule that notices by exors under the Act should be published in a London daily newspaper, or that a month should be allowed for the bringing in of claims; and a notice which fixed a month, but which was not published until a day or two after its date, was held sufficient. In considering the question of sufficiency, the Court will regard all the circumstances, such as the place of residence of the testator, and his position in life: *Re Bracken, Doughty v. Townson*, 43 Ch. D. 1, C. A.; explaining *Wood v. Weightman*, 13 Eq. 434; and see *Stuart v. Babington*, 27 L. R. Ir. 551.

Control and Conduct of Action.—A creditor suing for himself and the other creditors retains the absolute dominion of the action, and may dismiss it at his pleasure until judgment: *Handford v. Storie*, 2 S. & S. 196; *Wood v. Westall*, Yo. 305; or after judgment in another creditor's suit: *Armstrong v. Storer*, 9 Beav. 277; but not after judgment in his own: *Handford v. Storie, sup.*

The Deft, moreover, might, before decree, dismiss the bill on motion, paying Plt's debt, with interest at 4 p. c. (*Manton v. Roe*, 14 Sim. 353) and his costs as between party and party, and the co-Deft's costs: *Pemberton v. Topham*, 1 Beav. 316; including all costs after, as well as before, the tender: *Wainwright v. Sewell*, 11 W. R. 560. See also *Holden v. Kynaston*, 2 Beav. 204, in which, under special circumstances, proceedings were stayed without costs against some of the Defts, on payment of one of Plt's debts on which alone they were liable. And see *Damer v. E. Portarlington*, 2 Ph. 30.

Where Defts, partners of the testator, offered to pay the whole of the Plt's claim and costs, the Court refused to stay proceedings, there being an infant Deft whose rights must be provided for: *Clegg v. C.*, 17 L. R. Ir. 118.

If, after decree in creditor's suit, Plt died, leaving no pers. reprieve, the conduct could be given to another creditor, without bill of revivor, on his petition: *Brown v. Lake*, 2 Col. 620; or motion: *Inchley v. Allsopp*, 9 W. R. 649; 22 L. J. Ch. 170; 7 Jur. N. S. 1181; but not on motion by the accounting parties: *Johnson v. Hammersley*, 24 Beav. 498.

Inquiries as to the beneficial management and realization of the estate are not directed in a creditor's action: *Collinson v. Ballard*, 2 Ha. 119.

In a creditor's action for admon of personal estate, the Plt need not sue on behalf of all the creditors to obtain a general account of debts: *Re Blount*, *Naylor v. B.*, 27 W. R. 865.

As to costs in creditors' actions, *v. inf.* p. 1459.

Single Creditor's Suit.—As to the former procedure in a single creditor's suit, see Seton, 4th ed. p. 801; and for forms of decrees, 3rd ed. p. 138.

REPRESENTATION.

By the Court of Probate Act, 1857 (20 & 21 V. c. 77), ss. 3, 4, the jurisdiction of the Ecclesiastical and other Courts as to probate and letters of admon was transferred to the Probate Court; and, by sect. 23, the ecclesiastical jurisdiction as to legacies and distribution of residues was abolished.

By Jud. Act, 1873, s. 3, the Probate Court became part of the Supreme Court; and by sect. 5, the Judge became a Judge of the High Court, to which, by sect. 16, the jurisdiction was transferred.

By sect. 31 (5), the Probate Division was constituted, and to it is assigned, by sect. 34, all the exclusive jurisdiction of the Court of Probate.

The Ch. D. has, but will not as a matter of discretion exercise, probate jurisdiction: *Pinney v. Hunt*, 6 Ch. D. 98; even if the estate of the testator is in Court in the Ch. D.: *Bradford v. Young*, 26 Ch. D. 659.

By the Probate Amendment Act, 1858 (21 & 22 V. c. 95), s. 10, if the personality, including debts, is under 200*l.*, and the realty under 300*l.*, the contentious jurisdiction is vested in the County Courts, subject to appeal.

By the Court of Probate Act, 1857, s. 59, as amended by 21 & 22 V. c. 95, ss. 11, 12, probate or admon may be applied for, or revoked, in all cases in the Principal Registry, but proper contentious cases may be remitted to the County Court: see *Slater v. Alvey*, L. R. 2 P. & M. 154; *Wms. Exors.* 9th ed. 247.

As to grant of admon by the County Court, through the registrar, to widow or child of an intestate where the estate is under 100*l.*, see 36 & 37 V. c. 52; 38 & 39 V. c. 27.

Before the Court of Probate Act, 1857, the probate, although in solemn form, was only binding as to personality: *Wms. Exors.* 464, 478; but now, by sects. 61 and 62, the heir and persons interested in the real estate may be cited and bound by the probate. By sect. 63, where there is no real estate, or the will does not affect it, the heir need not be cited and is not bound: see *Campbell v. Lucy*, L. R. 2 P. & M. 209.

By sect. 64, the probate, or an office copy, was to be sufficient evidence of the validity of any devise or testamentary disposition of or affecting real estate, unless, after notice, the opposite side give notice that they intend to dispute its validity: see *Barracough v. Greenhough*, L. R. 2 Q. B. 612.

REAL REPRESENTATIVE—LAND TRANSFER ACT, 1897.

Devolution of Legal Interest in Real Estate on Death.—Now, by the Land Transfer Act, 1897 (60 & 61 V. c. 65), after a recital that "it is expedient to establish a real repressve," it is enacted by sect. 1, sub-sect. 1, as follows: "Where real estate is vested in any person without a right in any other person to take by survivorship, it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his pers. represves or repressve from time to time, as if it were a chattel real vesting in them or him." Under this enactment the real estate vests in all the exors and not merely in those who prove the will or act in the admon of the estate: *Re Pawley and London and Provincial Bank*, (1900) 1 Ch. 58.

Sub-sect. 2: "This section shall apply to any real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him." As to the effect of this section, see *Brickdale*, 240, 256, 257.

Sub-sect. 3: "Probate and letters of admon may be granted in respect of real estate only, although there is no personal estate."

Sub-sect. 4: "The expression 'real estate,' in this part of this Act, shall

not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant": see *Brickdale*, 242.

Sub-sect. 5: "This section applies only in cases of death after the commencement of this Act."

Provisions as to Administration.—Sect. 2, sub-sect. 1 of the same Act enacts: "Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the pers. represves of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate."

Sub-sect. 2: "All enactments and rules of law relating to the effect of probate or letters of admon as respects chattels real, and as respects the dealing with chattels real before probate or admon, and as respects the payment of costs of admon and other matters in relation to the admon of personal estate, and the powers, rights, duties, and liabilities of pers. represves in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint pers. represves, without the authority of the Court, to sell or transfer real estate": see *Re Pawley*, *sup.* p. 1397.

Sub-sect. 3: "In the admon of the assets of a person dying after the commencement of this Act" (i.e., on or after Jan. 1st, 1898), "his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; Provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies." As to the effect of the sub-section, see *Re Cary and Lott*, 70 L. J. Ch. 653; 84 L. T. 859.

Sub-sect. 4: "Where a person dies possessed of real estate, the Court shall, in granting letters of admon, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provisions shall be made by rules of Court for adapting the procedure and practice in the grant of letters of admon to the case of real estate."

ADMINISTRATION PENDENTE LITE OR OTHERWISE LIMITED.

By the Court of Probate Act, 1857, ss. 70, 71, and 21 & 22 V. c. 95, ss. 21, 22, pending suits as to validity of wills or grant or recall of probate or admon, the Court (Probate) may appoint an admor, with all rights and powers except that of distribution, and to act under its control, and may appoint a receiver; as to which see *Bellew v. B.*, 11 Jur. N. S. 588; 4 Sw. & Tr. 58; 34 L. J. P. 125; *et sup.* Vol. I. p. 782. An admor *pendente lite* paid legacies at his own risk: *Adair v. Shaw*, 1 Sc. & L. 254 (before the Act). Such an admor is, it seems, liable to be sued by a creditor without leave granted by the P. D.: *Re Toleman*, (1897) 1 Ch. 866.

For cases since the Probate Act, see *Charlton v. Hindmarsh*, 1 Sw. & Tr. 458; 8 W. R. 259; *Horrell v. Witts*, *Grant v. G.*, *Tichborne v. T.*, L. R. 1 P. & M. 103, 654, 730; *Tichborne v. T.*, *Mortimer v. Paull*, *Re Dawes*, 2 ib. 41, 85, 147.

The Court of Chancery would not in general appoint a receiver *pendente lite* after this Act was passed: *Hitchen v. Birks*, 10 Eq. 471; and refused to do so when an admor *pendente lite* had been appointed: *Veret v. Duprez*, 6 Eq. 329; and see *Re Richardson*, and *Teague v. Wharton*, L. R. 2 P. & M. 244, 360; *Overington v. Ward*, 34 Beav. 175; *Nothard v. Proctor*, 1 Ch. D. 6; and see *sup.* Vol. I. pp. 837, 838.

By the Admon of Estates Act, 1798 (38 G. III. c. 87), ss. 1—3, where after twelve months from the testator's death the exor or exors to whom probate had been granted was or were residing out of the jurisdiction, the Eccle-

ecclesiastical Court was empowered to grant to any creditor, next of kin, or legatee, admon limited to the purposes of becoming a Deft in a suit in equity and of carrying the decree into effect.

There was inherent jurisdiction to grant admon *durante absentia* before but not after probate: Wms. Exors. 433, 434.

By the Court of Probate Act, 1857 (20 & 21 V. c. 77), ss. 73, 74; 21 & 22 V. c. 95, s. 18, in case of intestacy, or no exor, or none willing or competent (see *Re Farrands*, 1 P. D. 439) to act, or resident abroad, the Court may in its discretion appoint an admor, other than the person entitled by law to the grant, and with security, and every such admon may be limited as the Court shall think fit; and the 38 G. III. c. 87, is to apply to all exors and admors resident out of the jurisdiction.

Admon limited to certain property transmitted from India to this country was granted under sect. 73: *Re Hughes*, L. R. 3 P. & M. 140.

By the Court of Probate Act, 1857, s. 75, while and so far as the grant subsists, no other person is to act as exor.

By sects. 76—78, any Court in which proceedings are pending, by or against a temporary admor, is enabled to deal with any revocation and new appointment, and *bona fide* payments are protected.

Admon *ad litem* made the grantee complete reprieve so far, and a decree against him bound the general admor: *Davis v. Chanter*, 2 Ph. 545 (overruling 14 Sim. 212; 15 Sim. 93); *Croft v. Waterton*, 13 Sim. 633; though the letters might not authorize him to collect any assets: *Ellice v. Goodson*, 2 Col. 4. If the admon was too limited, and further could be obtained, the Court might direct it to be applied for: *Faulkner v. Daniel*, 3 Ha. 199, 207; as might be the case where the whole estate had to be administered: *Devaynes v. Robinson*, 24 Beav. 98; *Cave v. Cork*, 2 Y. & C. C. 130.

These cases were before the Probate Act. For cases since, see *Williams v. Allen*, 32 Beav. 650; 4 D. F. & J. 71; 10 W. R. 261, 512; *Woodhouse v. W.*, 8 Eq. 514; *Collas v. Hesse*, 12 W. R. 565; *Dowdeswell v. D.*, 9 Ch. D. 294, C. A. The sections apply to an exor's exor: *Re Grant*, 1 P. D. 435.

But neither the Probate Act nor the Jud. Act, 1873, s. 24 (7), have affected the rule that for a general admon (e.g., in an action by a Plt, claiming as a sole next of kin, though brought merely to establish his title) a general admor is a necessary party: *Dowdeswell v. D.*, *sup.*

As to grant of admon *ad litem* by the Court of Probate, see *Maclean v. Dawson*, 1 Sw. & T. 425.

Admon has been granted under special circumstances to one of joint guardians appointed by this Court: *Re Murphy*, 5 Jur. N. S. 416.

Where a sole exor is an infant, admon *durante minore etate* is granted to his guardian or other fit person, under 38 G. III. c. 87, ss. 6, 7; Wms. Exors. 416 *et seq.*; but where there are several, and one is of age, this is unnecessary, as he can execute the will alone: *Ib.* 416. The admor *durante minore etate* can do all acts incumbent on an exor, and may execute a power of sale given to exors and admors: *Monseil v. Armstrong*, 14 Eq. 423; but see Bac. Abr. tit. Exor. (B. 1) 2; *Re Robinson and Lords*, 3 L. R. Ir. 429. He is not chargeable to creditors as an exor *de son tort*, but is liable for a devastavit, even after he has obtained a release from the infant on coming of age: Wms. Exors. 424, 425; in which case, however, he is not in general accountable to creditors.

As to other temporary and limited admors, see Wms. Exors. 427.

RENUNCIATION.

By the Court of Probate Act, 1857 (20 & 21 V. c. 77), s. 79, if an exor renounce, representation is to go as if he had not been named as exor in the will; and by 21 & 22 V. c. 95, s. 16, if he die without proving, or does not appear when cited, he is treated as not having been appointed exor.

PROBATE AND CONFIRMATION.

By the Land Transfer Act, 1897 (*v. sup.* p. 1397), s. 1, sub-s. 3, probate

and letters of admon may be granted in respect of real estate only, although there is no personal estate.

By the Confirmation of Exors (Scotland) Act, 1858 (21 & 22 V. c. 56), s. 9, a Scotch inventory may include personalty in England or Ireland of a person domiciled in Scotland.

By sects. 12, 13, a Scotch confirmation, produced and sealed in England or Ireland, is to have the effect of probate there: see *Hood v. L. Barrington*, 6 Eq. 218; *Re Ryde*, L. R. 2 P. & M. 86; 39 & 40 V. c. 70; and see sects. 42, 43, by which these sections are extended, and trust funds in England or Ireland may be included.

By sect. 14, English or Irish probates may in like manner be made effectual in Scotland.

By sect. 17, an affidavit as to domicile is to be made on applying for probate or admon: and see the Court of Probate Act, 1857 (20 & 21 V. c. 77), ss. 46, 47.

As to probate in Ireland, see 22 & 23 V. c. 31, and Irish probate being sealed in England, and English in Ireland, 20 & 21 V. c. 79, ss. 94, 95; 21 & 22 V. c. 56, s. 29; Wms. Exors. 296, 299.

The confirmation sealed in England is conclusive, although proceedings are pending in Scotland: *Cumming v. Fraser*, 28 Beav. 614; and see *Hawarden v. Dunlop*, 2 Sw. & T. 340; 31 L. J. P. & M. 17; and gives the exor all the powers of an English exor, though contrary to Scotch law: *Hood v. L. Barrington*, 6 Eq. 222, 223; and the scale of duty assessed there cannot be questioned here: *Re Booth*, 1 Gif. 46. And see *Re Hutcheson*, 3 Sw. & T. 165; *Re Ryde*, L. R. 2 P. & D. 86.

By sect. 19, before admon, an intestate's personalty is to vest in the Judge of the Court of Probate for the time being as theretofore in the ordinary.

By the Indian Securities Act, 1860 (23 & 24 V. c. 5), s. 1, enfaced Indian Government securities are to be personalty here, and probate or admon here, or confirmation in Scotland, is to embrace them.

Wills made in Foreign Countries.—By the Wills Act, 1861 (24 & 25 V. c. 114), ss. 1, 2, wills made by British subjects in a foreign country, whatever may be their domicile, or in another part of the United Kingdom, and valid according to the law there, are to be admitted to probate, and to be valid as to personalty. By sect. 3, subsequent change of domicile is not to invalidate a will. By sects. 4, 5, wills otherwise valid are not to be affected by the Act, nor wills of persons dying before the Act.

The will of an Englishman, resident in Scotland, valid according to Scotch law, though invalid according to English law, passed leaseholds in England by virtue of this Act: *Re Watson, Carlton v. C.*, 35 W. R. 711.

Though properly admitted to probate as to personalty, the will of a domiciled foreigner not executed as required by the Wills Act will not pass his interest in leaseholds: *Pepin v. Bruyere*, (1900) 2 Ch. 504.

Will of Alien.—A will made according to the forms of English law by an alien who, though his domicile of origin was English, was domiciled abroad at the time of making the will and of his death, is not entitled to probate in this country: *Blozam v. Favre*, 9 P. D. 130, C. A.; 8 P. D. 101.

In determining what is the valid will of an alien, the general principles of law recognized prior to the Naturalization Act, 1870, are still applicable: *S. C.*

As to this Act, see Wms. Exors. 308; *Re Lacroix*, 2 P. D. 94.

A will made here by an Italian, while naturalized here, was admitted, though he died domiciled in Italy: *Re Gally*, 1 P. D. 438.

By 39 & 40 V. c. 70, s. 41, the affidavit of Scotch domicile to the inventory is to be sufficient warrant for including personalty in England or Ireland.

By sect. 45, a calendar of confirmations and inventories is to be published annually.

The Colonial Probates Act, 1892 (55 V. c. 6), provides for the recognition and sealing here of probates, &c., granted in British possessions to be indicated by Order in Council.

PROBATE DUTY.

By the Probate Duty Act, 1860 (23 & 24 V. c. 15), s. 4, personalty

appointed by will under general powers is to be chargeable with probate and inventory duties.

For cases before the Act, see *Goldsworthy v. Crossley*, 4 Ha. 140 (a married woman's will); *A. G. v. Hope*, 2 Cl. & F. 84. By sect. 5, the duty is to be a charge on the property; by sect. 6, money secured on or by heritable property, or bonds in Scotland, is so charged: and see 23 & 24 V. c. 80; *Hanson*, App. xx.

By 27 & 28 V. c. 36, s. 4, British ships at sea were subjected to probate duty.

By sect. 5, there was no probate duty on effects not exceeding 100l.

By 28 & 29 V. c. 104, s. 57, a summary mode of recovering probate duty was provided.

By the Inland Revenue Act, 1868 (31 & 32 V. c. 124), s. 7, mortgage debts due from the deceased on the sole security of leaseholds, may be deducted in the affidavit of value for probate; and by sect. 8, the form of affidavit given in the schedule is to be used.

An action cannot be maintained by an exor or admor to recover a larger sum than that on which probate duty was paid. The full stamp must be obtained before judgment: *Howard v. Prince*, 10 Beav. 312; *Jones v. Howells*, 2 Ha. 342, 353; Stamp Acts, 1870, 1891, *sup.* Vol. I. pp. 155 *et seq.*; and before granting stop order on the fund: *Christian v. Devereux*, 12 Sim. 264; and although the claim for duty was doubtful: *Hunt v. Stevens*, 3 Taunt. 113; *Carr v. Roberts*, 2 B. & Ad. 905. And see *Re Ross*, 25 W. R. 808.

In *O'Sullivan v. Burke*, Ir. Rep. 9 C. L. 105, an unproved will was held admissible in evidence as a signed declaration of a fact.

The duty is payable on the whole personalty (including contingent rights, according to the value at the time of payment: *Lord v. Colvin*, 3 Eq. 737; *Hanson*, 289) to which the deceased was actually beneficially entitled, and which was situate in this country: *Hanson*, 2, 273, 274; 55 G. III. c. 184; *Wms. Exors.* 542 *et seq.*; *A. G. v. Hope*, 2 Cl. & F. 84; 8 Bli. N. S. 44; *Commrs of Stamps v. Hope*, (1891) A. C. 476, 481; *Blackwood v. Reg.* 8 App. Ca. 82; without regard to the domicile at the death: *Fernandes Exors' Case*, 5 Ch. 317; or to the law of the domicile: *Partington v. A. G.*, L. R. 4 H. L. 100. And as to funds in course of transmission to England at the death, see *A. G. v. Pratt*, L. R. 9 Ex. 140.

A simple contract debt is to be deemed to be in the locality in which the debtor is residing; a specialty in that in which the instrument is found at the creditor's death: *Commrs of Stamps v. Hope*, (1891) A. C. 476.

Certificates of shares in a foreign co., with forms of transfer and power of attorney indorsed and executed in blank, if marketable in this country and operative by delivery, are liable to probate duty: *Stern v. Reg.*, (1896) 1 Q. B. 211.

The duty is payable on the deceased's interest in realty equitably converted at his death, so as to bind him, whether by contract for sale: *A. G. v. Brunning*, 8 H. L. C. 243; or by the will under which he took: *A. G. v. Lomas*, L. R. 9 Ex. 29; *In the Goods of Gunn*, 9 P. D. 242; and a trust for sale on the request of husband and wife or survivor operates as a conversion of the land into personalty: *A. G. v. Dodd*, (1894) 2 Q. B. 150; or land of a lunatic purchased out of his personal estate under an order in lunacy, directing that such land was to be considered as part of the lunatic's personal estate: *A. G. v. Marquis of Ailesbury*, 12 App. Ca. 672; 16 Q. B. D. 408, C. A.; 14 Q. B. D. 895; and on realty forming partnership assets: *A. G. v. Hubback*, 13 Q. B. D. 275, C. A.; 10 Q. B. D. 488, discussing *Custance v. Bradshaw*, 4 Ha. 315; *A. G. v. Brunning*, *sup.*; *Forbes v. Steven*, 10 Eq. 178; or the share of a widow in mortgages passing under the residuary gift in the will of her husband and secured on real estate in New Zealand: *L. Sudeley v. A. G.*, (1897) A. C. 11 H. L.; (1896) 1 Q. B. 354, C. A.; or the share of a deceased beneficiary in the proceeds of sale under a will of a property in Jamaica: *Re Smyth, Leach v. L.*, (1898) 1 Ch. 89; but not on land which the testator had by voluntary deed directed to be sold: *Matson v. Smith*, 8 Beav. 368; nor on the interest of the deceased in a branch business carried on at Melbourne and kept separate in the partnership books: *Beaver v. Master in Equity*, (1895) A. C. 251, P. C.

An English co. who registered the shares of a deceased member in the names of his American exors, who did not intend to take out probate in this

country, was held to have constituted themselves exors *de son tort*, and to be liable to pay probate duty, and to have "taken possession" and "administered" within the Stamp Act, 1815 (55 G. III. c. 184), s. 37, so as to be liable to penalties: *New York Breweries Co. v. A. G.*, (1899) A. C. 62 H. L.; (1898) 1 Q. B. 205, C. A.

In the case of a person dying while subject to military law, so much only of his personal property as remains after payment of certain preferential charges is to be considered personal estate of the deceased with reference to the calculation of probate duty, or of any other duty, tax, or percentage, or for any of the purposes of admon: Regimental Debts Act, 1893 (56 & 57 V. c. 5), ss. 2, 3.

CUSTOMS AND INLAND REVENUE ACTS, 1881 AND 1889.

By the Customs and Inland Revenue Act, 1881 (44 V. c. 12), s. 27, the duties formerly imposed upon probates or letters of admon were thenceforth charged and paid on the affidavit required from the person applying for probate or admon in England or Ireland, or on the inventory to be exhibited and recorded in Scotland, and were collected by means of stamps on the affidavit or inventory and on the account delivered of the *donationes mortis causæ*, *inter vivos* gifts, and voluntary dispositions; the payment of the duty on "the account" being a satisfaction of any legacy or succession duties chargeable at the rate of 1 p. c. in respect of the property included therein.

This Act, which still applies to grants of probate or letters of admon in respect of the estates of persons who died before the 2nd August, 1894, introduced three rates of duty—the first for estates not above the value of 500*l.*, the second for estates not above the value of 1,000*l.*, and the third for estates above the value of 1,000*l.*

By sect. 28, the person applying for probate or admon is empowered to annex to the affidavit a schedule of debts due from the deceased to persons resident in the United Kingdom, and the funeral expenses; and the value, in the case of a person dying domiciled in the United Kingdom, is ascertained by deducting the aggregate amount of the debts, due by the deceased and payable by law out of his personal estate, and funeral expenses, from the value of the estate and effects as specified in the affidavit. Debts to be deducted are those due from the deceased, and do not include voluntary debts payable on his death, or under any instrument which shall not have been *bonâ fide* delivered to the donee three months before the death, or debts in respect whereof any real estate may be primarily liable (as to which, see Real Estate Charges Acts, *inf.* p. 1539), or a reimbursement may be capable of being claimed from any real estate.

As to return of over-paid duty, see sect. 31 and regulations of Inland Revenue.

After the admon has been closed the exors are not "persons acting in the admon of the estate" within the section, and are therefore not liable for a *bonâ fide* mistake in valuation: *A. G. v. Smith*, (1893) 1 Q. B. 239, C. A.; (1892) 2 Q. B. 289.

By sect. 38 (amended by the Customs and Inland Revenue Act, 1889, 52 V. c. 7, s. 11), the personal or moveable property on which the duty is payable includes:—

- (1.) Any property taken as a *donatio mortis causæ* made by any person dying on or after the 1st June, 1881, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bonâ fide* made (twelve) months before the death of the deceased; and this description is to include property taken under any gift, whenever made, of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise;
- (2.) Any property which a person dying on or after 1st June, 1881, having been absolutely entitled thereto, has voluntarily caused or may voluntarily cause to be transferred to or vested in himself and any

other person jointly, whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person; and the expression "to be transferred to or vested in himself and any other person" includes also any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone, or in concert, or by arrangement with any other person;

- (3.) Any property passing under any past or future voluntary settlement made by any person dying on or after 1st June, 1881, by deed or any other instrument not taking effect as a will, whereby an interest in such property for life, or any other period determinable by reference to death, is reserved, either expressly or by implication, to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself or to reclaim the absolute interest in such property. The expression "voluntary settlement" is to include any trust, whether expressed in writing or otherwise, in favour of a volunteer, and, if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and the expression "property" is to include the proceeds of sale thereof.

And the charge under the section is to extend to money received under a policy of assurance effected by any person dying after 1st June, 1889, on his life where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him where the policy is partially kept up by him for such benefit.

Sub-sect. 1.—Any benefit to the donor by contract or otherwise is sufficient to bring a case within the Act, *e.g.*, a covenant by the donee to pay an annuity to the donor during his life: *A. G. v. Worrall*, (1895) 1 Q. B. 99, C. A. The "account" stamp duty is payable by the donee personally, and not out of the estate of the deceased: *Re Foster, Thomas v. F.*, (1897) 1 Ch. 484.

Sub-sect. 2.—When two persons purchase stock jointly with express agreement as to benefit of survivorship, and one dies, the purchase, to the extent of the money paid by the deceased, is a voluntary transfer within the section: *A. G. v. Ellis*, (1895) 2 Q. B. 466.

Sub-sect. 3.—Under the description of "voluntary settlement" have been held to fall:—a deed empowering a partner to dispose of his share in the business to a limited class of descendants: *A. G. v. Gosling*, (1892) 1 Q. B. 645; or providing a life annuity for his widow: *A. G. v. Wendt*, 65 L. J. Q. B. 64; a settlement by a woman on marriage in favour of her children by a former marriage: *A. G. v. Jacobs-Smith*, (1895) 2 Q. B. 341, C. A.; a marriage settlement and a deed of appointment by the settlor in favour of a collateral under a general power given by the settlement in default of issue: *A. G. v. Chapman*, (1891) 2 Q. B. 526.

By sect. 41, where duty has been paid on the affidavit or inventory in conformity with the Act, the 1 p. c. duties imposed by 55 G. III. c. 184, and the Succession Duty Act, 1853, are not to be payable.

The Act does not alter the incidence of the duty as between specific and residuary legatees: *Re Bourne, Martin v. M.*, W. N. (92) 150, distinguishing *Re Croft, Deane v. C.*, (1892) 1 Ch. 652 (holding that as between specific and residuary appointees the duty was to be borne *pari passu*).

By the Act of 1889, ss. 5 and 6, a temporary estate duty was imposed where the value for probate duty or account duty exceeded 10,000*l.*; but this duty is not payable where the death occurs on or after June 1st, 1896.

Where the death occurs on or before the 1st Aug. 1894, the probate duty, the account stamp duty, the legacy duty, the succession duty, and the temporary estate duty, continue to be payable as if the Finance Act, 1894, had not passed: Finance Act, 1894, s. 21, sub-s. 2.

Additional Succession Duties under Act of 1889.—By the Customs and Inland Revenue Act, 1889 (52 V. c. 7), s. 21, in addition to the duties chargeable under sect. 10 of the Succession Duty Act, 1853, the following

duties were imposed upon the death of any person dying on or after July 1st, 1888; viz., where the successor was the lineal issue of the predecessor, 10s. p. c. upon the value of the interest, and in all other cases 1l. 10s. p. c.; but this additional duty was not payable upon the interest of a successor in leaseholds passing to him by will or devolution by law, or in property included in an account under the Act of 1881. The section contained an exception in the case of duties on legacies, payable out of, or charged upon, real estate of any person dying on or after July 1st, 1888, or any real estate, or rents, or profits which such person should have power to charge, or out of or upon any moneys to arise from sale, mortgage, or other disposition of real estate, and the old and new succession duties were to be levied in respect of every such legacy as a succession to personal property.

FINANCE ACTS—ESTATE DUTY.

General Principles.—By the Finance Act, 1894, a new duty, called estate duty, is imposed, and (1) all the property passing upon the death of a person dying after the 1st August, 1894, is to be regarded as one estate, and is to be liable to the duty at a rate to be determined by the value of the whole of such property (*v. inf.* pp. 1410, 1411), and (2) the duty at that rate is to be payable rateably by the several accountable persons in respect of the parts of the estate for which they are severally accountable (*v. inf.* pp. 1407 *et seq.*); but (3) some property so passing is excepted from the one estate, and is regarded as an estate by itself, and is liable to duty at a rate to be determined by its value without reference to the value of other property passing on the deceased's death (*v. inf.* p. 1411).

The scheme of the Act is to cast the duty on the estate as a whole, and the entire inheritance thereof, without regard to tenancies for life or other particular interests: *Re Parker-Jervis, Salt v. Locker*, (1898) 2 Ch. 643.

The expression "testamentary expenses" (as to which, *v. inf.* p. 1423) includes the estate duty payable in respect of personal estate: *Re Clemow*, (1900) 2 Ch. 182; *Re Treasure*, (1900) 2 Ch. 648; but not in respect of real estate, though the testator dies after the commencement of the Land Transfer Act, 1897: *Re Sharman, Wright v. S.*, (1901) 2 Ch. 280; following *Re Palmer*, W. N. (00) 9.

Grant of Estate Duty on Property passing on Death.—By sect. 1, "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value, ascertained as hereinafter provided, of all property, real or personal, settled or not settled, which passes on the death of such person, a duty, called 'estate duty,' at the graduated rates hereinafter mentioned, and the existing duties mentioned in the first schedule to this Act shall not be levied in respect of property chargeable with such estate duty."

The duties referred to in the first schedule are (1) the stamp duties imposed by the Customs and Inland Revenue Act, 1881, on the affidavit or inventory, *v. sup.* pp. 1402, 1403; (2) the stamp duties imposed by sect. 38 of that Act, as amended by sect. 11 of the Act of 1889, *v. sup.* p. 1402; (3) the additional succession duties imposed by sect. 21 of the Customs and Inland Revenue Act, 1889, *v. sup.* p. 1403, and (4) the temporary estate duties imposed by sects. 5 and 6 of the Act of 1889, *v. sup.* p. 1403; (5) the duty at the rate of 1l. p. c., which would, by virtue of the Acts in force relating to legacy duty or succession duty, have been payable under the will or intestacy of the deceased, or under his disposition or any devolution from him under which respectively estate duty has been paid, or under any other disposition under which estate duty has been paid.

What Property is deemed to Pass.—By sect. 2, sub-sect. 1, "Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—

- (a) Property of which the deceased was at the time of his death competent to dispose;
- (b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a

benefit accrues or arises by the cesser of such interest; but exclusive of property, the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corp. sole;

- (c) Property which would be required on the death of the deceased to be included in an account under sect. 38 of the Customs and Inland Revenue Act, 1881 (*v. sup.* p. 1403), 'as amended by sect. 11 of the Customs and Inland Revenue Act, 1889' (*v. sup.* p. 1403), if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily,' and a reference to a 'volunteer' were omitted therefrom; and
- (d) Any annuity or other interest purchased or provided by the deceased, either by himself alone, or in concert, or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

By sect. 22, (i) the expression "property passing on the death" includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and the expression "on the death" includes at a period ascertainable only by reference to the death.

By the Finance Act, 1896 (59 & 60 V. c. 28), property is not to be deemed to "pass" (see sect. 14) to a settlor who being in possession as tenant for life, becomes by failure of intermediate limitations entitled to the immediate reversion, or to an absolute power of disposition, or (see sect. 15) to a person who has alienated during the life of another and to whom, in his lifetime, the property reverts.

Section 2 (1), Clause a.—In *Re Scott*, (1901) 1 Q. B. 228, C. A.; (1900) 1 Q. B. 372, it was held that real estate devised by a father to his son, who died in his lifetime but left a child, so that the devise did not lapse, but took effect under sect. 33 of the Wills Act, was chargeable with estate duty as being (1) property of which the son was "competent to dispose" within (a) or (2) by the terms of sect. 33.

—*Clause b.*—Where father and son, tenant for life and tenant in tail, disentailed and resettled and then mortgaged, only the equity of redemption passed on the father's death to the son and estate duty was payable on that only: *Earl Cowley v. I. R. C.*, (1899) A. C. 198, H. L. (reversing C. A., (1898) 1 Q. B. 355);

—but no deduction was allowable in respect of an annuity to the son reserved by the resettlement and ceasing on the death of the father: *S. C.*

And see *Re Townsend*, (1901) 2 K. B. 331.

—*Clauses b and c.*—Where the tenant for life surrenders his life interest to the remainderman to the intent that it may merge, and dies more than twelve months after such surrender the property does not pass within sect. 2, sub-sect. 1 (b), and estate duty is not payable by the remainderman under the Act: *A. G. v. Beech*, (1899) A. C. 53, H. L.; (1898) 2 Q. B. 147, C. A.; and (as sect. 38 of the Customs and Inland Revenue Act, 1881, relates only to property which subsisting at the death of the deceased) the same result followed even though the tenant for life who so surrendered died within the twelve months: *A. G. v. De Preville*, (1900) 1 Q. B. 223, C. A. reversing *S. C.*, (1899) 2 Q. B. 238. But now by the Finance Act, 1900 (63 V. c. 7); s. 11, sub-sect. 1, "in the case of every person dying after the 31st March, 1900, property whether real or personal in which the deceased person or any other person had an estate or interest limited to cease on the death of the deceased shall, for the purpose of the Finance Act, 1894, and the Acts amending that Act, be deemed to pass on the death of the deceased, notwithstanding that that estate or interest has been surrendered, assured, divested, or otherwise disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in such property, unless that surrender, assurance, divesting, or disposition was *bond fide* made or effected twelve months before the death of the deceased, and *bond fide* possession and enjoyment of the property was assumed thereunder immediately upon the surrender, assurance, divesting, or disposition, and thenceforward retained to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise."

—*Clause (c).*—Under a deed of gift reserving a rent-charge to the donor and containing a covenant by the donee to pay the donor's debts and a conditional power of revocation, estate duty is payable upon the whole property comprised in the deed as property passing upon the death of the donor within sects. 1, 2, sub-sect. (c): *Earl Grey v. A. G.*, (1900) A. C. 124, H. L.; (1898) 2 Q. B. 534, C. A.

—*Clause (d).*—A life policy, effected on marriage, and settled by the assured on the usual trusts, is an interest "purchased or provided by the deceased" within the meaning of the clause: *A. G. v. Dobree*, (1900) 1 Q. B. 442.

Property out of United Kingdom.]—By sect. 2, sub-sect. 2, "Property passing on the death of the deceased when situate out of the United Kingdom shall be included only, if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes."

As to the liability of property situate out of the United Kingdom to succession and legacy duty, *v. sup.* Vol I. p. 240, and in particular *Wallace v. A. G.*, 1 Ch. 1; *A. G. v. Campbell*, L. R. 5 H. L. 524; *Re Ogala's Trusts*, 7 Ch. D. 351; *A. G. v. Jewish Colonisation Assoc.*, (1900) 2 Q. B. 556; (1901) 1 K. B. 123, C. A.

As to property situate out of the United Kingdom, *v. A. G. v. Sudeley, sup.* p. 1401; *Stern v. Reg.*, *sup.* p. 1401.

Property held by Deceased as Trustee.]—By sect. 2, sub-sect. 3, "Property passing on the death of the deceased shall not be deemed to include property held by the deceased as trustee for another person, under a disposition not made by the deceased, or under a disposition made by the deceased more than twelve months before his death where possession and enjoyment of the property was *bonâ fide* assumed by the beneficiary immediately upon the creation of the trust, and thenceforward retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise."

Exception for Transactions for Money Consideration.]—By sect. 3, "(1.) Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a *bonâ fide* purchase from the person under whose disposition the property passes, nor in respect of the falling into possession of the reversion on any lease for lives, nor in respect of the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee.

"(2.) Where any such purchase was made, or lease or annuity granted, for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee, the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty."

The expression "money or money's worth"—"words which seem to have been selected for the purpose of excluding the consideration of marriage," per Lord Westbury, L. C.: *Floyer v. Bankes*, 2 De G. J. & S. 306; and see *A. G. v. Rathdonell*, 32 L. R. Ir. 574,—is to be found in the Succession Duty Act (16 & 17 V. c. 51, s. 17), and receives a like construction under this Act: *A. G. v. Dobree*, (1900) 1 Q. B. 442.

A transaction by which an annuity chargeable on one part of an estate is released as to that part, and charged on another part of the same estate, is not a grant of an annuity for money's worth within the section: *A. G. v. Smith-Marriott*, (1899) 2 Q. B. 595.

A transaction which is in substance a family arrangement is not a "purchase" within the section: *A. G. v. Hawkins*, (1901) 1 K. B. 285.

Settled Property.]—By the Finance Act, 1894 (57 & 58 V. c. 30) s. 5, sub-s. 2, "if estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty shall not, nor shall any of the duties mentioned in the fifth paragraph of the First Schedule to this Act," *v. sup.* p. 1404, "be payable in respect thereof, until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property."

By sub-sect. 1 of this section the **settlement estate duty** (*v. inf.* p. 1413) is imposed, but this sub-section is not confined to that duty, but is of general application: *Freeth*, 114.

By sect. 22 (1) (i) the expression "settlement" means any instrument, whether relating to real property or personal property, which is a settlement within the meaning of sect. 2 of the Settled Land Act, 1882, or if it related to real property, would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust. As to the definition of "settlement" in the Settled Land Act, 1882, *v. inf.* p. 1813.

Where the owner of a reversion during the life of the tenant for life settles the reversion reserving a life interest to himself, estate duty becomes payable on his death under the concluding words of the sub-section, although such duty was previously paid on the death of the first tenant for life: *A. G. v. Hay*, (1899) 2 Q. B. 245.

By the Finance Act, 1898 (61 & 62 V. c. 10), s. 5, sub-s. 2 of the Finance Act, 1894, is to be read and have effect as if the following words had been inserted at the end thereof, "and who (if on his death subsequent limitations under the settlement take effect in respect of such property) was *sui juris* at the time of his death, or had been *sui juris* at any time while so competent to dispose of the property."

The marginal note to this amending enactment is as follows: "Persons not *sui juris* not to be deemed competent to dispose for the purpose of breaking settlements," and the enactment itself seems to be designed to meet the case of an appointment by an infant, see *Re D'Angibau*, 15 Ch. D. 228, C. A., *v. sup.* p. 989.

By sub-sect. 3, "In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death."

Where property of the wife is settled on marriage on the usual trusts, including a life interest to the husband, and he predeceases her without issue, the "subsequent limitations under the settlement continue to subsist" on his death within the meaning of this sub-sect. 3, and estate duty is, therefore, not payable: *A. G. v. Wood*, (1897) 2 Q. B. 102.

By sub-sect. 5, lands or chattels settled inalienably by Act of Parliament or royal grant are excepted from the provisions of the Act, and the property passing on the death of any person in possession of such lands or chattels is to be the interest of his successor and to be valued for estate duty in the like manner as for succession duty.

Executor and other Persons accountable.—By sect. 8, sub-s. 3, "the exor of the deceased shall, to the best of his knowledge and belief, specify in appropriate accounts annexed to the Inland Revenue affidavit all the property in respect of which estate duty is payable upon the death of the deceased, and shall be accountable for the estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death, but shall not be liable for any duty in excess of the assets which he has received as exor, or might but for his own neglect or default have received."

By sect. 22 (d), the expression "executor" means the exor or admor of a deceased person, and includes any person who takes possession of or intermeddles with the personal property of a deceased person.

By sect. 8, sub-sect. 4, "where property passes on the death of the deceased, and his exor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property, and shall, within the time required by this Act or such later time as the commrs allow, deliver to the commrs and verify an account, to the best of his knowledge and belief, of the property: Provided that nothing in this section contained shall render a person accountable

for duty who acts merely as agent or bailiff for another person in the management of property."

Charge and Incidence of Estate Duty on Property.]—By sect. 9, sub-s. 1, "a rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the exor as such, shall be a first charge on the property in respect of which duty is leviable; provided that the property shall not be so chargeable as against a *bona fide* purchaser thereof for valuable consideration without notice."

The sub-section must be construed with reference to the law as existing at the time of the passing of the Act, and not in accordance with the Land Transfer Act, 1897, and therefore real estate devolving on the exor by virtue of that Act is property "which does not pass to the exor as such" within the sub-section: *Re Palmer, P. v. Rose-Innes*, W. N. (00) 9.

Leaseholds specifically bequeathed being property which by law "passes to the exor as such," the estate duty upon them is payable out of the testator's general estate: *Re Culverhouse, Cook v. Culverhouse*, (1896) 2 Ch. 251; *secus*, a fund appointed under a general power of testamentary appointment: *Re Treasure*, (1900) 2 Ch. 648; *Re Muddock*, (1901) 2 Ch. 383; *Re Power*, W. N. (01) 158; 49 W. R. 678; not following *Re Moore, M. v. M.*, (1901) 1 Ch. 691.

Where a testator, dying after the 1st August, 1894, covenanted for payment of a sum after his death to the trustees of his son's settlement, the estate duty was payable out of his estate, and not by the covenantees: *Re Gray, G. v. G.*, (1896) 1 Ch. 620.

Where shares of residue are adeemed *pro tanto* by advances made within a year from the testator's death, the estate duty payable by the beneficiaries so advanced must be deducted from the amounts which they have to bring into account: *Re Beddington*, (1900) 1 Ch. 771.

Repayment to Exor.]—By sub-sect. 4, "if the rateable part of the estate duty in respect of any property is paid by the exor, it shall, where occasion requires, be repaid to him by the trustees or owners of the property, but if the duty is in respect of real property, it may, unless otherwise agreed upon, be repaid by the same instalments and with the same interest as are in this Act mentioned." As to effect of the concluding provision, see Freeth, 151.

Power to raise amount by Sale or Mortgage.]—By sub-sect. 5, "a person authorized or required to pay the estate duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property or any part thereof."

Payment to Person having Limited Interest.]—By sect. 9, sub-sect. 6, "a person having a limited interest in any property, who pays the estate duty in respect of that property, shall be entitled to the like charge, as if the estate duty in respect of that property had been raised by means of a mortgage to him."

A jointress is to be treated as a tenant for life of the capitalized value of the jointure ascertained for the purpose of duty at the same number of years purchase as that at which the estate as a whole is valued, and to pay interest at the rate actually paid until payment of the duty, and thereafter to keep down the interest at the rate at which the amount of the capitalized value could be raised by mortgage of the estate: *Re Parker-Jervis, Salt v. Locker*, (1898) 2 Ch. 643.

The charge under this sub-section was held not to extend to expenses incurred in settling the amount of the duty: *Re Laurie*, W. N. (98) 136 (Sc.); 25 *Rettie*, 636.

Payment out of Capital Money.]—By sect. 9, sub-sect. 7, any money arising from the sale of property comprised in a settlement, or held upon trust to lay out upon the trusts of a settlement, and capital money arising under the Settled Land Act, 1882, may be expended in paying any estate duty in respect of property comprised in the settlement and laid out upon the same trusts.

Certificate of Commissioners.]—By sect. 9, sub-sect. 2, it is provided that the commissioners shall grant a certificate of the estate duty paid

in respect of the property, specifying the debts and incumbrances allowed, and the lands or other subjects of property; and, by sub-sect. 3 (subject to any repayment of estate duty), the certificate is to be conclusive evidence that the amount of duty named therein is a first charge on the property after the debts and incumbrances allowed.

Apportionment of Duty.]—By sect. 14, “(1.) In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorized or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise), under a disposition not containing any express provision to the contrary.

“(2.) Any dispute as to the proportion of estate duty to be borne by any property or person, may be determined upon application by any person interested in manner directed by Rules of Court, either by the High Court or, where the amount in dispute is less than 50*l.*, by a county court for the county or place in which the person recovering the same resides, or the property in respect of which the duty is paid is situate.” For forms of application, see D. C. F. 1245 *et seq.*

“(3.) Any person from whom a rateable part of estate duty can be recovered under this section shall be bound by the accounts and valuations as settled between the person entitled to recover the same and the commrs.”

Sub-sect. 1 has no reference to the incidence of the estate duty, but is intended for the protection of the exor or other person who is called upon to pay the duty, by giving him a right to recoupment: *Wade v. Wade*, (1898) 2 Ch. 276. Accordingly, where a policy was assigned on trust to raise a specified sum out of the policy moneys the estate duty on the whole fund was payable out of the balance remaining after payment of the sum: *S. C.*

And as between specific and residuary appointees, the sum appointed to the former being “charged on the property” within sub-sect. 1, the duty must be borne *pari passu*: *Re Countess of Orford*, *Cartwright v. Duc Del Balzo*, (1896) 1 Ch. 257.

The limitation of a jointure to be paid “without any deduction whatsoever except in respect of income tax” is an “express provision” within sub-sect. 1: *Re Parker-Jervis*, *Salt v. Locker*, (1898) 2 Ch. 643.

Exemptions.]—Sect. 15 exempts from duty any single annuity not exceeding 25*l.* purchased or provided by the deceased, as therein stated, and empowers the Treasury to remit the estate duty, or any other duty leviable on or with reference to death, in respect of any pictures, prints, books, manuscripts, works of art or scientific collections, as appear to the Treasury to be of national, scientific, or historic interest, and to be given or bequeathed for national purposes, or to any university, or to any county council or municipal corp., and the property so exempted is not to be aggregated with any other property for fixing the rate of duty. There are also exemptions in respect of (a) certain pensions or annuities payable by the government of British India to the widow or child of any deceased officer, and (b), in respect of any advowson or church patronage which would have been free from succession duty under sect. 24 of the Succession Duty Act, 1853.

Collection and Recovery of Duty.]—By sect. 6, sub-sect. 1, the estate duty is to be a stamp duty collected and recovered as therein mentioned.

By sub-sect. 2, “the exor of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death, on delivering the Inland Revenue affidavit, and may pay in like manner the estate duty in respect of any other property passing on such death which by virtue of any testamentary disposition of the deceased is under the control of the exor, or in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment.”

By sub-sect. 5, “every estate shall include all income accrued upon the property included therein down to and outstanding at the date of the death of the deceased.”

By sub-sect. 7, “the duty, which is to be collected upon an Inland Revenue affidavit or account, shall be due on the delivery thereof, or on the expiration of six months from the death, whichever first happens.”

By the Finance Act, 1896 (59 & 60 V. c. 28), s. 18, simple interest at the rate of 3 p. c. per ann. without deduction for income tax is payable upon all estate duty from the date of the death of the deceased, or, where the duty is payable by instalments, or becomes due at any date later than six months after the death, from the date at which the first instalment or the duty becomes due, and is recoverable in the same manner as if it were part of the duty.

Value of Property for purposes of Estate Duty.]—By sect. 7, sub-sect. 1, “in determining the value of an estate for the purpose of estate duty allowance shall be made for reasonable funeral expenses and for debts and incumbrances; but an allowance shall not be made—

- (a) for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bonâ fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest, nor
- (b) for any debt in respect whereof there is a right to re-imbursement from any other estate or person, unless such re-imbursement cannot be obtained, nor
- (c) more than once for the same debt or incumbrance charged upon different portions of the estate;

and any debt or incumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of property liable thereto.”

Where by a voluntary settlement sums are appropriated to specific trusts, and the residue of the settled fund is held in trust for the settlor, such sums are not to be regarded as voluntary incumbrances under this sub-section, but as substantive settlements and as liable to the duty *pro ratâ*: *Re Meyrick, M. v. Hargreaves*, (1897) 1 Ch. 99; and a sum payable within six months from the decease of a testator to the trustees of his son's settlement is not a debt within the section: *Re Gray*, (1896) 1 Ch. 620.

Foreign debts or property.]—By sect. 7, sub-sect. 2, “an allowance shall not be made in the first instance for debts due from the deceased to persons resident out of the United Kingdom (unless contracted to be paid in the United Kingdom, or charged on property situate within the United Kingdom), except out of the value of any personal property of the deceased situate out of the United Kingdom in respect of which estate duty is paid; and there shall be no repayment of estate duty in respect of any such debts, except to the extent to which it is shown to the satisfaction of the commrs that the personal property of the deceased situate in the foreign country or British possession in which the person to whom such debts are due resides, is insufficient for their payment.”

By sub-sects. 3 & 4, the commrs are empowered to make an allowance, not exceeding 5 per cent. on the value of the property, in respect of additional expense of admon incurred by reason of its being situate out of the United Kingdom.

Value, how estimated.]—By sub-sect. 5, “the principal value of any property shall be estimated to be the price which, in the opinion of the commrs, such property would fetch if sold in the open market at the time of the death of the deceased; provided that, in the case of any agricultural property, where no part of the principal value is due to the expectation of an increased income from such property, the principal value shall not exceed twenty-five times the annual value as assessed under Schedule A. of the Income Tax Acts, after making such deductions as have not been allowed in that assessment and are allowed under the Succession Duty Act, 1853, and making a deduction for expenses of management not exceeding 5 per cent. of the annual value so assessed.”

Interest in expectancy.]—By sub-sect. 6, “where an estate includes an interest in expectancy, estate duty in respect of that interest shall be paid, at the option of the person accountable for the duty, either with the duty in respect of the rest of the estate or when the interest falls into possession, and if the duty is not paid with the estate duty in respect of the rest of the estate,

then (a) for the purpose of determining the rate of estate duty in respect of the rest of the estate the value of the interest shall be its value at the date of the death of the deceased; and (b) the rate of estate duty in respect of the interest when it falls into possession shall be calculated according to its value when it falls into possession, together with the value of the rest of the estate as previously ascertained."

By sect. 22 (1) (j), the expression "interest in expectancy" includes an estate in remainder or reversion and every other future interest, whether vested or contingent, but does not include reversions expectant upon the determination of leases.

Benefit accruing by cesser.—By sub-sect. 7, "the value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall—

- (a) if the interest extended to the whole income of the property, be the principal value of the property; and
- (b) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended."

On the cesser of an annuity charged on land the full principal value must be taken notwithstanding that by reason of a subsequent charge then coming into effect, the owner of the land does not get the full benefit of the cesser: *Ld. Advocate v. MacLachlan*, (Sc.) 1 Fraser, 917; W. N. (00) 104.

Aggregation of property to form one estate for purpose of estate duty.—By sect. 4, "for determining the rate of estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof:

"Provided that any property so passing, in which the deceased never had an interest, or which under a disposition not made by the deceased passes immediately on the death of the deceased to some person other than the wife or husband or a lineal ancestor or lineal descendant of the deceased, shall not be aggregated with any other property but shall be an estate by itself, and the estate duty shall be levied at the proper graduated rate on the principal value thereof; but if any benefit under a disposition not made by the deceased is reserved or given to the wife or husband or a lineal ancestor or lineal descendant of the deceased, such benefit shall be aggregated with property of the deceased for the purpose of determining the rate of estate duty." As to the effect of this section see *Freeth*, 107 *et seq.*

Rates of Estate Duty.—By sect. 17 of the Act of 1894, as amended by sect. 17 of the Act of 1896, "the rates of estate duty shall be according to the following scale:—

Where the Principal Value of the Estate				Estate Duty shall be payable at the Rate per cent. of
Exceeds -	£	100 and does not exceed	£	One pound.
" -	500	" "	1,000	Two pounds.
" -	1,000	" "	10,000	Three pounds.
" -	10,000	" "	25,000	Four pounds.
" -	25,000	" "	50,000	Four pounds ten shillings.
" -	50,000	" "	75,000	Five pounds.
" -	75,000	" "	100,000	Five pounds ten shillings.
" -	100,000	" "	150,000	Six pounds.
" -	150,000	" "	250,000	Six pounds ten shillings.
" -	250,000	" "	500,000	Seven pounds.
" -	500,000	" "	1,000,000	Seven pounds ten shillings.
" -	1,000,000	-	-	Eight pounds.

The rate of the settlement estate duty where the property is settled shall be 1 per cent." Provided that where the principal value of an estate

comprises a fraction of 100*l.* in excess of 100*l.*, or of any multiple of 100*l.*, such fraction shall be excluded from the value of the estate for the purpose of determining both the rate and the amount of duty, except that where the principal value of the estate exceeds 100*l.* and does not exceed 200*l.* the duty shall be 1*l.*

Exceptions and Savings.—*Where duty previously paid.*—By sect. 21, sub-sect. 1, estate duty is not to be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before 2nd August, 1894, in respect of which property any duty mentioned in paragraphs 1 and 2 of the First Schedule to the Act, *v. sup.* p. 1404, or the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act, 1881, has been paid or is payable, “unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property.”

A settlement and a will executing a general power of appointment contained in the settlement together constituted one “disposition” within the sub-section, and probate duty on the property, deducting an outstanding life interest having been paid by the exors of the will, estate duty was not payable when the life dropped on the value on which probate duty had been paid (nor, *semble*, per Rigby, L. J., approved in *I. R. C. v. Priestley*, (1901) A. C. 208, H. L., on the value of the life interest): *A. G. v. Dodington*, (1897) 2 Q. B. 373, C. A.

And duty paid on the death of a wife on her disposable interest under a settlement under which her husband was tenant for life, was held to exempt the settled property, under sect. 5, sub-sect. 2 (*v. sup.* p. 1406) from duty until the death of a person competent to dispose of the property should occur: *I. R. C. v. Priestley*, *sup.*

Where interest in expectancy already dealt with.—By sub-sect. 3, where an interest in expectancy in any property has, before 2nd August, 1894, been *bond fide* sold or mortgaged for full consideration in money or money’s worth, no other duty on such property is to be payable by the purchaser or mortgagee when the interest falls into possession, than would have been payable if the Act had not passed; and in the case of a mortgage, any higher duty payable by the mortgagor is to rank as a charge subsequent to that of the mortgagee. This exemption is in favour of purchaser or mortgagee, not vendor or mortgagor: *Re Vernon*, (1901) 1 K. B. 297.

Husband and Wife successively entitled to Income.—By sub-sect. 5, “where a husband or wife is entitled, either solely or jointly with the other, to the income of any property settled by the other under a disposition which has taken effect before” 2nd August, 1894, “and on his or her death the survivor becomes entitled to the income of the property settled by such survivor, estate duty shall not be payable in respect of that property until the death of the survivor.”

This sub-section does not apply where the survivor of husband and wife becomes entitled not merely to the income but to the corpus of the property settled: *A. G. v. Strange*, (1898) 2 Q. B. 39, C. A.

General Provisions.—*Appeal from Commissioners.*—By sect. 10, a right of appeal to the High Court is given to persons aggrieved by decisions of the Commissioners as to duty: see Freeth, 153 *et seq.*

Powers of Commissioners.—In addition to provisions already noticed provisions are made as follows:—

- Sect. 11 as to release of persons paying estate duty: Freeth, 156 *et seq.*
- Sect. 12, as to commutation of duty on interest in expectancy: Freeth, 158.
- Sect. 13, as to acceptance of composition for death duties: Freeth, 159.

Small Estates.—By sect. 16, special provisions are made as to estates not exceeding 1,000*l.*: see Freeth, 165 *et seq.*

British Possessions.—By sect. 20, allowance is to be made in cases where duty becomes payable on property situate in certain British possessions; and nothing in the Act is to be held to create a charge for estate duty on any property situate in a British possession, while so situate, or to authorize the

Commrs to take any proceedings in a British possession for the recovery of any estate duty: see *Freeth*, 176 *et seq.*

FINANCE ACTS—SETTLEMENT ESTATE DUTY.

Imposition of Settlement Estate Duty.—By the Finance Act, 1894, s. 5, sub-s. 1, “where property in respect of which estate duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property, (a) a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased; but (b) during the continuance of the settlement the settlement estate duty shall not be payable more than once.”

By sect. 17, “the rate of the settlement estate duty where the property is settled shall be one per cent.”

By sect. 21, sub-sect. 4, “the settlement estate duty of one per cent. shall not be payable in respect of property settled by a disposition which has taken effect before” 2nd August, 1894.

By sect. 5, sub-sect. 4, any person paying the settlement estate duty on property is empowered to deduct the *ad valorem* stamp duty (if any) charged on the settlement in respect of the property.

Having regard to the definition of “settlement” contained in the Act (*v. sup.* p. 1407), this duty is payable on property set apart to provide for an annuity to A., and subject thereto given to B., and to raise portions for children on the death of their parent: *A. G. v. Owen*; *A. G. v. Coulson*, (1899) 2 Q. B. 253; and see *Re St. Albans (D.)*, (1900) 2 Ch. 873.

Property contingently settled is liable to the duty although the contingency may never arise: *A. G. v. Fairley*, (1897) 1 Q. B. 698 (where the possibility of accruer over of shares of beneficiaries in the event of their death under twenty-one was held sufficient to impose the duty).

Under sect. 5, sub-sect. 1 (a), the settlement estate duty is payable in respect of property which is only contingently settled: *A. G. v. Clarkson*, (1900) 1 Q. B. 156, C. A.; but by the Finance Act, 1898 (61 & 62 V. c. 10), s. 14, it is provided that “where in the case of a death occurring after the commencement of this Act settlement estate duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen and cannot arise, the said duty paid in respect of such property shall be repaid.”

This enactment amounts to an adoption by the legislature of the construction put upon sect. 5, sub-sect. 1 (a), of the Act of 1894 in *A. G. v. Fairley*, (1897) 1 Q. B. 698; *A. G. v. Clarkson*, (1900) 1 Q. B. 156, C. A.

Incidence of Settlement Estate Duty.—It was held in *In re Webber, Gribble v. W.*, (1896) 1 Ch. 914, that where legacies or shares of residue are settled by will, the estate duty and the settlement estate duty imposed by the Finance Act, 1894, are not to be borne by the settled property, but must be wholly borne by the general residue. But now, by the Finance Act, 1896 (59 & 60 V. c. 28), s. 19 (1), “the settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy or property in exoneration of the rest of the deceased’s estate,” and (2) provision is made for the collection of such duty upon an account setting forth the particulars of the legacy or property: *Re Webber* (which was disapproved of as regards settlement estate duty by C. A. in *Re Maryon Wilson*, (1900) 1 Ch. 565; and see *Re St. Albans (D.)*, (1900) 2 Ch. 873) is now therefore overruled *pro tanto*, but (*semble*) it holds good as to estate duty: *Re Palmer, P. v. Rose-Innes*, W. N. (00) 9.

The section is not retrospective: see *Re Gibbs, Thorne v. G.*, (1898) 1 Ch. 625, where it was held that if the testator dies after the Act of 1894 and before that of 1896 (*v. inf.*) the duty is still payable out of residue in accordance with *Re Webber, sup.*

As to the application of the section to a case where the settlement is not

made by the will of the deceased, but by a previous covenant entered into by him, see *Re Maryon Wilson*, (1900) 1 Ch. 565, C. A.

Under a covenant for payment at death of a sum "without any deduction" to trustees of a settlement, the settlement estate duty is thrown upon the residuary estate of the covenantor; *secus* (*semble*), under a covenant for payment *simpliciter*: *Re Maryon Wilson*, (1900) 1 Ch. 565, C. A.

A direction in a will for payment out of a specified fund of "all duties payable by law out of" the estate was held not to amount to such an express provision as is required by sect. 19 of the Finance Act, 1896, in order to make settlement estate duty payable otherwise than out of the settled legacy: *Re Lewis*, L. v. L., (1900) 2 Ch. 176.

Collection of Settlement Estate Duty.—By the Finance Act, 1896 (59 & 60 V. c. 28), s. 19, sub-s. 2, the settlement estate duty is to be collected upon an account setting forth the particulars of the legacy or property, and delivered to the Commissioners by the exor within six months after the death, or within such further time as the Commissioners may allow.

FINANCE ACTS—SUCCESSION DUTY.

Value of Real Successions for Succession Duty.—By the Finance Act, 1894, s. 18, "(1) The value for the purpose of succession duty of a succession to real property arising on the death of a deceased person shall, where the successor is competent to dispose of the property, be the principal value of the property, after deducting the estate duty payable in respect thereof on the said death and the expenses if any properly incurred of raising and paying the same; and the duty shall be a charge on the property, and shall be payable by the same instalments as are authorized by this Act for estate duty on real property, with interest at the rate of 3 p. c. per ann.; and the first instalment shall be payable and the interest shall begin to run at the expiration of twelve months after the date on which the successor became entitled in possession to his succession or to the receipt of the income and profit thereof; and after the expiration of the said twelve months the provisions with respect to discount shall not apply.

"(2) The principal value of real property for the purpose of succession duty shall be ascertained in the same manner as it would be ascertained under the provisions of this Act for the purpose of estate duty; and in the case of any agricultural property where no part of the principal value is due to the expectation of an increased income from such property, the annual value for the purpose of succession duty shall be arrived at in the same manner as under the provisions of this part of this Act for the purpose of estate duty."

As to the effect and meaning of the section, see Freeth, 172.

EFFECT OF PROBATE.

Probate not appealed against is conclusive of the factum and validity of the will as to personality: *Havergal v. Harrison*, 7 Beav. 49; *Allen v. M'Pherson*, 1 H. L. C. 191; *Meluish v. Milton*, 3 Ch. D. 27, C. A.; and in some cases, as to realty, under the Court of Probate Act, 1857: *sup.* p. 1397; and now for the provisions of the Land Transfer Act, 1897, *v. sup.* p. 1397. As to the boundary, &c. between the Probate and Chancery jurisdiction, see *Thornton v. Curling*, 8 Sim. 310; *Campbell v. Beaufoy*, Joh. 320; *Pinney v. Hunt*, *Bradford v. Young*, *sup.* p. 1397.

The Court of Chancery could entertain questions as to the validity of the execution of powers by will: *Morgan v. Annis*, 3 Dr. & S. 461.

If it is suggested that the probate copy is inaccurate, opportunity may be given to set this right: *Havergal v. Harrison*, 7 Beav. 49; and the Court will sometimes look at the original will and be guided by it in its construction: *Re Harrison*, *Turner v. Hellard*, 30 Ch. D. 390, C. A.; *Compton v. Bloxham*, 2 Col. 201; *Oppenheim v. Henry*, 9 Ha. 802, n.; *Manning v. Purcell*, 7 D. M. & G. 55, where erasures omitted in the probate copy were regarded: *Bernal v. B.*, 3 My. & C. 561, 563; *Re Cliff's Trusts*, (1892) 1 Ch.

229 (correcting *L'Fit v. L'Batt*, 1 P. Wms. 526, where the Court looked at the French original as well as the English translation which was admitted to probate); *Re Harrison*, *sup.*, where the will was on a printed form with blanks not filled up: *Thompson v. Whitelock*, 4 D. & J. 490; *Re Pinckard*, L. JJ., 26 March, 1858, where the probate copy had been mislaid. But there must be special circumstances: *Gann v. Gregory*, 3 D. M. & G. 777; and the probate cannot be treated as erroneous: *Taylor v. Creagh*, 8 Ir. Ch. Rep. 281.

A grant of admon obtained by suppressing a will which contained no appointment of exors cannot be treated as utterly and *ab initio* void: *Bozall v. B.*, 27 Ch. D. 220; distinguishing *Abram v. Cunningham*, 2 Lev. 182.

Probate being granted, with cross lines in ink over some legacies, it was held they were not part of the will: *Gann v. Gregory*, 3 D. M. & G. 777.

As to the principles on which the Court supplies omissions in a will, and that such omissions may be supplied in case of independent gifts to strangers as well as of a series of gifts to children of the testator, or members of a class, see *Mellor v. Daintree*, 33 Ch. D. 198.

After foreign probate, ancillary probate is granted here, and in general to the same person, though not the person entitled to the grant by English law: *Re Earl*, L. R. 1 P. & M. 450; *Re Duchesse d'Orleans*, 1 Sw. & Tr. 253; 20 & 21 V. c. 77, s. 73, *sup.* p. 1399. The foreign grant is conclusive as to the will being valid by the law of the domicile: *Whicker v. Hume*, 7 H. L. C. 124; *Re Smith*, 16 W. R. 1130; precludes a case of undue influence, &c. being set up here: *Miller v. James*, L. R. 3 P. & M. 4; and is conclusive as to the contents: *Enohin v. Wylie*, 10 H. L. Ca. 1. All questions of testacy or intestacy, and the construction of the will, and the distribution and admon of the personal estate, are governed by the law of the domicile: *S. C.*; *A. G. v. Campbell*, L. R. 5 H. L. 524, 530; *Bremer v. Freeman*, 10 Moo. P. C. 306; *Crispin v. Doglioni*, 3 Sw. & Tr. 98. *Secus*, as to real estate or chattels real which will not pass unless the formalities required by the Wills Act are observed, although the will is admitted to probate here: *Pepin v. Bruyere*, (1900) 2 Ch. 504. And as to probate of the wills of foreigners, see Wms. Exors., 9th ed. 296 *et seq.* And see, as to wills in exercise of powers, *D'Huart v. Harkness*, 34 Beav. 324, and cases there cited; *Re Trufort, Trafford v. Blanc*, 36 Ch. D. 600.

The will of a British subject made in France and valid by French law, but not attested by two or more witnesses as required by the Wills Act, 1837, even if admissible to probate under s. 1 of the Wills Act, 1861 (Lord Kingsdown's Act, 24 & 25 V. c. 114), will not, it seems, operate as an execution of a testamentary power of appointment: *Hummel v. H.*, (1898) 1 Ch. 642; *Re Kirwan's Trusts*, 25 Ch. D. 373; *secus*, where the will is that of a domiciled Frenchman valid by the French law, and has been recognized as a valid will in the Probate Division in this country: *Re Price, Tomlin v. Latter*, (1900) 1 Ch. 442; *Pouey v. Hordern*, (1900) 1 Ch. 492; but where special formalities are required by the instrument creating the power, a will which is valid according to the law of the domicile (*e.g.*, an unattested French "holograph" will), but which does not comply with the terms of the power or the requirements of the Wills Act, will be ineffectual: *Barretto v. Young*, (1900) 2 Ch. 339.

A will in execution of a general power of appointment takes effect according to the law of the country of the creation of the power: *Re Megret*, (1901) 1 Ch. 547; *Re Bald*, 76 L. T. 463; *Pouey v. Hordern*, *sup.*

The Court will not act upon a will before probate: *Hensloe's Case*, 9 Rep. 38 a; Wms. Exors. 242; and although the assets are all abroad and admon has been granted there, it must be obtained in England also: *Enohin v. Wylie*, 10 H. L. C. 1, 19; *Lasseur v. Tyrconnel*, 10 Beav. 28; *Tyler v. Bell*, 2 My. & C. 89; *Maclean v. Dawson*, 27 Beav. 21; *Re Commercial Bk., &c.*; *Fernandes Exors' Case*, 5 Ch. 314; but see *M'Mahon v. Rawlings*, 16 Sim. 429.

Where the Probate Division has granted a general probate of the will of a Scotch testator, the ordinary admon decree may be made in the Ch. Div. without limiting it to the English assets: *Stirling-Maxwell v. Cartwright*, 9 Ch. D. 173.

Letters testimonial sealed by the Supreme Court of the Colony of Victoria, setting forth verbatim a will of real estate made in that colony, and stating that it had been duly proved, were accepted as sufficient proof for the purposes of the usual preliminary judgment in a partition action: *Waite v. Bingley*, 21 Ch. D. 674.

Upon petition for payment out of Court under a testamentary appointment, the Court declined to act on the probate in the Supreme Court of New Zealand in the absence of English probate: *Exp. Limehouse Bd. of Works; Re Vallance*, 24 Ch. D. 177; distinguishing *Re Tootal's Trusts*, 23 Ch. D. 536, because the Court of Shanghai had a special jurisdiction as to the property of British subjects resident in China.

PARTIES.

The legal pers. repesve is a necessary party to an admon action, and an exor Deft must have proved the will: *Penny v. Watts*, 2 Ph. 149; *Simons v. Milman*, 2 Sim. 241; *Lowry v. Fulton*, 9 Sim. 104; *Cooke v. Gittings*, 21 Beav. 497; *Beardmore v. Gregory*, 2 H. & M. 491; *Cary v. Hills*, 15 Eq. 79; *Rowell v. Morris*, 17 Eq. 20; *Barry v. Quinlan*, 21 L. R. Ir. 11; *Dowdeswell v. D.*, 9 Ch. D. 294, C. A.; *Re Leask, Richardson v. L.*, 65 L. T. 199.

Where, after judgment for admon of real and personal estate, a subsequent will was discovered and probate of the old will recalled, the Court, under the circumstances, and in the absence of opposition, made an order dismissing the action: *Re Dean, D. v. Wright*, 21 Ch. D. 581, C. A.

A decree for general admon cannot be made in the absence of a general repesve of the estate: *Groves v. Lane*, 16 Jur. 1061; and this rule is not altered by the Jud. Acts: *Dowdeswell v. D.*, 9 Ch. D. 294, C. A.

And a suit for protecting the estate until probate and also for administering the estate, was irregular and demurrable: *Rawlings v. Lambert*, 1 J. & H. 458; *Overington v. Ward*, 34 Beav. 175; but see *Tempest v. Camoys*, 35 Beav. 201; and an originating summons by a creditor of an intestate married woman against her husband who had not proved the will, was held entirely bad: *Re Leask, Richardson v. L.*, W. N. (91) 159; 65 L. T. 199.

The suit cannot be sustained or continued against the admor of the testator's exor alone: *Barber v. Walker*, 15 W. R. 728; but may (without leave of the Probate Division) be maintained against an admor *ad litem*: *Re Toleman*, (1897) 1 Ch. 866, *sup.* p. 1398; *secus*, a suit to establish title as next of kin: *Dowdeswell v. D.*, 9 Ch. D. 294, C. A.

The exor fully represents the estate for the purposes of an action by creditors, and a residuary legatee therefore cannot be allowed to appeal from a judgment made against the exor in such an action: *Re Youngs, Doggett v. Revett*, 30 Ch. D. 421, C. A.

The legal pers. repesve constituted by the forum of the domicile of the deceased intestate is the person entitled to receive and give receipts for the net residue of his personal estate obtained in any country: *Eames v. Hacon*, per Fry, J., 16 Ch. D. 407; *affd.* 18 Ch. D. 347, C. A.

On the other hand, it has been held, in *Rayner v. Koehler*, 14 Eq. 262; *Coote v. Whittington*, 16 Eq. 534, and *Re Lovett, Ambler v. Lindsay*, 3 Ch. D. 198, that the presence of an exor *de son tort* is enough; and see *Blewitt v. B.*, Yo. 541.

However this may be, an exor *de son tort* may be sued to recover a sum in his hands separated from the rest of the estate without involving him in the general accounts: *Penny v. Watts*, 2 Ph. 149; or jointly with the rightful exor: *Carmichael v. C.*, 2 Ph. 101; *Creasor v. Robinson*, 14 Beav. 589; 15 Jur. 1049.

The suit could not proceed, the admor being abroad: *Donald v. Bather*, 16 Beav. 26; *Lowry v. Fulton*, 9 Sim. 104. See now the 20 & 21 V. c. 77, ss. 73, 74, and 21 & 22 V. c. 95, s. 18, *sup.* p. 1399.

Where exors sue or are sued, those who have acted must be parties, although they have not all proved the will: *Vickers v. Bell*, 4 D. J. & S. 274; *Hamp v. Robinson*, 3 D. J. & S. 97; *Latch v. L.*, 10 Ch. 464; and see *Guthrie v. Walrond*, 22 W. R. 723.

An exor of an exor who has not completed the proving of the will of the original testator does not represent that testator: *Willcocks v. Doughty*, 29 L. R. Ir. 17.

O. xvi, 6, enabling a Plt to sue one or more for a joint and several demand, does not apply where a general account is required: *Hall v. Austin*, 2 Coll. 570; and see *Plumer v. Gregory*, 18 Eq. 621, and other cases *sup.* pp. 1139, 1140; *Morley v. White*, 8 Ch. 731.

As to joining the represves of deceased exors, *v. inf.* SECT. VIII.

An exor cannot maintain but may begin a suit before probate, if he prove before the hearing of the suit: *Newton v. Metrop. Ry.*, 1 Dr. & S. 583; or of

a plea that he is not exor: *Simons v. Milman*, 2 Sim. 241; and the same applies to letters of admon: *Humphreys v. H.*, 3 P. Wms. 350, 351.

An exor cannot maintain an admon action against one creditor as a sole Deft, even where, from the exor being universal devisee and legatee, no next of kin or c. t. could become Plt, or be named Deft: *Mandeville v. M.*, 23 L. R. Ir. 339, not following *Buckle v. Albo*, 2 Vern. 37; but as to proceedings by originating summons for ascertaining a class of creditors without admon, see O. LV, 3, 5.

By O. XVI, 47, in an admon action no party to the cause, other than an exor or admor, is entitled to appear (except by leave of the Judge) either in Court or in Chambers on the claim of any person not a party to the cause for a debt or liability. But the Judge may direct any other party to the cause to appear either in addition to or in place of the exor or admor.

A renunciation of probate after bill filed, but before amendment, did not sustain a plea of not exor: *Morley v. White*, 8 Ch. 731.

An admor appointed after bill filed against an exor *de son tort* was added by amendment: *Beardmore v. Gregory*, 2 H. & M. 491.

An estate may be bound, although the Deft, who is alleged in the pleadings to be the legal pers. represve did not obtain admon till after suit brought: *Bateman v. Margerison*, 6 Ha. 496; and see *Newton v. Metrop. Ry.*, 1 Dr. & S. 583.

If from conflict of duty and interest, or otherwise there is reason to believe that the exor will not properly protect the estate, the proper course is for the party interested to apply for leave to appear in the name of the exor, or to be added as Deft; it is irregular to give "leave to intervene" at the trial of the action: *Samuel v. S.*, 12 Ch. D. 152.

As to making a debtor to the estate a party as well as the exor, see Sect. XVII., p. 1563, "OUTSTANDING ESTATE."

The A. G. does not sufficiently represent the estate of an illegitimate child who has died intestate: *Bell v. Alexander*, 6 Ha. 543.

A creditor suing an admor *de son tort* alone may take out admon himself, and amend accordingly: *Creasor v. Robinson*, 14 Beav. 589; 15 Jur. 1049; but the suit remains a creditor's suit, and the Plt must still prove his debt: *Nichols v. N.*, 10 W. R. 598.

Proof by an exor *de son tort* of a settled account, between him and the rightful exor, is an answer to a suit against him for an account: *Hill v. Curtis*, 1 Eq. 90 (explaining *Carmichael v. C.*, 2 Ph. 101); and see Wms. Exors. 8th ed. 273 (r); 9th ed. 219 (k).

Admon granted to one person, as attorney of another, makes him liable to be sued as if it had been granted to him in his own right: *Chambers v. Bicknell*, 2 Ha. 536; and therefore he is not justified in paying over the assets to his principal for distribution: *Re Rendell, Wood v. R.*, (1901) 1 Ch. 230; referring to *Edgar v. Reynolds*, 4 Drew. 269; 27 L. J. Ch. 562.

Admor in India and here, the letters here being revoked, and granted to the next of kin, must account to him for all the Indian assets: *Sundilands v. Innes*, 3 Sim. 263.

Where Plt was alleged, but at the hearing appeared not to be the creditor's represve, leave to add the true represve as co-Plt was given: *Maughan v. Blake*, 3 Ch. 32.

Where the testator's represve was made a Deft in another capacity, an allegation that she was such represve was allowed to be added at the hearing: *S. C.*; and see now O. XVI, 12.

The agent of a limited admor having an admitted surplus in his hands, which has been remitted to him for payment to the persons entitled, is bound to pay the same to the general admor, without requiring the concurrence of the next of kin: *Eames v. Hacon*, 18 Ch. D. 347, C. A.; *De la Viesca v. Lubbock*, 10 Sim. 629.

O. LV, 15, that no judgment or order for general admon shall be made under r. 4 by the Master, extends to orders for general admon of trusts constituted by deed: *Davidson v. Young*, 54 L. J. Ch. 747.

As to parties to suits to administer the realty, *v. sup.* pp. 1396, 1397.

RIGHT TO JUDGMENT OR ORDER.

If in a creditor's action the Plt's debt is proved or admitted, and the represve admits assets, the Court orders payment, without directing an account, as,

the judgment being personal against the repesve, the rights of any other creditor as against the estate are not prejudiced: *Woodgate v. Field*, 2 Ha. 211; and see Forms 4, 8, *sup.* pp. 1392, 1393. As to admission of assets, *v. inf.* 1484.

To entitle the Plt to judgment, his debt must be proved or admitted, and a statement by the exor that he believes it is due, is not enough: *Hill v. Binney*, 6 Ves. 738; and see *Caledon v. Ivory*, 2 Moll. 360.

In *Keaton v. Lynch*, 1 Y. & C. C. 437, an acceptance by the testator, put in as an exhibit, was held not to be sufficient evidence of the debt, and it was suggested that proof of the consideration was necessary. But the onus is on those who dispute a bill or note to raise a *prima facie* case of no consideration: *Byles*, 141.

And a seal implied consideration at law, and equity would always give effect to a legal obligation, though voluntary: *May*, Vol. Conv. 460; and as to covenants for further assurance in voluntary deeds which are set aside, *Ib.* 191.

Accordingly, a Plt is entitled to a judgment in respect of a voluntary covenant: *Watson v. Parker*, 6 Beav. 283; or bond: *Lechmere v. Carlisle*, 3 P. Wms. 222; but not a voluntary assignment (invalid at law) of a debt: *Sewell v. Moxey*, 2 Sim. N. S. 189; but see now Jud. Act, 1873, s. 25 (6), *sup.* Vol. I. p. 503.

If Plt has *debitum in presenti solvendum in futuro*, it is enough: *Whitmore v. Oxborough*, 2 Y. & C. C. 13.

Secus, an annuitant whose annuity is not in arrear, though secured by covenant declaring that it is to be considered as accruing from day to day: *Re Hargreaves*, *Dicks v. Hare*, 44 Ch. D. 236, C. A.

As to the rights of a creditor of A., to pay whose debts a sum was directed by the will of B. to be raised, see *Joel v. Mills*, 3 K. & J. 458.

The testator's surviving partners may sue in respect of a debt due from him to the partnership, on the balance of accounts to be taken: *Paynter v. Houston*, 3 Mer. 302.

Contingent bonds, not provable in insolvency, remained a debt: *Hawker v. Hallewell*, 3 Sm. & G. 203; 8 D. M. & G. 318.

A *curator bonis* to a lunatic in Scotland can sue and give discharges for his personalty here: *Scott v. Bentley*, 1 K. & J. 281; but, *semble*, the action, in point of form, should rather be by the lunatic by his curator and next friend: *Didisheim v. London and Westminster Bank*, (1900) 2 Ch. 15, C. A.; and a foreign curator or administrateur "*provisoire*" of a lunatic who has not been so found judicially, and is domiciled and resident abroad, can sue as next friend for the recovery of the lunatic's personalty here: *S. C.* In such a case the Courts in this country, on general principles of private international law, recognise the authority conferred by the foreign court, unless prevented from so doing by reason of the lunacy jurisdiction being invoked, or because the sufficiency of the authority is open to question: *S. C.*, discussing and explaining *Re Barlow*, 36 Ch. D. 287, C. A. So a bankrupt's assignees can recover his property abroad; but a guardian's power is doubtful: *Scott v. Bentley*, 1 K. & J. 281; and see *Mackie v. Darling*, 12 Eq. 319.

A deceased lunatic's estate may be administered by a creditor for costs of the commission properly sued out: *Chester v. Rolfe*, 4 D. M. & G. 798; 18 Jur. 114; though the lunatic has died pending proceedings to set it aside: *Re Cumming*, 5 D. M. & G. 30; 18 Jur. 181.

As to a creditor's admon suit founded on an admon bond given by the intestate, see *Bolton v. Powell*, 14 Beav. 275; 2 D. M. & G. 1.

If, on the result of the account, Plt has been overpaid, the Court has jurisdiction to order him to bring in the overpayment, and pay the costs of taking the account: *Graves v. Wright*, 2 Dr. & W. 77, in which case the bill was not dismissed, but remained in operation for the benefit of the other creditors.

By Cos. Act, 1862, s. 76, the pers. represves, heirs and devisees of a deceased contributory are liable to contribute to the assets of the co. in a due course of admon. And by sect. 95, official liquidators may sue or take out admon; and see sects. 99, 105; *Turquand v. Kirby*, 4 Eq. 123; *Re Muggeridge*, *M. v. Sharpe*, 10 Eq. 443; *Buck v. Robson*, *Ib.* 629; *Taylor v. T.*, *Ib.* 477; *Hamer's Devisees' Case*, 2 D. M. & G. 366; *Buckley*, Cos. Acts, 231.

RIGHT TO JUDGMENT AGAINST THE REAL ESTATE.

The jurisdiction of the Court of Probate being limited to personality, a claim for costs of probate litigation would not sustain the suit as against the realty: *Charter v. C.*, 3 Ch. D. 218; and see *Young v. Dendy*, L. R. 1 P. & M. 344; *Newton v. N.*, 13 Ir. Ch. Rep. 245.

In *Hughes v. Eades*, 1 Ha. 486, creditor's suit to charge realty and personality, the decree was made on an admission of Plt's debt by the exors and trustees, and parties *sui juris* only, though one Deft was a *feme covert* and another an infant, and leave was given to exhibit interrogatories to prove two other Defts to be out of the jurisdiction: *S. C.*, *sup.* p. 1392.

The devisees are not bound by the amount of a claim substantiated in an action against the exor alone: *Morse v. Tucker*, 5 Ha. 79; *Willson v. Leonard*, 3 Beav. 373; and see *Talbot v. E. Shrewsbury*, 14 Eq. 503. But the judgment is *prima facie* evidence against them: *Harvey v. Wilde*, 14 Eq. 438; and they may be liable for the costs of an inquiry on the subject: *Willson v. Leonard*, 3 Beav. 381.

Land which has been *bond fide* aliened for value by the heir or devisee, with or without notice of the ancestors' debts, is not liable for them: *Mathews v. Jones*, 2 Anst. 506; *Richardson v. Horton*, 7 Beav. 112; *Spackman v. Timbrell*, 8 Sim. 253, 260; although the alienation is merely equitable: *Coope v. Cresswell*, 2 Ch. 112; *Brit. Mutual Investment Co. v. Smart*, 10 Ch. 567, notwithstanding *Carter v. Sanders*, 2 Drew. 248.

Judgments against the heir for his personal debts will not have priority over the creditors of the ancestor: *Kinderley v. Jervis*, 22 Beav. 1; and see *Pimm v. Insall*, 1 Mac. & G. 449; 7 Ha. 193, where articles by an infant heiress for a marriage settlement were held not to withdraw the estate from the ancestor's assets.

Creditors have no right, as judgment creditors, under the 2 & 3 V. c. 11, s. 4 (amended by the Land Charges Act, 1900 (63 & 64 V. c. 26)), against their debtor's leasehold on his decease, nor, it seems, till decree for sale: *Simpson v. Morley*, 2 K. & J. 71.

The pers. represve cannot, as sole Plt, sue for admon of the realty: *Tubby v. T.*, 2 Coll. 136; *Catley v. Sampson*, 33 Beav. 551.

ESTABLISHING WILL AGAINST THE HEIR.

In a creditor's suit to administer real estate since the Admon of Estates Act, 1833 (3 & 4 W. IV. c. 104), it has not been necessary to establish the will against the heir: *Goodchild v. Terrett*, 5 Beav. 398; but see *Reid v. Territt*, 8 Jur. 484; nor to make the heir a party as well as the devisee: *Bridges v. Hinzman*, 16 Sim. 71 (overruling *Brown v. Weatherby*, 10 Sim. 125; 12 Sim. 6); *Burch v. Coney*, 14 Jur. 1009; *Weeks v. Evans*, 7 Sim. 546.

And by O. XVI, 45, it is provided that in any cause or matter to execute the trusts of a will it shall not be necessary to make the heir-at-law a party; but the Plt shall be at liberty to make the heir-at-law a party where he desires to have the will established against him.

As to cases in which the heir disputes the will, and it has not been proved, see *Williams v. W.*, and *Cougill v. Rhodes*, 33 Beav. 306, 310.

ACCOUNT AND NATURE OF DEBTS AND THEIR PRIORITIES.

Independently of the provisions of the Jud. Act, 1875, s. 10 (as to which *v. inf.* p. 1460), the following is the order in which, after payment of funeral and testamentary expenses (as to which, *v. inf.* p. 1423) and costs of admon suit, the debts are payable from legal assets:—

I. Debts due to the Crown by record or specialty, which take precedence over debts of whatever nature, as well prior as subsequent: *Wms. Exors.* 854; and, *semble*, this priority (notwithstanding the provisions of the Bankruptcy Act, 1883) is not affected by sect. 10 of the Jud. Act, 1875: *Re Williams*, *Jones v. W.*, 36 Ch. D. 573, 582; *Re Churchill*, *Manisty v. C.*, 39 Ch. D. 174; *Re Bentinck*, (1897) 1 Ch. 673, *inf.* p. 1421.

As to what constitutes a debt to the Crown, see *Re West London Comm. Bk.*, 38 Ch. D. 364, and cases there cited.

A distress put in by the Crown prevails over a prior distress by a subject not completed by actual sale: *A. G. v. Leonard*, 38 Ch. D. 622.

Money not accounted for and due from a receiver under the Court is, by his recognizance, made a debt of record, although the balance has not been ascertained: *Seagram v. Truck*, 18 Ch. D. 296.

A surety who pays a debt due to the Crown from his deceased principal debtor is entitled to stand in the place of the Crown, and to have priority over all other creditors of the principal debtor: *Re Churchill, Manisty v. C.*, 39 Ch. D. 174.

II. Debts to which priority is given by particular statutes, as, for example, (a) money due to a parish by the overseers: Poor Relief Act, 1743 (17 G. II. c. 38); (b) to a friendly society by its officers: formerly under the Friendly Societies Act, 1875 (38 & 39 V. c. 60), s. 15 (7); *Re Atkins, Esp. Edmonds*, 51 L. J. Ch. 406; 46 L. T. 240; 30 W. R. 432; and now under the Friendly Societies Act, 1896 (59 & 60 V. c. 25), s. 35, sub-s. 1; (c) preferential charges on the property of a person dying while subject to military law, payable *inter se* as provided by the Regimental Debts Act, 1893 (56 & 57 V. c. 5), s. 2; (d) debts due from a deceased treasurer or collector of paving commrs: 57 G. III. c. 22, s. 51; see Wms. Exors. 856; to a savings bank from its actuary under the Savings Bank Act, 1863 (26 & 27 V. c. 87), s. 14: see *Re Williams, Jones v. W.*, 36 Ch. D. 573.

When admon takes place in bankruptcy under sect. 125 of the Bankruptcy Act, 1883, as amended by sect. 21 of the Bankruptcy Act, 1890 (*v. inf.* p. 1464), the priority of debts will be regulated by sect. 40 of the Act of 1883, as amended by the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 V. c. 62).

III. Judgments in Courts of record recovered against the deceased, which are paid rateably *inter se*, but they have no preference unless registered under the Law of Property Amendment Act, 1860 (23 & 24 V. c. 38), s. 3: *Van Gheluve v. Nerinckx*, 21 Ch. D. 189; *Re Illidge, Davidson v. I.*, 27 Ch. D. 478, C. A.

The priority was held to be not affected by sect. 10 of the Jud. Act, 1875: *Smith v. Morgan*, 5 C. P. D. 337; *Re Maggi, Winchouse v. W.*, 20 Ch. D. 545; but see *Re Whitaker, W. v. Palmer*, (1900) 2 Ch. 676; (1901) 1 Ch. 9, C. A.; *inf.* p. 1462.

A decree for foreclosure is not a judgment: *Wilson v. Dunsany*, 18 Beav. 293; nor any other decree for an account and payment: *Chadwick v. Holt*, 8 D. M. & G. 584; 4 W. R. 791; *Smith v. Eyles*, 2 Atk. 385; *Searle v. Lane*, Freem. Ch. 103; *Widgery v. Tepper*, 6 Ch. D. 364, C. A.; and see *Garner v. Briggs*, 4 Jur. N. S. 230; 27 L. J. Ch. 483; 6 W. R. 378; though the certificate had been drawn up: *Chadwick v. Holt, sup.*; nor a Master's certificate: *E. Mansfield v. Oyle*, 4 D. & J. 38; nor an order for payment into Court: *Ward v. Shakeshaft*, 1 Dr. & S. 269; nor a judgment in the Lord Mayor's Court against a garnishee: *Holt v. Murray*, 1 Sim. 485; nor an attachment there obtained since the death against some of the assets: *Redhead v. Welton*, 29 Beav. 521; nor an Irish or foreign judgment against an Englishman: *Wilson v. Dunsany*, 18 Beav. 293 (and see *Re Kloebe*, 28 Ch. D. 175, 180); *Dupleix v. De Roven*, 2 Vern. 540; nor a balance order directing an exor to pay a call out of assets "in a due course of admon": *Re Hubback, International Hydropathic Co. v. Hawes*, 29 Ch. D. 935, C. A.; *Westmoreland Slate Co. v. Feilden*, (1891) 3 Ch. 15; nor, it would seem, a garnishee order in the High Court: *Pritchett v. English and Colonial Syndicate*, (1899) 2 Q. B. 428, C. A.

The priorities of creditors are regulated by the law of the domicile of the deceased, but an Irish judgment gave priority as to Irish assets, though sent over here: *Cook v. Gregson*, 2 Dr. 286.

An order for taxation and payment of costs is a judgment (*sup.* Vol. I. p. 267), but not a taxing master's certificate: *Ib.*; nor, in the admon of a lunatic's estate, an order for taxing costs, and inquiry as to raising them out of the lunatic's property: *Stedman v. Hart*, Kay, 607.

And see further as to what operates as a judgment, *sup.* Vol. I. pp. 482, 489.

IV. Recognizances and Statutes: Wms. Exors. 865.

V. Judgments recovered against the exor or admor, whether registered or not, provided the exor or admor has notice of them: *Jennings v. Rigby*, 33 Beav. 198 (upon the construction of the Law of Property Amendment Act, 1860, 23 & 24 V. c. 38): *Re Maggi, Winehouse v. W.*, 20 Ch. D. 545; and whether recovered in respect of a specialty or simple contract debt: *Re Williams, W. v. W.*, 15 Eq. 270; the Admon of Estates Act, 1869 (32 & 33 V. c. 46), by which the distinction between specialty and simple contract debts is abolished, not affecting the right of a creditor who first obtains judgment, even though not registered, to payment in priority to all other creditors of equal degree: *S. C.*; *Re Stubbs, Hanson v. S.*, 8 Ch. D. 154; and this priority is not affected by the Jud. Act, 1875, which does not apply to judgment debts: *Smith v. Morgan*, 5 C. P. D. 337; *secus*, if judgment has been obtained on the same day as an admon decree which operates as a judgment in favour of all the creditors: *Parker v. Ringham*, 33 Beav. 535.

And a creditor who obtains judgment against the exor before judgment in admon action cannot be restrained from enforcing his judgment: *Re Womersley, Etheridge v. W.*, 29 Ch. D. 557 (where the receiver in the action was directed to pay the debt and costs out of the assets, without prejudice to the question whether or not they ought to be allowed to the exor).

Judgments confessed by the exor or admor stand on the same footing as judgments recovered against them; and cannot be avoided by mere allegation of fraud or covin: *Williams v. Fowler*, 1 Str. 407; *Lyttleton v. Cross*, 3 B. & C. 322; even after a bill filed for admon: *Larkins v. Paxton*, 2 Beav. 219; *Wms. Exors.* 861; or an action commenced by another creditor of equal degree: *Lyttleton v. Cross, sup.*; *Prince v. Nicholson*, 1 Marsh. 280; 5 Taunt. 333; *Parker v. Dee*, 3 Sw. 531, n.; or a decree for an account: *Smith v. Eyles*, 2 Atk. 385. And by voluntarily confessing judgments which exhaust the assets the exor does not lose his priority for costs: *Sanderson v. Stoddart*, 32 Beav. 155.

Judgments against exors are payable according to priority of date: *Morrice v. Bank of E.*; *Abbis v. Winter*, 3 Sw. 573, 578, n., Ca. t. Talb. 217, 223; *Dollond v. Johnson*, 2 Sm. & G. 301.

The 23 & 24 V. c. 38, is not retrospective: *Evans v. Williams*, 2 Dr. & S. 325.

A judgment confessed for solr's charges in favour of a non-professional man was, in the absence of agreement, disallowed: *Re Carew*, 30 Beav. 274.

A surety for a testator who has satisfied a judgment against him for the debt is thereupon entitled, by force of sect. 5 of the Mercantile Law Amendment Act, 1856, to rank as a judgment creditor: *Re McMyn, Lightbown v. M.*, 33 Ch. D. 575.

VI. Debts by specialty or simple contract, and unregistered judgments against the deceased.

The Admon of Estates Act, 1869 (32 & 33 V. c. 46), after reciting that "it is expedient to abolish the distinction as to priority of payment between specialty and simple contract debts of deceased persons," enacts that in the admon of the estates of persons dying after 1st Jan. 1870, "no debt or liability of such person shall be entitled to priority by reason merely that the same is" a specialty debt, but all creditors by specialty and simple contract are to be treated as of equal degree, and be paid accordingly out of the assets, whether legal or equitable, but the Act is not to prejudice any lien, charge, or other security of any creditor.

As to specialty and simple contract debts, see *Wms. Exors.* 869 *et seq.*

Simple contract debts owing to the Crown take precedence over other simple contract debts, but no priority over specialty debts is conferred upon them by the Act, and accordingly where there is a debt due to the Crown on simple contract the assets must be apportioned rateably between the specialty and simple contract creditors, and then the Crown debt will be paid first out of the amount apportioned to the simple contract debts: *Re Bentinck*, (1897) 1 Ch. 673.

It has been held that rent in arrear has now no priority over simple contract debts: *Shirreff v. Hastings*, 6 Ch. D. 610.

In the admon of the English assets of a foreigner, no priority is given to

English over foreign creditors: *Re Kloebe, Kannreuther v. Geiselbrecht*, 28 Ch. D. 175, explaining *Blackwood v. Reg.*, 8 App. Ca. 82, 92.

An unregistered judgment against the deceased gives no priority, although the exor had notice of it: *Re Turner, T. v. Walter*, 12 W. R. 337; 33 L. J. Ch. 232; 10 Jur. N. S. 147; *Kemp v. Waddingham*, L. R. 1 Q. B. 355; *Van Gheluive v. Nerinckx*, 21 Ch. D. 189; *Re Illidge, Davidson v. I.*, 27 Ch. D. 478, C. A.

Debts postponed by Statute.—By the Partnership Act, 1890 (53 & 54 V. c. 39), persons lending money or selling a goodwill to a partnership in consideration of a share of profits are precluded from recovering in the event of insolvency, "until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied;" and by the Married Women's Property Act, 1882 (45 & 46 V. c. 75), s. 3, money lent by a wife to her husband for the purposes of his trade or business is treated as assets in the case of his bankruptcy with a similar reservation of her claim to dividend after, but not before, all claims of other creditors (*v. sup.* p. 921).

VII. Voluntary covenants and bonds.

A voluntary bond, or other voluntary legal obligation under seal is a debt, and therefore preferred to legacies: *Markwell v. M.*, 34 Beav. 12, 418; *Adames v. Hallett*, 6 Eq. 468; May, Vol. Conv. 167; but has been postponed to all debts for value: *Blount v. Doughty*, 3 Atk. 483; *Jones v. Powell*, 1 Eq. Ab. 84; *Dawson v. Kearton*, 3 Sm. & G. 186. So a voluntary judgment: *Fairbaird v. Bowers*, Prec. Ch. 17; 2 Vern. 202; and an annuity by deed *præmium pudicitiae*: *Howell v. Price*, 1 Jur. N. S. 494; but a voluntary promissory note confers no such right on the payee: *Re Whitaker*, 42 Ch. D. 119, C. A.; in which case, however, payment out of the estate of a lunatic was under the circumstances allowed by the Court in lunacy by way of bounty, and as in discharge of a debt of honour on the part of the lunatic.

Voluntary bonds, assigned for value, stand on the same footing as bonds originally given for value: *Payne v. Mortimer*, 4 D. & J. 447; *Halifax J. S. Bank v. Gledhill*, (1891) 1 Ch. 31, and see *Re Williams and Parry*, 72 L. T. 869.

A voluntary bond had priority over interest on simple contracts: *Garrard v. L. Dinorben*, 5 Ha. 213.

In *Hervey v. Audland*, 14 Sim. 531, the covenantee under a covenant for further assurance in a voluntary settlement was not allowed to prove against the covenantor's estate, but had leave to bring an action (the trial is reported 16 M. & W. 862); but see *Cox v. Barnard*, 8 Ha. 310. An issue went as to a bond being voluntary or for value: *Hepworth v. Heslop*, 6 Ha. 561, 622.

A voluntary payment by a father of a debt due by his son to a bank in which the father was partner, did not constitute a debt to the father's estate: *Graham v. Wickham* (2), 31 Beav. 478; and see *S. C.*, 1 D. J. & S. 474; *Melland v. Gray*, 2 Y. & C. C. 199.

A *donatio mortis causâ* is subject to the donor's debts: *Tate v. Leithead, Kay*, 658.

A voluntary release of a debt must in general have been perfected at law to make it effectual in equity, and a mere promise to release it is not enough: *Cross v. Sprigg*, 6 Ha. 552; *Peace v. Hains*, 11 Ha. 151; *Luzmore v. Clifton*, 16 W. R. 265; and so a parol release of a promissory note to the devisee of the maker will be ineffectual, as by the Bills of Exchange Act, 1882 (45 & 46 V. c. 61), ss. 62, 89, a writing is required unless the release is to the "maker," which, though it might include exors or admors, will not include devisee: *Edwards v. Walters*, (1896) 2 Ch. 517, C. A.; but there might be circumstances to prevent the debt being enforced in equity, though still subsisting at law: *Taylor v. Manners*, 1 Ch. 48; or the promise may amount to such a representation as would be enforceable in equity: *Yeomans v. Williams*, 1 Eq. 184; 35 Beav. 130; and an intention to forgive the debt, with a technical release by the appointment of the creditor exor, is enough: *Strong v. Bird*, 18 Eq. 315; *Re Applebee, Leveson v. Beales*, (1891) 3 Ch. 422; and see *Re Griffin, G. v. G.*, (1899) 1 Ch. 408. Payment of the probate and legacy duty is a sufficient consideration for the release: *Taylor v. Manners*, 1 Ch. 48.

For decisions as to what is a loan and what a gift, see *Knapp v. Burnaby*, 8 W. R. 305; *Hill v. Wilson*, 8 Ch. 888.

Solr's lien under 23 & 24 V. c. 127, s. 28 (*q. v. sup.* p. 1087), for costs

on property recovered or preserved, has priority in admon against such property over all other debts not specially charged upon it. The similar lien previously enforced by the Court had priority over specialty debts: *Turwin v. Gibson*, 3 Atk. 720.

In the distribution in lunacy of a deceased lunatic's estate, moneys properly expended by the committee of the lunatic, both before and after the inquisition, in maintenance of the lunatic, his wife and family, are paid in priority to debts: *Re Pink*, 23 Ch. D. 577, C. A.; and see *Re Plenderleith*, (1893) 3 Ch. 332, C. A.; *Re Winkle*, (1894) 2 Ch. 519, C. A.; but this rule does not affect funds in the High Court: *Re Brown, Llewellyn v. Brown*, (1900) 1 Ch. 489, C. A. (where balance only after satisfying charging order was transferred to lunacy); and see *Re Clarke*, (1898) 1 Ch. 336, C. A.

TESTAMENTARY EXPENSES.

A direction by a testator for payment of his "testamentary expenses," includes the costs of an admon suit: *Miles v. Harrison*, 9 Ch. 316; 22 W. R. 441; *Penny v. P.*, 11 Ch. D. 441; *Morgan v. Alford*, V.-C. H., 19 Nov. 1874, B. 3625, overruling *Browne v. Groombridge*, 4 Madd. 495, and *Brougham v. Poulett*, 19 Beav. 119 (where the words were stronger); *Linley v. Taylor*, 1 Giff. 67 (*S. C.*, 2 D. F. & J. 84); see also *Morell v. Fisher*, 4 D. & Sm. 422;

—and also estate duty in respect of the personal property: *Re Clemow*, (1900) 2 Ch. 182; or of property passing by testamentary appointment under a general power: *Re Treasure*, (1900) 2 Ch. 648;

—and where a testator by his will directed payment of the "testamentary expenses" of his widow, the expression was held to include the expenses of admon under her intestacy: *Re Clemow*, *sup.*;

—and, generally, whenever duty is essential to obtaining a grant of probate it must be considered as a testamentary expense: *Re Treasure*, (1900) 2 Ch. 648, 653; *Re Clemow*, *sup.*;

—and as to what other debts are included, see 2 Jarm. W. 1491, n.

LEGAL AND EQUITABLE ASSETS.

All property which a Court of law would have treated as assets, and which would therefore have come to the exors' hands *virtute officii*, is legal assets: *Cook v. Gregson*, 3 Drew. 547.

Under the Admon of Estates Act, 1833 (3 & 4 Will. IV., c. 104), any estate or interest of the deceased in real estate not charged by will is made assets for payment of his debts to be administered in a Court of equity: see *Re Illidge, Davidson v. I.*, 27 Ch. D. 478, 483, C. A.; *Price v. P.*, 35 Ch. D. 297; *Lewin*, 1013; and copyholds are assets in the lord's hands where they have escheated for want of heirs: *Evans v. Brown*, 5 Beav. 114; *Downes v. Morris*, 3 Ha. 394.

And freeholds, where there is no heir of an intestate mortgagor, go to the mortgagee, subject to the intestate's debts: *Beale v. Symonds*, 16 Beav. 406.

An equity of redemption in freeholds: *Foster v. Handley*, 1 Sim. N. S. 200; 15 Jur. 73; or in copyholds: *Re Burrell, B. v. Smith*, 9 Eq. 443; or in a sum of money charged on real estate: *Cook v. Gregson*, 3 Drew. 547; 2 Jur. N. S. 510; *Shee v. French*, 3 Drew. 716; or in leaseholds: *Sharpe v. E. Scarborough*, 4 Ves. 538, 541; *Christy v. Courtenay*, 26 Beav. 140 (and see cases cited, 3 P. Wms. 344, n.; Wms. Exors. 1548); or the interest of one seised in fee subject to a mortgage by demise: *Wride v. Clarke*, 2 Bro. C. C. 261, n.; *Plunket v. Penson*, 2 Atk. 290; *Cole v. Warden*, 1 Vern. 410, is legal assets.

The balance of the produce of a West India estate received by the exor here as consignee was held to be legal assets: *Thomson v. Grant*, 1 Russ. 540, n.

An annuity payable to the widow of a trader as part of the consideration for a transfer of his business was held applicable for paying his debts: *French v. F.*, 6 D. M. & G. 495; and to be legal assets: *Shee v. French*, 3 Drew. 716; 3 Jur. N. S. 428.

The estate of a woman married before 1883 was dealt with as equitable

assets, and distributed among all creditors *pari passu*: *Owens v. Dickenson*, Cr. & Ph. 48; *Bruere v. Pemberton*, 1810, A. 1365; 3 D. F. & J. 406, n.; *S. C. (Anon.)*, 18 Ves. 258; *Johnson v. Gallagher*, 7 Jur. N. S. 280; and see *S. C.*, 3 D. F. & J. 494, *et sup.* p. 901.

The Married Women's Property Act, 1870 (33 & 34 V. c. 93), *sup.* p. 912, did not alter the rules as to the admon of the estates of deceased married women: *Re Poole, Thompson v. Bennett*, 6 Ch. D. 739.

All interests in lands devised to pay or charged with debts, though the devisees or persons to sell are exors, are equitable assets: *Silk v. Prime*, 1 Dick. 384; 1 Bro. C. C. 138, n.; 2 L. C. Eq. 5th ed. 111; and the decree: 2 Coll. 609; and see *Blatch v. Wilder*, 1 Atk. 420, n.; West, 322; *Prouse v. Abingdon*, 1 Atk. 484; *Newton v. Bennet*, *Barker v. Boucher*, 1 Bro. C. C. 135, 140, n.; *Deg v. D.*, 2 P. Wms. 415. See now the Land Transfer Act, 1897, s. 2, sub-s. 3; *sup.* p. 1398; *Brickdale*, 254 *et seq.*

A mere general direction to pay debts charges the land, although there are no words—such as “in the first place,” &c.—importing a general and primary purpose, that the payment of debts, &c. should precede the subsequent dispositions: *Williams v. Chitty*, *Shallcross v. Fynden*, 3 Ves. 545, 739; and though the direction to pay is at the end of the will: *Harding v. Grady*, 1 D. & War. 430; *Wrigley v. Sykes*, 21 Beav. 337, 345; and see the cases reviewed, 2 Jarm. W. 1396 *et seq.*; *Corser v. Cartwright*, L. R. 7 H. L. 731; 8 Ch. 971; 21 W. R. 938.

But power to adjust and pay all claims on the estate, and generally to act as the exors in their discretion think fit, is not equivalent to a direction to pay debts, so as to confer a power to sell real estate: *Re Head's Trustees and Macdonald*, 45 Ch. D. 310, C. A.

And a direction that the exors shall pay the debts and legacies is no charge: *Powell v. Robins*, 7 Ves. 209; *Willan v. Lancaster*, 3 Russ. 108; unless there are special words in the devise, such as “subject as aforesaid”: *Dowling v. Hudson*, 17 Beav. 248; and see *Wisden v. W.*, 2 Sm. & G. 396.

Except as to realty devised to them: *Re Tanqueray-Willaume to Landau*, 20 Ch. D. 465, C. A.; *Re Bailey, B. v. B.*, 12 Ch. D. 268; *Henvell v. Whitaker*, *Finch v. Hattersley*, 3 Russ. 343, 345, and cases there cited; although the devise is contained in a general residuary devise and bequest of residue: *Wheeler v. Howell*, 3 K. & J. 198; or is on trust for others: *Hartland v. Murrell*, 27 Beav. 204; *Re Tanqueray-Willaume to Landau*, 20 Ch. D. 465, C. A.; *Re De Burgh Lawson, De B. L. v. De B. L.*, 41 Ch. D. 568; and the whole real estate devised will be charged unless a contrary intention appears upon the whole will: *S. C.*; *Re Bailey, B. v. B.*, 12 Ch. D. 268. But this exception does not apply where the devise is to one of several exors who are directed to make the payment: *Warren v. Davies*, 2 My. & K. 49; *Wasse v. Heslington*, 3 My. & K. 495; *Dowling v. Hudson*, 17 Beav. 248; nor where the several exors take unequal benefits: *Harris v. Watkins*, Kay, 438; nor where the devise is to others as trustees for them: *Symons v. James*, 2 Y. & C. C. 301; nor where the exor only takes a life estate or other limited interest: *Cook v. Dawson*, 3 D. F. & J. 127.

So a direction to exors to pay legacies out “of my estate,” being referable to the personality coming to them as exors, does not operate to charge the realty: *Re Cameron, Nixon v. C.*, 26 Ch. D. 19, C. A.

An implied charge by a general direction for payment is cut down or controlled by the subsequent provision of an express fund for payment: *Wrigley v. Sykes*, 21 Beav. 337; or by the devise of a particular estate subject to payment: *Corser v. Cartwright*, L. R. 7 H. L. 731; 8 Ch. 971; 21 W. R. 938; but an express charge is not so limited: *Ellison v. Airey*, 2 Ves. 568; *Coze v. Bassett*, 3 Ves. 155; *Wrigley v. Sykes*, *sup.*; and see *Wisden v. W.*, 2 Sm. & G. 396.

A direction for payment out of rents and profits is in general a charge of the corpus: *Fitzherbert v. Weld*, 24 W. R. 43; *Metcalf v. Hutchinson*, 1 Ch. D. 591; *Coke v. Cholmondeley*, 3 Drew. 1.

A charge of debts on realty includes damages accrued since the decease: *Willson v. Leonard*, 3 Beav. 373; *Morse v. Tucker*, 5 Ha. 79; and mortgage debts: *Poole v. P.*, 7 Ch. 17. A charge of testamentary expenses includes the costs of an admon action: *sup.* p. 1423. As to what other debts are included, see 2 Jarm. W. 1491, n.

As to the power of exors to sell and mortgage, see *inf.* pp. 1541 *et seq.* As to the effect of the Land Transfer Act, 1897, see *Brickdale*, 255 *et seq.*

EXECUTOR'S RIGHT TO GIVE PREFERENCE IN PAYMENT OF DEBTS.

At any time before a judgment for admon has been made an exor or admor may prefer any creditor over those of equal degree (*v. sup.* pp. 1419 *et seq.*) by paying his debt in money: *Williams v. Fowler*, Str. 407—410; *Lytleton v. Cross*, 3 B. & C. 322; *Re Radcliffe, European Ass. Soc. v. R.*, 7 Ch. D. 733; *Re Harris, H. v. H.*, 35 W. R. 710; 56 L. T. 507; 56 L. J. Ch. 810; *Re Wells, Molony v. Brooke*, 45 Ch. D. 569.

Or in goods: *Hepworth v. Heslop*, 6 Ha. 561; or by himself taking the amount out of the assets and making himself personally liable for the debt: *S. C.*

Or by mortgaging or pledging any part of the assets: *Earl Vane v. Rigden*, 5 Ch. 663.

Or by confessing judgment even after suit or action commenced by other creditors: *Larkins v. Paxton*, 2 Beav. 219, and other cases, *sup.* p. 1421.

Although there was no pressure by the creditor: *Hepworth v. Heslop*, 6 Ha. 561; and whether the assets are actually in his hands or not: *Earl Vane v. Rigden*, 5 Ch. 663; see 665, n.

And since the Admon of Estates Act, 1869 (32 & 33 V. c. 46), a simple contract creditor may be preferred to a specialty creditor: *Re Ormond, Drury v. O.*, 58 L. T. 24.

And as the rules of equity now prevail, the power may be exercised as against a creditor who has brought an action for his debt: *Vibart v. Coles*, 24 Q. B. D. 364, C. A.

But in confessing judgment an exor may not, it is apprehended, exhaust the assets for one creditor: *May*, Vol. Conv. 109; and see *Earl Vane v. Rigden*, 5 Ch. 663.

After an admon decree the exor cannot do any act to affect the priorities of creditors; if he pays any creditor, he will not be allowed such payment as preferential, but can only stand in the place of such creditor against the estate: *Irby v. I.*, 24 Beav. 525; *Jones v. Jukes*, 2 Ves. jun. 518; *Mitchelson v. Piper*, 8 Sim. 64; *Jackson v. Woolley*, 12 Sim. 12, 16.

But an order under O. XV, merely for an account and reserving further consideration, but not directing application of assets in a due course of admon, does not affect the power of preference: *Re Barrett, Whitaker v. B.*, 43 Ch. D. 70.

Where a creditor has been paid part of his debt in preference by the exor, the Court will not pay him any more, either out of legal or equitable assets, until the other creditors have received the same proportion of their debts: *Mitchelson v. Piper*, 8 Sim. 64; *Lowthian v. Hasell*, 4 Bro. C. C. 167. And see Sect. XXX., pp. 1675 *et seq.*

As to the exor's right to prefer his own debt by retaining the amount, see *inf.* Sect. X., pp. 1529 *et seq.*

INTEREST ON DEBTS.

The direction for computing interest, formerly inserted, used to be expressly confined to the debts carrying interest: *Hamilton v. Houghton*, 2 Bli. 181; *Creuze v. Hunter*, 2 Ves. jun. 165.

But by O. LV, 62, where an account is directed of the debts of the deceased, unless otherwise ordered, interest is to be computed on those carrying interest at the rate they carry, and on all others at 4 p. c. from the date of the judgment or order.

By r. 63, on debts proved against the estate, not carrying interest, interest is allowed at 4 p. c. from the date of the judgment or order, after satisfying costs, debts, and interest of such debts as by law carry interest.

Under this rule a creditor is not entitled to interest from the date of the judgment on a debt which accrues subsequently, but from the time of its being proved: *Lainson v. L.*, 18 Beav. 7; 17 Jur. 1044.

And the rules do not apply to decrees made before 1841, though the creditor, who was Plt, technically came in since: *Wheeler v. Gill*, 19 Eq. 316; *Gruggen v. Cochrane*, 13 W. R. 520; 12 L. T. 72.

In paying a creditor who proves on a bill of exchange, income tax is deducted from interest: *Dinning v. Henderson*, 3 D. & S. 702.

A creditor on an insolvent estate, whose debt bears interest, is not entitled to interest up to the day of payment, but only to the date of the judgment for admon, which, by virtue of Jud. Act, 1875, s. 10, is equivalent to an adjudication in bankruptcy in cases where the testator or intestate has died since 1st Nov. 1875: *Re Trott's Estate, Pomeroy v. Summerhay*, M. R. at Chamb. 14 Nov. 1878, B. 3332; *Re Summers, Boswell v. Gurney*, 13 Ch. D. 136 (where, however, the Court declined to vary an order on further consideration made on a different footing); and see *Re London, &c. Hotels Co., Quartermaine's Case*, (1892) 1 Ch. 639, disapproving *Re Talbot, King v. Chick*, 39 Ch. D. 567, and holding that in the case of a winding up, when a secured creditor has realized his security and proves as an unsecured creditor for the balance, he cannot (as respects proceeds of sale) treat arrears of interest accrued due after the commencement of the winding-up as paid in priority to principal, although he is permitted to do so by reason of earlier authorities (see *Exp. Ramsbottom*, 2 Mont. & Ayr. 79; *Exp. Penfold*, 4 De G. & S. 282; *Re Savin*, 7 Ch. 760) as respects sums received under the security in the nature of profits or income.

By the Bankruptcy Act, 1890, s. 23, "where any debt has been proved upon a debtor's estate," under the Bankruptcy Act, 1883, "and such debt includes interest, or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding 5 p. c. per ann., without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full."

The provision does not prevent a secured creditor, who has realized or assessed the value of his security from allocating such value in discharge of the interest, although at a higher rate than 5 p. c. per ann., and proving for the principal or balance due: *Re Fox and Jacobs, Exp. Discount Banking Co. of England and Wales*, (1894) 1 Q. B. 438.

Interest on a judgment debt was allowed out of the surplus of the estate of an insolvent debtor in lieu of directing such surplus to be paid to his exors under the Judgments Act, 1838 (1 & 2 V. c. 110), s. 92; *Re Claggett, Exp. Lewis*, W. N. (88) 100; 36 W. R. 653.

The direction to compute interest may be given on further consideration: see *Flintoff v. Haynes*, 4 Ha. 309. To entitle to interest under this rule the debt must have been established in the particular suit: *Davis v. Combermere*, 15 Sim. 394; and see *Gruggen v. Cochrane*, 13 W. R. 520; 12 L. T. 72.

Though an obligee has received the whole principal due on the bond under the bankruptcy of one obligor, he may treat that as an ordinary payment on account, so as to recover interest against a co-obligor's estate: *Bower v. Marria*, C. & Ph. 351, 354.

In *Purcell v. Blennerhasset*, 3 J. & Lat. 24, interest on the Plt's debt was given only from the time of filing the bill, because of the laches of Plt.

In *Lancaster v. Evors*, 10 Beav. 154, 166, 266, one estate in Court was not entitled to interest on a sum paid on account of and recouped from another estate after great length of time.

A direction to pay a brother's debt amounted to a legacy, but did not give interest until after a year from testator's death: *Askew v. Thompson*, 4 K. & J. 620.

The claim by the writ for interest is not a good demand within the Civil Procedure Act, 1833 (3 & 4 W. IV. c. 42), s. 28 (v. sup. p. 1387): *Rhymney Ry. Co. v. Rhymney Iron Co.*, 25 Q. B. D. 147.

A solr is entitled to interest at 4 p. c. on his taxed costs at any time before they are paid: *Blair v. Cordner*, 19 Q. B. D. 516.

In giving interest on legal debts equity followed the law, and applied similar principles as to other debts. For the general rules as to the right to interest, v. sup. p. 1386.

As to interest on legacies, v. inf. p. 1504.

As to subsequent interest on debts, v. inf. pp. 1457, 1458.

SALE OF REALTY.

The old rule was to administer the personalty, and in case of a deficiency to raise the residue from the realty, and then, if it was foreseen the per-

sonalty would be deficient, a sale of the realty was proceeded with meanwhile: *Holme v. Stanley*, 8 Ves. 2; *Lloyd v. Johns*, 9 Ves. 65; *Curtis v. Price*, 12 Ves. 105; *Watson v. Birch*, 2 Ves. jun. 53; *Wakeman v. De Rutland*, 3 Ves. 505, 506.

Afterwards it became usual only to direct an inquiry as to the real estate and the incumbrances: *Rouse v. Jones*, 1 Ph. 465, 466; and a sale of the real estate was not directed till further directions, the deficiency of the personal then appearing; especially where an infant was interested in the real: *Baillie v. Jackson*, 10 Sim. 167; but see *contra*, *Lynch v. Joyce*, 3 D. & War. 349.

Now, however, it is of course to direct a sale in the first instance, in case the personal estate shall not be sufficient; and a direction for sale has been added in Chambers: see Forms 2, 3, *sup.* pp. 1390, 1391.

By O. LI, 1 (replacing 15 & 16 V. c. 86, s. 55, *v. sup.* Vol. I. pp. 338, 339), in any cause or matter relating to real estate, the Court may direct a sale of the realty, if necessary or expedient, at any time in the suit, with the same effect as on the hearing.

A sale will not be directed against the will of the beneficiaries, provided they satisfy the debts, costs, &c.: *Cooper v. C.*, L. R. 7 H. L. 72; nor against the will of a devisee of part, who submits to pay his share: *Lees v. L.*, 15 Eq. 151; and in deciding whether the debts are to be raised by sale or mortgage, the wishes of those immediately entitled will be consulted before those who are remotely interested: *Metcalfe v. Hutchinson*, 1 Ch. D. 591. And see *Swann v. Webb*, *Martin v. Hadlow*, 1 W. R. 90, 101.

And the Court has power to order a sale of real estate only when it is necessary or expedient, for the purposes of the action before it, that the property should be sold: *Re Robinson*, *Pickard v. Wheeler*, 31 Ch. D. 247.

And an action to administer personal estate, and rents and profits of real estate, is not a cause or matter relating to real estate within the rule: *Re Staines, S. v. S.*, 33 Ch. D. 172.

Where there is a trust for sale to pay debts in aid of the personalty, an order for sale, after a certificate that all the debts are paid out of personalty, is invalid: *Carlyon v. Truscott*, L. R. 20 Eq. 348.

By r. 2, the title is to be laid before counsel with reference to the conditions and matters of sale, and a time for delivering the abstract to be fixed.

And by r. 3, the sale is to be, with the approbation of the Judge, to the best purchaser, to be allowed by such Judge, and all proper parties are to join as he shall direct.

To take the conduct of a sale from Plt, a case should be made, and parties having title deeds, whether conducting the sale or not, must facilitate it: *Knott v. Cottee*, 27 Beav. 33.

Real estate may be sold under the Admon of Estates Act, 1833 (3 & 4 W. IV. c. 104), to pay debts, though the suit is brought, not by a creditor, but by the heir and next of kin: *Price v. P.*, 15 Sim. 484; or person interested under the will: *Rodney v. R.*, 16 Sim. 307; *Dinning v. Henderson*, 2 Coll. 330 (and see *Kinderley v. Jervis*, 22 Beav. 1); but not where the legal pers. reprieve is sole Plt: *Tubby v. T.*, *Catley v. Sampson*, *sup.* p. 1419.

As to the sale of land subject to an annuity at the suit of the annuitant, see Sect. XXV. *inf.* p. 1639.

By the Trustee Act, 1893 (56 & 57 V. c. 53), s. 30, where a sale is decreed for any purpose, the Court may declare the legal owners trustees within the Act, and discharge the contingent right of any unborn person.

By sect. 31, in any decree for conveyance or assignment of lands, the Court may declare any parties interested to be trustees, and that unborn persons, who would on coming into existence become interested, would be trustees within the Act.

As to these sections, see pp. 1271, 1272, *sup.*

The C. A. will not interfere with the discretion of the Judge ordering the sale as to the mode of carrying it into effect: *McDonald v. Foster*, 6 Ch. D. 193, C. A.

Where the costs of suit exceeded the funds in the cause, the Court directed the costs of the purchasers, occasioned by the trustee's refusal to execute the conveyance, to be taxed and paid, and then Plt's and Dett's rateably: *Billing v. Webb*, 1 D. & S. 716.

In a creditor's suit, an incumbrancer, made a party, who from the frame of

the suit could not have relief in it, was still not entitled to his costs against *Plt: Joyce v. De Moleyns*, 3 J. & Lat. 698.

As to equitable conversion of the surplus, where more is sold than necessary, *v. inf.* p. 1552.

If there are distinct and separate incumbrances on different parts of the estate, it will be more convenient that such parts should be sold separately, and the proceeds paid in to separate accounts, as, if the estate is sold entire, the proceeds will have to be apportioned according to the respective values of such parts; for a direction for that purpose, *v. inf.* Sect. II.

If there are estates devised in trust to pay, or charged with debts, descended estates, or estates specifically devised, should be sold in their proper order: *v. inf.* Sect. XXIX., pp. 1663 *et seq.*; and the proceeds should be paid in to distinct accounts; and where there are estates applicable, in successive order, the decree generally directs which are to be sold in the first instance.

MORTGAGEE CONSENTING TO SALE.

The usual direction in the case of mortgagees, who consent to the sale, is for the purchase-money to be paid into Court: Form 2, p. 1390.

The estate cannot be sold free from the mortgage without the mortgagee's consent, and, if a party, he must elect at once if it shall be so sold: *Langton v. L.*, 1 Jur. N. S. 1078; 24 L. J. Ch. 625; 3 W. R. 222; 3 Eq. R. 394; *Wickenden v. Rayson*, 6 D. M. & G. 210. If he consents he must produce and leave the title deeds necessary for the sale: *Livesey v. Harding*, 1 Beav. 343.

The mortgagee is only entitled to six months' interest from the date of his consent to be paid off out of the purchase-money: *Day v. D.*, 31 Beav. 270; *Fish. Mort.* 907.

A party having a lien on an estate, and proving his debt, and on the estate being sold, subject to the lien, refusing to accept from the purchaser the amount fixed by the Master, was not to share as a creditor in the purchase-money: *Hempstead v. H.*, 4 Beav. 423.

The mortgagee consenting to a sale is entitled to his principal, interest, and costs out of the proceeds in priority to all other costs: *Hepworth v. Heslop*, 3 Ha. 484; *Crosse v. Gen. and Reversionary, &c. Co.*, 3 D. M. & G. 698, 722; *Ross v. R.*, 29 L. R. Ir. 318; but in *Berry v. Hebblethwaite*, 4 K. & J. 80, was allowed only the actual costs of sale, as against the proceeds; but see *Fish. Mort.* p. 890, s. 1884, n.

Where the amount realized by the sale was insufficient to satisfy the mortgage, and was the only assets, the whole was paid to the mortgagee, after paying the costs of the sale: *Dighton v. Withers*, 31 Beav. 423; *Threlfell v. Harrison*, W. N. (77) 192; but *semble* only the mortgagee's costs: *Re Mac-kinlay, Ward v. M.*, 2 D. J. & S. 358.

As to costs where the mortgagee is plaintiff, *v. inf.* Vol. III. pp. 1925, 1926.

In a creditor's suit, where the parties beneficially entitled to the real estate, subject to the debts, were also entitled to the second charge, and the estate was insufficient to pay the first and second charges, upon the offer of such parties to pay off the first charge and take the estate in satisfaction of their demands, an inquiry went whether it was proper to carry such offer into effect, instead of selling: *Lynch v. Kelly*, 3 J. & Lat. 628; and see *Rogers v. Maule*, *sup.* p. 1391.

SALE FREE FROM INCUMBRANCES—CONVEYANCING ACT, 1881, s. 5.

For the provisions of sect. 5 of the Conveyancing Act, 1881, empowering the Court to order a sale of incumbered real estate, *v. sup.* Vol. I. p. 342.

An order for the sale of land free from incumbrances, the incumbrancer not being a party to the action, should follow the wording of the Act, and after directing payment of the purchase-money into Court, and setting apart a sufficient amount to meet the claims of the incumbrancer, proceed to declare that thereupon any person interested should be at liberty to apply at Chambers for a declaration that the land is freed from the incumbrance: *Dickin v. D.*, 30 W. R. 887.

In an admon action, the Court will not, upon further consideration, direct

the sale of real estate under sect. 5, free from an annuity, but will direct a sale to be carried out in Chambers: *Patching v. Bull*, 30 W. R. 244.

RENTS—ACCOUNT OF, WHEN DIRECTED.

It is not usual in a creditor's suit to direct an account of rents in the original decree: *Schomberg v. Humfrey*, 1 D. & War. 411.

At law a bond creditor was only entitled to judgment against the heir for the lands descended of which he was seised at the time of suing the original writ or filing the bill: *Jeffreson v. Morton*, 2 Saund. 7 a, n.; but in Equity he was always entitled to an account of the mesne profits from the death of the obligor: *Curtis v. C.*, 2 Bro. C. C. 633.

A widow, in accounting for rents and profits received by her as trustee for her son, is entitled, as a just allowance, to her arrears of dower, and future payments, without being put to sue for dower: *Graham v. G.*, 1 Vez. 262.

Mesne rents and profits are never applied, unless necessary by reason of a deficiency of other assets; and an account of them will not be directed until, on further consideration, the necessity for such account appears by the insufficiency of the corpus: *Stronge v. Hawkes*, 4 D. & G. 655; *Schomberg v. Humfrey*, 1 D. & War. 411; *Stratford v. Ritson*; *Eardley v. Owen*, 10 Beav. 25, 577; *Davies v. Topp*, Form 2, Sect. XXX.

So also in the case of equitable assets: *Silk v. Prime*, 2 Coll. 510; *S. C.*, 1 Dick. 385; but see *Plunket v. Penson*, 2 Atk. 290, 294; *Lowthian v. Hasel*, 4 Bro. C. C. 167.

As to the position of a mortgagee when coming to the Court as Plt in an admon action, *v. inf.* Chap. XLVII., "MORTGAGES," p. 1924.

As to the rights of tenant for life and remainderman *inter se*, see Sect. XXXIII., "TENANT FOR LIFE OF RESIDUE."

SECTION II.—ALLOWANCE AND DISALLOWANCE OF CLAIMS BY CREDITORS.

1. *Order, on Summons adjourned into Court, allowing Claim.*

LET the applicant be allowed as a creditor upon the estate of B., the testator &c., for the sum of £—.

For reference to special referee as to a claim, see *Re Perrin, Court v. P.*, M. R., 8 Nov. 1875, B. 1688, *et sup.* Vol. I., p. 401.

2. *The like, disallowing Claim.*

LET the claim of A. to be allowed as a creditor against the estate of B., the testator &c., in respect of £— alleged to be due on the bond dated &c., and all interest thereon, be disallowed.—*Re Cox*, V.-C. S., 18 July, 1861, A. 1741.

3. *Order admitting Scottish Judgment Creditor on registered Judgment.*

LET the order dated &c. be varied so far as the same directs that J. L. of — [*the Appellant*] be perpetually restrained from enforcing

the registered decret or judgment in the Court of Session in Scotland the subject of the second-mentioned matter and action; And Let instead thereof the said J. L. and his agents be perpetually restrained from enforcing in England the said registered decret or judgment; But the said J. L. is to be at liberty, notwithstanding the Master's certificate dated &c. in the first-mentioned action, to prove in the said action for the amount due and owing to him on his said registered decret or judgment, and the costs of registration thereof in England.—See *Re Low, Bland v. L.*, C. A., 27 Nov. 1893, B. 1485; (1894) 1 Ch. 147, C. A.

4. Order in Chambers allowing Claims sent in after the proper Time.

LET, notwithstanding that the time limited for creditors to send in their claims has expired, the applicant be allowed as a creditor upon the estate of the testator W. for the sum of £— together with £— for interest thereon, at the rate of &c., from &c. to &c., and £2 2s. for his costs, making together £—.—The applicant to pay to the Plt and the Deft their ascertained costs of the application.—*Williamson v. W.*, V.-C. B. at Chambers, 22 March, 1875, B. 866.

If the order is made after the hearing on further consideration, there will be a direction for payment: see *Ramsbottom v. Morrell*, M. R., at Chambers, 30 May, 1877, B. 1534.

For an order allowing claim, and for creditor to participate in any future distribution of assets, and for creditor to pay costs of application, see *Gates v. Williams*, V.-C. H. at Chambers, 31 May, 1877, A. 1094.

5. Order for Leave to prove after Time for Adjudication.

LET the applicant H. be at liberty to go in before the Judge in Chambers and prove such debt, if any, as he can establish against the estate of P., the testator, notwithstanding the time has expired for adjudicating upon debts due from the said estate; And Let the applicant pay to the Plt and the Deft their costs of this application, and consequent thereon, such costs to be taxed by the taxing master, in case the parties differ.—*Westall v. Bain*, V.-C. S., 27 Nov. 1858, B. 1229.

For form of summons, see D. C. F. 567.

For order after further directions, allowing bond creditor of intestate, who was surety after the principal debtor became bankrupt, to go in on terms and prove, and qualifying previous admission of assets by the administratrix, and arranging priorities as against simple contract creditors who had proved, the bond creditor being aware of the suit, but the fund not distributed, and a creditor who had purchased under the decree having been allowed to retain his purchase-money in part payment, see *Brown v. Lake*, 1 D. & S. 150.

For order in Chambers to admit applicants as creditors before apportionment, see *Lrycester v. Logan*, V.-C. W., 19 Jan. 1859, B. 793.

For like order on petition for leave to prove after further consideration, petitioner undertaking to dismiss bill filed by him for same purpose, with costs, see *Jones v. Evans*, V.-C. S., 1 June, 1855, A. 1092.

For order for leave to prove after Master's certificate but before further

consideration, see *Ellice v. Goodson*, V.-C. S., 26 Feb. 1853, A. 551. For like order after further consideration on undertaking as to costs, see *Lewis v. Morrison*, M. R. 21 July, 1856, B. 1539.

NOTES.

ESTABLISHING DEBTS OR CREDITS—PROCEDURE.

By O. LV, 45, "Where an advertisement is required for the purpose of any proceeding in Chambers, a peremptory advertisement, and only one, shall be issued, unless for any special reason it may be thought necessary to issue a second advertisement or further advertisements, and any advertisement may be repeated as many times and in such papers as may be directed."

By r. 46, "The advertisement [for claimants] shall be prepared by the party prosecuting the judgment or order, and submitted to the chief clerk (Master) for approval, and when approved shall be signed by him, and such signature shall be sufficient authority to the printer of the *Gazette* to insert the same."

By r. 46A, "The advertisement for creditors shall be prepared and signed by the solr of the party prosecuting the judgment or order; and such signature shall be sufficient authority to the printer of the *Gazette* to insert the same."

As to such advertisements, see *Wood v. Weightman*, 13 Eq. 434; *Re Bracken, Doughty v. Townson*, 43 Ch. D. 1, C. A., *et sup.* p. 1396; and for forms see D. C. F. 555 *et seq.*

None are required after advertising under the Law of Property Amendment Act, 1859 (22 & 23 V. c. 35): *Cuthbert v. Wharmby*, W. N. (69) 12.

By r. 48, claimants filing affidavits are not required to take office copies, but the person who examines the claims must do so, and must produce the same at the hearing, unless otherwise ordered in Chambers; and see Dan. 824.

By r. 54, if on the appointed day any claims are not disposed of, an adjourned day is to be fixed, and where further evidence is to be adduced, a time may be named for closing it, and directions given as to adducing.

By rr. 49—53 and 55—58, further provisions are made as to claims by "creditors or other claimants"; and no debt need be proved by the creditor's affidavit unless notice of its disallowance has been given by the exor or admor, to whom all claims are to be sent for examination; and see Dan. 825.

By r. 59, a list of claims allowed, when required by the Judge, is to be left by the person who examines the claims.

The ordinary judgment in a creditor's action is not treated as conclusively establishing the Plt's debt: *Owens v. Dickenson*, Cr. & Ph. 56; *Field v. Titmuss*, 1 Sim. N. S. 218; the claim may be opposed in Chambers on fresh evidence, and on grounds not raised at the hearing: *Cardell v. Hawke*, 6 Eq. 464; *Whitaker v. Wright*, 2 Hare, 310; *secus*, in a suit by a specific incumbrancer, where all parties interested in disputing the debt are before the Court: *Owens v. Dickenson*, *sup.*

Judgment obtained against the admor in a foreign action can only be treated as *prima facie* evidence of the debt: *Re Boyse, Crofton v. C.*, 15 Ch. D. 591.

As to the merger of an original debt in a judgment, see *Vibart v. Coles*, 24 Q. B. D. 364, C. A.; *Re Davison*, 13 Q. B. D. 50; *Edevain v. Cohen*, 43 Ch. D. 187, C. A.; *Usborne v. Limerick Market Trustees* (1900), 1 I. R. 85, C. A., and *inf.* Vol. III., p. 1943.

A claimant may be cross-examined on his affidavit: *Cast v. Poyser*, 3 Sm. & G. 369; though he has obtained judgment: *Leuton v. Brudenell*, *Re Baker*, 12 W. R. 1127; 10 L. T. 859; and exors will be allowed the costs of cross-examination properly and not vexatiously taken: *Re Barber, Burgess v. Vinnicombe*, 31 Ch. D. 665; *Leuton v. Brudenell*, 12 W. R. 1127.

The Court will not in general allow a debt or claim to be established on the uncorroborated evidence of the claimant: *Re Finch, F. v. F.*, 23 Ch. D. 267, C. A.; *Re Harnett, Leahy v. O'Grady*, 17 L. R. Ir. 543; *Re Whittaker, W. v. W.*, 21 Ch. D. 657; *Poole v. Foxwell*, 13 W. R. 199; 11 L. T. 441; *Grant v. G.*, 34 Beav. 623, 627; *Down v. Ellis*, 35 Beav. 578; *Hughes v.*

Seonor, Rogers v. Powell, Morley v. Finney, 18 W. R. 109, 282, 490; 38 L. J. Ch. 684; but the rule to this effect is not a rule of law: *Re Hodgson, Beckett v. Ramsdale*, 31 Ch. D. 177, C. A.; *Re Garnett, Gandy v. Macaulay*, 31 Ch. D. 1, C. A.; but at most only a rule of prudence: *Re Finch*, 23 Ch. D. 267, C. A., at p. 271; *Re Dillon, Duffin v. Duffin*, 44 Ch. D. 76, C. A.; and a *donatio mortis causa* has been established on the sole evidence of the donee where the Court considered it trustworthy: *Re Dillon, sup.*; *Re Farman, F. v. Smith*, 57 L. J. Ch. 637.

Generally, affidavits should be filed before cross-examining the party on the other side; but for their allowance, under circumstances, with leave to file affidavits in reply, see *Lancefield v. Iggulden*, 20 W. R. 621; 41 L. J. Ch. 473; 26 L. T. 687; *Mayes v. M.*, 14 W. R. 169.

For the mode of proving debts in Chambers, see Dan. 822 *et seq.* As to the right of a claimant to production of documents by the exors, see *Re M'Veagh's Estate*, 1 D. J. & S. 399; and see *Newland v. Steer*, 11 Jur. N. S. 596; 13 L. T. 111; 13 W. R. 1014.

A letter from a testator to his exor, but not communicated to the exor nor executed as a will, stating that a debt due from the exor was cancelled, is inadmissible as evidence of the cancellation of the debt: *Re Hyslop, H. v. Chamberlain*, (1894) 3 Ch. 522.

As to the mode of proof under the Bankruptcy Act, 1883, ss. 37, 40, Sched. 2, r. 21, for a debt payable at a future date with interest in the meantime according as the rate of interest is or is not 5 p. c., see *Re Broune, Exp. Ador*, (1891) 2 Q. B. 574, C. A.

An issue may be directed: see Chap. XII. *sup.* Vol. I. p. 372.

As to costs of parties attending in Chambers, *v. sup.* Vol. I. p. 329.

Creditors who have proved their debts are not entitled to notice of proceedings in the cause, except such as particularly affect them: *Hare v. Rose*, 2 Vez. 558.

A creditor who has proved his debt in a bankruptcy has an interest which entitles him to apply to the Court to expunge the proof of another which has been admitted by the trustee: *Exp. Merriman, Re Stenson*, 25 Ch. D. 144, C. A.

Only one party (in general the exor or admor) should attend to oppose a claim brought in in an admon action: *Re Watts, Smith v. W.*, 22 Ch. D. 1, C. A.

The report, speaking from its date, rightly deducted from debts proved, sums paid on them *aliunde* since the proof by other persons liable: *Jennings v. Elster*, 1 My. & K. 440.

DEBTS PROVABLE.

Where a suit for a legacy assented to by the exor had been brought against him, and the exor died, the legatee was allowed to abandon his suit, and prove against the exor's estate for the legacy and costs: *Turner v. Wardle*, 7 Sim. 80; a supplemental suit under such circumstances by the legatee should embrace general admon of the exor's estate: *Cochrane v. Robinson*, 9 Sim. 377.

A debt for dilapidations ranked after simple contract debts against legal assets: *Bryan v. Clay*, 1 El. & Bl. 38; but was payable *pari passu* out of equitable assets: *Bisset v. Burgess*, 23 Beav. 278. Now, by the Eccles. Dilapidations Act, 1871 (34 & 35 V. c. 43), s. 36, the amount and costs may be recovered as a debt due from the late incumbent, his exors or admors, but by sect. 53 there must first be a bishop's order; and the debt thus created by statute is payable *pari passu* with the other debts: *Re Monk, Wayman v. M.*, 35 Ch. D. 583. As to this Act, see *Jones v. Dangerfield*, 1 Ch. D. 438; *Gleaves v. Marriner*, 1 Ex. D. 107; *Wright v. Davies*, 1 C. P. D. 638, C. A.

A mortgagee, after foreclosure and attempted sale, giving up the property was allowed to prove for his debt, but not for the costs of the foreclosure: *Haynes v. H.*, 3 Jur. N. S. 504.

A local Board which has not taken summary proceedings within the time limited by the Summary Jurisdiction Act, 1848, commonly known as Jervis' Act (11 & 12 V. c. 43), for recovery of improvement expenses against the owner who is liable cannot prove as creditors in an action to administer his

estate: *West v. Downman*, 14 Ch. D. 111; nor, unless by consent, enforce their charge by summons in the action: *Ib.*

And such expenses are not a debt due from the estate of the person who was owner at the time when the work was done: *Re Boor, B. v. Hopkins*, 40 Ch. D. 572.

The estate of a tenant for life who takes subject to a condition in the will requiring him to do repairs is liable in equity for omission to repair: *Re Williams, Andrews v. W.*, 52 L. T. 41; 54 L. T. 105.

Where a charge has been postponed at the request of the debtor, an implied promise to indemnify being inferred, the incumbrancer may prove for the amount which he would have received if he had not consented to the postponement: *Exp. Ford, Re Chappell*, 16 Q. B. D. 305, C. A.

A blank acceptance for value is not revoked by the acceptor's decease, but taking it with notice or suspicion of defect of title may avoid the claim: *Hatch v. Searles*, 2 Sm. & G. 147.

The holder of a bill of exchange deposited by the drawee with him as security for a sum less than the amount of the bill can prove against the estate of the bankrupt acceptor for the whole amount of the bill: *Exp. Newton; Exp. Griffin, Re Bunyard*, 16 Ch. D. 330, C. A.

As to proof in respect of a bill of exchange drawn abroad and accepted in England, and afterwards dishonoured, see *Re Gillespie, Exp. Roberts*, 18 Q. B. D. 286, C. A.; 16 Q. B. D. 702; *Re Commercial Bk. of S. Australia*, 36 Ch. D. 522.

The purchaser of the deceased's book debts was only entitled to the balance due, less all sums due to the debtors: *Chick v. Blackmore*, 2 Sm. & G. 274.

Persons disappointed by the election of an heir to take against the will were entitled to prove against the heir's estate for sums received by him under the will: *Greenwood v. Penny*, 12 Beav. 403; and see the order, *ib.* 497, 1849, A. 451; and see *Howells v. Jenkins*, 1 D. J. & S. 617; and as to election, *inf.* p. 1588.

A sum which a legatee of worthless leaseholds has to pay in respect of non-repair by the testator is not a debt of the testator within the meaning of a trust for payment of debts: it is at the most a "liability": *Hawkins v. H.*, 13 C. D. 470, C. A.

The Indian admor of an Indian creditor could prove without taking out admor here: *Re Macnichol, M. v. M.*, 19 Eq. 81.

A solr dying before his clerk's articles expired, part of the premium was held a debt to be repaid from his assets: *Hirst v. Tolson*, 2 Mac. & G. 134; 16 Sim. 620; *Webb v. England*, 29 Beav. 44. But see *Whincup v. Hughes*, L. R. 6 C. P. 78; *Ferns v. Carr*, 28 Ch. D. 409, *et sup.* p. 1012; and as to the jurisdiction of the Court between master and apprentice, see *Webb v. England*, 29 Beav. 44; and see Chap. XLIX., "PARTNERSHIP," p. 2181, as to return of premium by partners.

A claim by the winner of a wager paid to the testator as his agent was disallowed: *Byer v. Adams*, 3 Jur. N. S. 709; 5 W. R. 795; 26 L. J. Ch. 841; and see *Hampden v. Walsh*, 1 Q. B. D. 189; *Batson v. Newman*, 1 C. P. D. 573; *Read v. Anderson*, 13 Q. B. D. 779, C. A.; *Bridger v. Savage*, 15 Q. B. D. 363, C. A.; see the Gaming Acts, 1845 (8 & 9 V. c. 109), s. 18, and 1892 (55 V. c. 9), which is not retrospective: *Knight v. Lee*, (1893) 1 Q. B. 41; *Tutam v. Reeve*, (1893) 1 Q. B. 44; *Universal Stock Exchange v. Strachan*, (1896) A. C. 166, H. L.; (1895) 2 Q. B. 329, C. A. (contract as to "differences" on Stock Exchange transactions); *Burge v. Ashley*, (1900) 1 Q. B. 744, C. A. (money deposited to abide event of wager); but bonds given for gaming debts were valid in the hands of *bond fide* holders for value without notice: *Hawker v. Halliwell*, 2 Jur. N. S. 537, 794; 3 Sm. & G. 194.

A debt arising out of an illegal transaction cannot be proved: *Smith v. White*, 1 Eq. 626.

But where a debt is not originally founded on felony, although the felonious act was an inducement to lend, a proof may be made: *Exp. Leslie, Re Guerrier*, 20 Ch. D. 131, C. A.

Under a joint and not several obligation, the survivor alone remains liable, and there can be no proof against the other's estate: *Richardson v. Horton*, 6 Beav. 185; *Wilmer v. Currey*, *Crossley v. Dobson*, 2 D. & S. 347, 486; *Other v. Iveson*, 3 Drew. 177; and the separate debts have priority against the separate assets: *Lodge v. Prichard*, 1 D. J. & S. 610; but see

Cowell v. Sykes, 2 Rus. 191; *Gray v. Chiswell*, 6 Ves. 118; and see Chap. XLIX., "PARTNERSHIP"; *Silk v. Prime*, 1 Bro. C. C. 138, n.; 2 L. C. Eq. 143; and as to proof as affecting rights of sureties, see Chap. XLVIII., "PRINCIPAL AND SURETY."

Proof may be made against a lunatic's estate for necessities supplied to him: *Wentworth v. Tubb*, 1 Y. & C. C. 171; *Stedman v. Hart*, Kay, 607; *Nelson v. Duncombe*, 9 Beav. 211, *et v. sup.* p. 1174; or to his wife: *Re Wood, Davidson v. W.*, 1 D. J. & S. 365; but only for reasonable sums for maintenance: *Carter v. Beard*, 10 Sim. 7; and for costs and expenses in lunacy: *Williams v. Wentworth*, 5 Beav. 325; *Re Rhodes, R. v. R.*, 44 Ch. D. 94, C. A. Proof was allowed for the costs of an unsuccessful traverse of the inquisition: *Wentworth v. Tubb*, 2 Y. & C. C. 537.

As to proof against a husband's estate for necessities supplied to a deserted wife, see *Jenner v. Morris*, 3 D. F. & J. 45; or costs incurred in a divorce suit by her which was compromised: *Re Hooper, Baylis v. Watkins*, 2 D. J. & S. 91; and for necessities supplied to an infant, *Martin v. Gale*, 4 Ch. D. 428, and Chap. XXXVIII., "INFANTS," *sup.* p. 987.

A mother could not claim against her son's estate advances made to him when an infant, but intended as gifts; nor maintenance after he attained twenty-one, supplied without any contract: *Re Cottrell, Joyce v. C.*, 12 Eq. 566.

For the course to be taken against the estate of the exor of A. by a person claiming part of A.'s residuary estate, see *Barker v. Rogers*, 7 Ha. 19, where the distribution of the fund was delayed pending the ascertainment of the residue of A.'s estate, but the costs were taxed and paid at once; and see *Turner v. Wardle, Cochrane v. Robinson, sup.* p. 1432.

The old practice was to allow only creditors whose debts were due at the death of the testator to come in under the decree, but now all debts due before the certificate are included: see *Thomas v. Griffith*, 2 D. F. & J. 555, 563, 564.

As to proof where the estate is insolvent, see further, *inf.* p. 1460.

As to proof by creditor in bankruptcy for several debts distinct in substance and involving different rights over as against third parties, see *Re Morris, James v. London and County Banking Co.*, (1898) 2 Ch. 413; for assessed taxes, see *Re Calvert*, (1899) 2 Q. B. 145; for damages awarded in divorce proceedings, *Re O'Gorman*, (1899) 2 Q. B. 62.

TIME FOR PROVING DEBTS.

By O. LV, 44, where a judgment or order is given or made, whether in Court or in Chambers, directing an account of debts, claims, or liabilities, &c., unless otherwise ordered, all persons who do not come in and prove their claims within the time that may be fixed by advertisement shall be excluded from the benefit of the judgment or order.

By r. 57, "After the time fixed by the advertisement (as to which, *v. sup.* p. 1431) no claim shall be received (except as provided in case of an adjournment) unless the Judge shall think fit to give special leave upon application made by summons, and then upon such terms and conditions as to costs and otherwise as the Judge shall direct."

As to proof against the estate by secured creditors, see *inf.* p. 1462; and as to amendment in case of inadvertence, see *Re Lister & Co.*, (1892) 2 Ch. 417.

After the time limited by the advertisements and the Master's certificate, a creditor may be allowed to come in on terms and prove his debt (*Brown v. Lake*, 1 D. & S. 150, *et sup.* pp. 1430, 1431) so long as there are assets undistributed: *Re Metcalfe; Hicks v. May*, 13 Ch. D. 236, C. A.; *Angell v. Haddon*, 1 Madd. 529; by summons: *Halliley v. Henderson*, 4 Jur. N. S. 202; O. LV, 57, *sup.*

But he must make a special case: *Hornby v. Hunter*, 1 Russ. 97; and show that he is not in default: *David v. Frowd*, 1 My. & K. 209; *Re Wheeler*, 1 Sch. & L. 242; and is not allowed to stay the division of the funds until his claim is established: *Hull v. Falconer*, 11 Jur. N. S. 161; 11 L. T. 761; but this was done on the application of the exor: *Brett v. Curmichael*, 35 Beav. 340.

Delay, coupled with means of knowledge, but without actual knowledge, is not necessarily default: *Re Metcalfe, Hicks v. May*, 13 Ch. D. 236, C. A.

In general, the right to come in on terms only lasts until the fund is distributed: *Lashley v. Hogg*, 11 Ves. 602; but has been allowed after apportionment and transfer to the Accountant-General for payment, on payment of all costs: *Angell v. Haddon*, 1 Madd. 529. Where only part of the fund remains in Court, the creditor can only prove against it for a similar proportion of his debt: *Gillespie v. Alexander*, 3 Russ. 130; *Greig v. Somerville*, 1 Russ. & M. 338; *Todd v. Studholme*, 3 K. & J. 324.

Where further assets fell in after a lapse of years, but some of the creditors whose claims were allowed could not be found, a sum of consols representing the debts of such creditors, with interest, was retained in Court, and the residue of the estate was distributed: *Re Macdonald, McAlpin v. M.*, 59 L. J. Ch. 231; 62 L. T. 541.

The right of the creditor prevails over assignees for value of parts of the residue who have obtained stop orders: *Hooper v. Smart*, 1 Ch. D. 90; but *semble*, not over assignees who have received the legacies: *Noble v. Brett*, 24 Beav. 499; and see *Graham v. Drummond*, (1896) 1 Ch. 968.

A creditor coming in after a dividend has been paid will be put on an equality with the other creditors before any further dividend is paid: *Re Wheeler*, 1 Sch. & L. 242.

As to claims against a distributed estate, see Sect. XXVIII., "REFUNDING LEGACIES," *inf.* p. 1657 *et seq.*

COSTS OF PROVING OR FAILING TO PROVE DEBTS.

By O. LV, 58, "a creditor who has come in and established his debt in the Judge's Chambers under any judgment or order, shall be entitled to the costs of so establishing his debt, and the sum to be allowed for such costs shall be fixed by the Judge, unless he shall think fit to direct the taxation thereof; and the amount of such costs, or the sum allowed in respect thereof, shall be added to the debt so established." A sum is generally named for costs at the time of allowance of proof. The costs to be allowed to a creditor for proving his debt when it amounts to 20*l.* or upwards, are in general 2*l.* 2*s.*, and where below that amount, a smaller fee according to circumstances. Creditors attending under r. 50 of that order, to produce securities or other evidence, will be allowed a proper fee for such attendance: *Dan.* 842.

By O. LXV, 14A, "the costs occasioned by any unsuccessful claim or unsuccessful resistance to any claim to any property shall not be paid out of the estate unless the Judge shall otherwise direct."

If the assets are deficient, such costs are added to, and paid rateably with, their debts, and do not affect Plt's right to costs: *Morshrad v. Reynolds*, M. R., 3 May, 1856; *Reg. Min.* 165; 21 Beav. 638; *Flintoff v. Haynes*, 4 Ha. 309.

A claimant failing to prove his debt in Chambers may be ordered to pay the costs occasioned thereby: *Hatch v. Searles*, L. JJ., 16 Nov. 1854; 2 Sm. & G. 147; *Yeomans v. Haynes*, 24 Beav. 127; *Colyer v. C.*, 10 W. R. 748; *Wright v. Larmuth*, W. N. (69) 36; and the right of a claimant to the costs of staying his action depended on whether his debt was established: *King v. K.*, 12 W. R. 1095; and see *Morgan v. Elstob*, 4 Ha. 477.

Where Plt is a devisee, and also sets up, but fails to prove, a claim as a creditor, he must pay the costs of his claim, though his title as devisee is admitted: *Lancfield v. Iggulden*, 10 Ch. 136.

For form of summons for costs, see D. C. F. 569.

CONTRIBUTION TO COSTS OF ACTION.

Formerly decrees contained a direction that the creditors, before coming in under the decree, should contribute to pay Plt's costs, and this could be enforced if the funds proved insufficient to pay the Plt's costs: *Thompson v. Cooper*, 9 Jur. 788; 2 Coll. 87; but see *Bluett v. Jessop*, Jac. 243; *Lechmere v. Brazier*, 1 Russ. 76; *Shortley v. Selby*, 5 Madd. 447.

Such a direction did not preclude the Court from ordering Plt to pay the costs: *Dunning v. Hards*, 2 Ph. 294.

As the fund brought into Court in a creditor's action is, in part at least, the fund of all the creditors, and the taxed costs are paid before it is distributed, the Plt thus receives contribution in effect.

STATUTES OF LIMITATIONS.

By the Real Property Limitation Act, 1833 (3 & 4 W. IV. c. 27), s. 2, the period allowed for recovery of land or rent was fixed at twenty years, but this was reduced to twelve years by the Real Property Limitation Act, 1874 (37 & 38 V. c. 57), s. 1.

The section does not apply to conventional rents, *e.g.*, rent reserved by lease: *Paget v. Foley*, 2 Bing. N. C. 679, 688; *Dean of Ely v. Bliss*, 2 D. M. & G. 472; *Grant v. Ellis*, 9 M. & W. 113, 122; *Irish Land Commission v. Grant*, 10 App. Ca. 14; but to rents of inheritance: *James v. Sulter*, 3 Bing. N. C. 544; *Owen v. De Beauvoir*, 16 M. & W. 567; 5 Ex. 166; including a quit rent payable in respect of a copyhold tenement: *Howitt v. Earl of Harrington*, (1893) 2 Ch. 497; and to the yearly sum payable under 42 G. III. c. 116, s. 123, as interest or consideration money for redemption of land tax: *Skene v. Cook*, (1901) 2 K. B. 7.

There can be no "discontinuance of possession" within sect. 3 of 3 & 4 W. IV. c. 27, when the land is not capable of use and enjoyment: *Leigh v. Jack*, 5 Ex. Div. 264; but there may be *clam*, *e.g.*, where A. has occupied a cellar under the land of B.: *Rains v. Buxton*, 14 Ch. D. 537. An equivocal act of exclusion, which might have been done merely with the intention of protecting a right of way from the public, will not amount to dispossession so as to ground the acquisition of title under the Statute of Limitations: *Littledale v. Liverpool College*, (1900) 1 Ch. 19, C. A.

Where the title of a reversioner is extinguished by lapse of time under sect. 34, the right to the rent is determined also: *Re Jolly, Gathercole v. Norfolk*, (1900) 2 Ch. 616, C. A., reversing (1900) 1 Ch. 292.

By sect. 40, the same limit of time was fixed as to the recovery of "any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy"; by the Law of Property Amendment Act, 1860 (23 & 24 V. c. 38), s. 10, this was extended to cases of claims against the estates of intestates: see *Darley v. Tennant*, 53 L. T. 287; and by the Real Property Limitation Act, 1874 (37 & 38 V. c. 57), s. 8, 3 & 4 W. IV. c. 27, s. 40, is re-enacted in the same words, except that, as from 1st Jan. 1879, the period is twelve years instead of twenty: see *Re Tynte*, 15 Ch. D. 125.

Money due on an ancestor's bond, and binding the heir, is not charged upon or payable out of land: *Roddam v. Morley*, 1 D. & J. 1.

As to the effect of sect. 2 of the Real Property Limitation Act, 1874 (37 & 38 V. c. 57), limiting the time to six years when the person entitled to the particular estate is out of possession, see Shelf. R. P. 195: *Re Earl of Devon's Settled Estates*, (1896) 2 Ch. 562.

Sect. 8 of 37 & 38 V. c. 57, applies where real estate is devised subject to payment of debts: *Re Stephens, Warburton v. S.*, 43 Ch. D. 39; and to an action on the covenant in a mortgage deed: *Sutton v. S.*, 22 Ch. D. 511, C. A.; and on a collateral bond: *Fearnside v. Flint*, 22 Ch. D. 579; *Re Powers, Lindsell v. Phillips*, 30 Ch. D. 291, C. A.; but not to an action against sureties on a bond for payment of the mortgage debt: *S. C.*; nor (*semble*) to a personal action unless brought against the mortgagor or his represes: *Re Frisby, Allison v. F.*, 43 Ch. D. 106; nor to an action for arrears of rent or mining royalties: *Darley v. Tennant, sup.*; and the time for recovering a simple contract debt charged on land is not extended by the Act 37 & 38 V. c. 57: *Barnes v. Glenton*, (1899) 1 Q. B. 885, C. A.

And the section is not confined to judgments which operate as charges upon land, but extends to judgments generally: *Hebblethwaite v. Peever*, (1892) 1 Q. B. 124; *Jay v. Johnstone*, (1893) 1 Q. B. 25; *Ib.* 189, C. A.

By 3 & 4 W. IV. c. 27, ss. 41, 42, no arrears of dower, nor damages on account thereof, and no arrears of rent, or interest on money charged on or payable out of land or rent, or in respect of any legacy, can be recovered but within six years of becoming due, or an acknowledgment in writing, except where a prior incumbrancer has been in possession.

As to arrears of rent, see Shelf. R. P. St. 185; *Bunting v. Sargent*, 13 Ch. D. 330, C. A.; *Irish Land Commission v. Grant*, 10 App. Ca. 14; of interest on mortgages, or judgments, see Chap. XLVII., "MORTGAGES," p. 1946; on unpaid purchase-money, *Toft v. Stevenson*, 5 D. M. & G. 735.

By the Civil Procedure Act, 1833 (3 & 4 W. IV. c. 42), s. 3, the time

allowed for bringing "actions of debt upon an indenture of demise or covenant, or debt upon bond or other specialty, actions of debt upon *sci. fa.* upon recognizance," is twenty years.

This section (which applies to personal actions only) is to be treated as an exception out of the 3 & 4 W. IV. c. 27, s. 42, *sup.*, which applies to the demand against the land only; and the result is, that only six years' arrears of rent or interest on sums charged on or payable out of land or rent can be recovered, except by an action upon a specialty debt, in which case the limitation is twenty years: *Hunter v. Nockolds*, 1 Mac. & G. 640; *Paget v. Foley*, 2 Bing. N. C. 679; *Elvy v. Norwood*, 5 D. & S. 240; *Darley v. Tenant, sup.*; but as to arrears of interest on mortgages, see Chap. XLVII., "MORTGAGES."

The section refers to actions for penalties, or damages or sums of money in the nature of penalties, and does not apply to an action by a shareholder against the directors of a co. to recover, under the Directors' Liability Act, 1890, compensation for loss or damage sustained by him by reason of untrue statements in the prospectus of the co. on the faith of which he subscribed for shares: *Thomson v. Ld. Clanmorris*, (1900) 1 Ch. 718, C. A.; (1899) 2 Ch. 523.

The limitation of twenty years will apply to a specialty, though executed in a foreign country where specialties and simple contracts rank alike, and are all barred in three years: *Alliance Bank of Simla v. Carey*, 5 C. P. D. 429.

In the case of an arbitrary fine on the admittance of a tenant to copyhold the period of limitation under the section runs from the time of the admittance: *Monckton v. Payne*, (1899) 2 Q. B. 603.

In the case of a statutory liability as an action for calls by a co. under 8 & 9 V. c. 16, or against a co. on a warrant for interest on debenture stock issued under the Companies Clauses Act, 1863 (26 & 27 V. c. 118), the period of limitation is twenty years: *Re Cornwall Minerals Ry. Co.*, (1897) 2 Ch. 74; *Shelf. R. P.* 203.

When a company declares a dividend on shares, the Statute of Limitations immediately begins to run against the shareholder; but *quære* whether, in the case of a company under the Companies Acts, 1862 to 1890, the period of limitation is six or twenty years: *Re Severn and Wye and Severn Bridge Ry. Co.*, (1896) 1 Ch. 559.

Although the Jud. Act, 1873, s. 25 (2), *sup.* p. 1154, provides that no claim against a trustee is to be held barred by any Statute of Limitations, an express trust will not, after 1st Jan. 1879, prevent the operation of 3 & 4 W. IV. c. 27, ss. 40, 42, or c. 42, s. 3: see 37 & 38 V. c. 57, s. 10; *Lewin*, 1076, 1077, citing *Hughes v. Coles*, 27 Ch. D. 231.

Statutes of Limitation do not affect land in the colonies: *Pitt v. Ld. Dacres*, 3 Ch. D. 295.

Simple contract creditors standing in the place of specialty creditors by marshalling, were held not to be barred by less than twenty years: *Vickers v. Oliver*, 1 Y. & C. C. 211.

Part payment.—As to what is part payment, taking the case out of the statutes, see *Shelf. R. P.* St. 182; *Ashlin v. Lee*, 23 W. R. 458; 44 L. J. Ch. 174; 31 L. T. 721; *Harlock v. Ashberry*, 19 Ch. D. 539, C. A.; *Lewin v. Wilson*, 11 App. Ca. 639; *Scott v. Synge*, 27 L. R. Ir. 560; *Re England, Stevard v. E.*, (1895) 2 Ch. 820, C. A.; *Re Allen, Bassett v. A.*, (1898) 2 Ch. 499; and that the words "in the meantime" in sect. 8 of the Real Property Limitation Act, 1874, include the period intervening between action brought and the time when the remedy would otherwise be barred: see *Re Ld. Clifden*, (1900) 1 Ch. 774; *Harty v. Davis*, 13 Ir. L. R. 23.

A payment of interest may be made without any money actually passing: *Maber v. M.*, L. R. 2 Ex. 153; payment under compulsion of law is not enough: *Morgan v. Rowlands*, L. R. 7 Q. B. 493.

Payment of interest by a devisee on a specialty debt of his testator is an acknowledgment within 3 & 4 W. IV. c. 42, s. 5, and will keep the debt alive against and bind all persons entitled in remainder as well as the person making the payment: *Roddam v. Morley*, 1 D. & J. 1; *Pears v. Laing*, 12 Eq. 41; *Re Hollingshead, H. v. Webster*, 37 Ch. D. 651; but payment by a tenant for life after the debt is barred will not revive it as against tenant in tail in remainder: *Becher v. Delacour*, 11 L. R. Ir. 187; and notwithstanding

Coope v. Cresswell, 2 Ch. 112; and the acknowledgment by one of several devisees liable does not bind the others: *Dickenson v. Teasdale*, 1 D. J. & S. 52; *Richardson v. Young*, 10 Eq. 275. The payment must be by some person liable to pay or entitled to do so by the terms of the contract: *Harlock v. Ashberry*, 19 Ch. D. 539, C. A.; *Lewin v. Wilson*, 11 App. Ca. 639; e.g., by the principal of a surety who has mortgaged his own property: *Lewin v. Wilson*, *sup.*; but not a mere tenant of the mortgagor: *Harlock v. Ashberry*, 19 Ch. D. 539, C. A.; or other stranger to the contract, such as a mortgagor after he has assigned and not acting as agent of the assignee; or a former solr to the mortgagor: *Newbould v. Smith*, 33 Ch. D. 127, C. A.; or the payee of a promissory note who had no authority to receive on behalf of the plaintiffs, indorsers: *Stamford, &c. Banking Co. v. Smith*, (1892) 1 Q. B. 765, C. A.; and the receipt by the mortgagee, without notice to the mortgagor, of the surrender value of a policy comprised in the mortgage cannot be treated as a payment by the mortgagor: *Re Ld. Clifden*, (1900) 1 Ch. 774, questioning *Re Conlun's Estate*, 29 L. R. Ir. 199. Payment of interest by the receiver in possession of one of several estates comprised in the same mortgage, being regarded as made by the mortgagor, will keep the debt alive against all: *Chinnery v. Evans*, 11 H. L. C. 115; and a levy of part of a judgment debt against one of two joint debtors was held sufficient to keep the debt alive against both: *Brew v. B.* (1899), 2 I. R. 163; and payment of interest made by exor and beneficial devisee keeps the debt alive against the personalty, and against residuary legatees who have been paid, and against devised land, but not against other land devised to the exor in trust: *Fordham v. Wallis*, 10 Ha. 217; but payment of rent of part of a property in mortgage does not keep alive the right of the mortgagee in respect of other parts: *Harlock v. Ashberry*, 19 Ch. D. 539, C. A.; and payment of interest by a mortgagor to the tenant for life under a settlement will not prevent time from running as between the tenant for life and trustees under the Trustee Act, 1888, s. 8: *Re Somerset, S. v. Poulett*, (1894) 1 Ch. 231, C. A.

A receipt for interest indorsed on a note by the holder must, to avoid the statute, be given before it has run: *Briggs v. Wilson*, 5 D. M. & G. 12.

Where a note was payable on demand, admissions of payment of interest were sufficient evidence of a demand to make the statute run: *Re Rutherford, R. v. Brown*, 14 Ch. D. 687, C. A.; and the usual submission to pay in the common order to tax is sufficient: *Re Maryette*, (1896) 2 Ch. 263.

So where the drawer of a cheque notified the holder that it could not be paid, presentment being thus excused, time ran from the date of the notice: *Re Bethell, B. v. B.*, 34 Ch. D. 561.

A note given by two partners was barred against the estate of one of them, though the survivor, who was his exor, had paid interest within the six years: *Thompson v. Waitman*, 3 Drew. 628; 5 W. R. 30; *Watson v. Woodman*, 20 Eq. 721; and see *Knox v. Gye*, L. R. 5 H. L. 656; *Nash v. Hodgson*, 6 D. M. & G. 474; *Kay*, 650; but money paid by a surviving partner cannot be appropriated to items, in a running account of the firm, in respect of which the estate of the deceased partner has been held not to be liable: *Friend v. Young*, (1897) 2 Ch. 421.

A partner who makes no claim as such for six years does not lose his right against his co-partners, as time only begins to run against him from some act of exclusion by them: *Barton v. North Staffordshire Ry. Co.*, 38 Ch. D. 458.

Particular payments made in respect of particular advances will not prevent the general balance from being statute barred: *Re Rainforth, Gwynn v. G.*, 49 L. J. Ch. 5; 41 L. T. 610, C. A.

A payment made on the eve of bankruptcy for the express purpose of reviving a statute-barred debt may be effectual in the absence of a fraudulent intent, and *quere* whether, even in case of fraud, the debt would not be revived if the creditor were innocent: *Re Lane, Exp. Guze*, 23 Q. B. D. 74.

Part payment by a receiver of the Court without the sanction of the admix, did not take the case out of the statute: *Whitley v. Lowe*, 2 D. & J. 704; 25 Beav. 421; 4 Jur. N. S. 197, 815; but payment of an instalment of a business debt by a receiver of a business duly appointed under a mortgage deed, and sect. 24 of the Conv. Act, 1881, "with power to manage" the business is sufficient; *quere*, whether so, if the appointment had been solely under the Act: *Re Hale, Lilley v. Foad*, (1899) 2 Ch. 107, C. A.

Payment of interest by continuing partners after the retirement of an out-

going partner, which was kept secret, was held to take the case out of the Statute of Limitations, notwithstanding sect. 14 of the Mercantile Law Amendment Act, 1856 (19 & 20 V. c. 97), the circumstances being such that the continuing partners must be treated as agents of the other: *Re Tucker, T. v. T.*, (1894) 3 Ch. 429, C. A.

Acknowledgment.—As to acknowledgment, see *Chasemore v. Turner*, L. R. 10 Q. B. 500; *Quincey v. Sharpe*, 1 Ex. D. 72; *Sket v. Lindsay*, 2 Ex. D. 314; *Edwards v. Janes*, 1 K. & J. 534; *Curwen v. Milburn*, 41 Ch. D. 424, C. A. It must be in writing (9 G. IV. c. 14, s. 9, Statute of Frauds Amendment Act, 1828), and only revives the debt in the manner and to the extent specified: *Phillips v. P.*, 3 Ha. 299; *Mitchell's Claim*, 6 Ch. 822; and must be unconditional, so that a promise to pay can be implied: *Green v. Humphreys*, 26 Ch. D. 474, C. A.; 23 Ch. D. 207 ("at that time the debt will have been paid in full," not sufficient); and see *Meyerhoff v. Froehlich*, 4 C. P. D. 63, C. A.; *Fordham v. Wallis*, 10 Ha. 217; *Iven v. Elwes*, 3 Drew. 25 (a recital in a creditor's deed); *Goode v. Job*, 1 El. & El. 6; 7 W. R. 7 (admission of title in an answer in Chancery); *Briggs v. Wilson*, 5 D. M. & G. 12 (qualified admission by an exor held insufficient); *Astbury v. A.*, (1898) 2 Ch. 111 (acknowledgment as to interest due on mortgage by one of two executors and devisees in trust of real estate against the wishes of the other not good within sect. 42 of the Real Property Limitation Act, 1833); *Re Macdonald, Dick v. Fraser*, (1897) 2 Ch. 181 (acknowledgment of debt by one co-exor binding under 9 G. IV. c. 14, s. 1); *Banner v. Berridge*, 18 Ch. D. 254, 274 (admission that an unsettled account was pending and promise to pay what might be found due); *Curwen v. Milburn*, *sup.* (letter from new solrs to former solrs asking for particulars of "any unsettled bill of costs you may have against" client, sufficient); but after extinguishment of title by adverse possession for twenty years, acknowledgment is of no avail: *Sanders v. S.*, 19 Ch. D. 373, C. A.; and see *Re McClure and Garrett* (1899), 1 I. R. 223.

If an estate is devised to a trustee to sell and pay debts, and subject thereto for A., an acknowledgment in writing by the trustee or his agent preserves the creditor's right of suit for twenty years: *L. St. John v. Boughton*, 9 Sim. 219.

As to revival of debts by the debtor's will, see *Poole v. P.*, 7 Ch. 17.

Concealment.—As to concealed fraud, see *Vane v. V.*, 8 Ch. 383; *Dawes v. Bagnall*, 23 W. R. 690; *Sturgis v. Morse*, 24 Beav. 541; *Manby v. Beuwick*, 3 K. & J. 342; *Re McCullum*, (1901) 1 Ch. 143, C. A.; wrongful possession is not enough unless it is intentional, and steps are taken to prevent discovery: *Dean v. Thwaite*, 21 Beav. 621; *Petre v. P.* 1 Drew. 397, 398; *Re Astley & Tildesley Coal Co.*, 68 L. J. Q. B. 252; 80 L. T. 116 (disapproving *Eccles. Commrs. v. N. E. Ry. Co.*, 4 Ch. D. 845; but see *Bull's Coal Mining Co. v. Osborne*, (1899) A. C. 351, P. C., tending to show that so long as there has been no laches by the party defrauded, it is immaterial whether or not there have been on the part of the wrongdoer active measures to prevent detection); time runs from the time when the fraud was, or might have been "with reasonable diligence," discovered: 3 & 4 W. IV. c. 27 (Real Property Limitation Act, 1833), s. 26; *Chetham v. Hoare*, 9 Eq. 571; *Eccles. Commrs. v. N. E. Ry.*, 4 Ch. D. 845; *Gibbs v. Guild*, 9 Q. B. D. 59, C. A.; 8 Q. B. D. 296; *Re Jennens, Willis v. Earl Howe*, (1893) 2 Ch. 545, C. A.; 50 L. J. Ch. 4; *Re McCullum*, (1901) 1 Ch. 143, C. A.; and as between partners, although at the time the fraud might have been discovered by the use of due caution, one partner being entitled to rely on the good faith of his co-partners: *Betjemann v. B.*, (1895) 2 Ch. 474, C. A.; and so where a mother wilfully concealed from her daughter the fact that the daughter was entitled to property: *Re McCullum*, *sup.*; and as to the extent of the qualification as to reasonable diligence, see *Betjemann v. B.*, (1895) 2 Ch. 474, 478, 479, per Lindley, L. J. —*secus*, where there is concealment, but no fraud: *Ruins v. Buxton*, 14 Ch. D. 537; or for negligence only without fraud: *Armstrong v. Milburn*, 54 L. T. 247, 723; but see *Wood v. Jones*, 61 L. T. 551.

The fraud must be that of, or in some way imputable to, the person who invokes the aid of the statute: *Thorne v. Heard*, (1895) A. C. 495, H. L.; *Re McCullum*, *sup.*

Where a debt is incurred by fraud of a debtor not discovered until after

adjudication in his bankruptcy, as no action can be brought pending the bankruptcy, the statute will not run until it is annulled: *Re Crosley, Munna v. Burn*, 35 Ch. D. 266, C. A.

The statute (3 & 4 W. IV. c. 27, s. 26) is a legislative recognition and expression of previously well-settled principles applicable to all kinds of property: *Thorne v. Heard*, (1894) 1 Ch. 599, 605, per Lindley, L. J.; but does not express the whole doctrine of equity applicable to concealed fraud: see *Gibbs v. Guild*, 8 Q. B. D. 296, 305, per Field, J.; *S. C.*, 9 Q. B. D. 59, C. A.

There is no rule in equity any more than at law, that the mere non-suing by a specialty creditor for any period within the statutory limit of twenty years is such negligence as to deprive him of his right of requiring payment of the specialty debt: *Re Baker, Collins v. Rhodes*; *Re Seaman, Rhodes v. Wish*, 20 Ch. D. 230, C. A.; unless, by conduct or express authority, he has misled the exors, and induced them to part with assets liable to answer his claim: *Re Birch, Roe v. B.*, 27 Ch. D. 622, C. A.; *Rochevoucauld v. Boustead*, (1897) 1 Ch. 196, C. A.

Account and Simple Contract.—The joint effect of 21 Jac. I. c. 16, s. 3, and the Mercantile Law Amendment Act, 1856 (19 & 20 V. c. 97), s. 9, is that actions of account (*v. sup.* p. 1370) and on simple contract debts must be brought within six years.

A claim for past maintenance of a lunatic is simply a debt, and the Court will not pay more than six years' arrears out of his estate: *Re Harris*, 49 L. J. Ch. 327; *Re Gibson*, 7 Ch. 52; *Re Watson, Stumford Union v. Bartlett*, (1899) 1 Ch. 72.

By 19 & 20 V. c. 97, s. 10 (which is retrospective: *Pardo v. Bingham*, 4 Ch. 735; *Cornill v. Hudson*, 8 E. & B. 429) and sect. 11, absence beyond seas or imprisonment of the creditor is no disability; and by sect. 12 (which is not retrospective: *Flood v. Patterson*, 29 Beav. 295), no part of the United Kingdom, or adjacent or Channel Isles, is to be deemed to be "beyond seas."

Notwithstanding O. xi, a Plt is entitled under 4 Anne, c. 16 (folio edition, 4 & 5 Anne, c. 3), to bring an action against a person after his return from beyond the seas within the time limited by 21 Jac. I. c. 16: *Musurus Bey v. Gadban*, (1894) 2 Q. B. 352, C. A.

By sect. 14 (which is not retrospective: *Jackson v. Woolley*, 8 El. & Bl. 778; but see *Thompson v. Waithman*, 3 Drew. 628), part payment by one of several debtors or contractors will not prevent the statute from running against the others: see *Richardson v. Younge*, 6 Ch. 478; *Darby & Bos. 125 et seq., et inf.* p. 1488.

Payment by a debtor of premiums on a policy under a trust deed for securing payment of his debts was held sufficient to prevent the operation of the statute: *Scott v. Synge*, 27 L. R. Ir. 560.

As to these enactments, see Shelf. R. P. St. 228, 229; Lindl. 269—271, 512. Equity has followed the periods of limitation prescribed by these statutes: *Knox v. Gye*, L. R. 5 H. L. 656; *Lockey v. L.*, Prec. Ch. 518; and acted in obedience to them: *Hovenden v. Annesley*, 2 Sch. & L. 629; *Friend v. Young*, (1897) 2 Ch. 421.

The time runs from the earliest period at which an action could be brought —*e.g.*, where the loan is not to be called in for a term if interest is regularly paid, from the first default in payment of interest: *Reeves v. Butcher*, (1891) 2 Q. B. 509, C. A.; *Hemp v. Garland*, 4 Q. B. 519; see *Re Tidd, T. v. Overall*, (1893) 3 Ch. 154, where, in the case of money deposited for safe custody, the statute did not run until demand for repayment; *Parr's Banking Co. v. Yates*, (1898) 2 Q. B. 460, C. A. (where a bank's right of action for principal moneys on a continuing guarantee was barred after six years from the last advance to their customer).

Where there is a present debt and a covenant to pay on demand, there is an immediate right of action; but where the covenant is to pay a collateral sum on demand (*e.g.*, by a surety) the statute does not run until demand made: *Re Brown, B. v. B.*, (1893) 2 Ch. 300.

The old rule, that if the Plt sues before the time has expired, and the Deft dies, the Plt may bring a new action within a reasonable time thereafter, though the statute has run, still remains in force, notwithstanding, under Jud. Acts, there is no abatement: *Swindell v. Bulkeley*, 18 Q. B. D. 250, C. A.

On an advance to a firm, to be repaid on demand, with compound interest, time ran from the advance, and was not saved by entries in the firm's books, crediting the lender with the interest: *Jackson v. Ogg*, Joh. 397; 5 Jur. N. S. 976.

Executor or Administrator.—By the Real Property Limitation Act, 1833 (3 & 4 W. IV. c. 27), s. 6, for the purposes of that Act, an admor claiming the estate or interest of his intestate is to be deemed to claim as if there had been no interval of time between the death and grant of admor.

Time under this section runs from the death of the intestate, and not the grant of the admor: *Re Williams, Davies v. W.*, 34 Ch. D. 558.

The statute does not run against a testator's or intestate's estate until a legal pers. represve has been constituted: *Murray v. E. I. Co.*, 5 B. & Ald. 204; *Douglas v. Forrest*, 4 Bing. 636; *Burdick v. Garrick*, 5 Ch. 241; unless it was running at his death: *S. C.* And see *Boatwright v. B.*, 17 Eq. 71; *Freaker v. Craneheldt*, 3 My. & C. 499; nor against a creditor of a co. (Cos. Clauses Act) while it has no assets: *Re Kensington Station Act*, 20 Eq. 197.

A claim against the exor personally for a devastavit in distributing assets without providing for a simple contract debt is barred in six years from the devastavit: *Re Hyatt, Bowles v. H.*, 38 Ch. D. 609; *Re Gale, Blake v. G.*, 22 Ch. D. 820; *Thorne v. Kerr*, 2 K. & J. 51; and payment of interest by beneficiaries to mortgagees will not keep such right alive: *Re Gale, sup.*; but (independently of the provisions of the Trustee Act, 1888 (51 & 52 V. c. 59), s. 8, *v. sup.* p. 1156) he may be made liable in equity after that period, on the ground of breach of trust in an action to administer his testator's estate: *Re Marsden, Bowden v. Layland*, 26 Ch. D. 783; *Re Birch, Roe v. B.*, 27 Ch. D. 622; *Re Hyatt*, 38 Ch. D. 609; for an exor cannot, when called upon to account, set up his own devastavit as a defence, and then claim the benefit of the Statute of Limitations: *Re Marsden, sup.*; *Re Hyatt, sup.*; *Lewin*, 400.

The defence of the Statute of Limitations might have been raised by demurrer: *Prance v. Symson, Kay*, 678; *Dawkins v. Ld. Penrhyn*, 4 App. Ca. 51; 6 Ch. D. 318; *Noyes v. Crawley*, 10 Ch. D. 31; except where the cause of action was not taken away: *Wakelee v. Davis*, 25 W. R. 60.

A debtor to the testator (an exor to whom leave to prove was reserved) not having proved the will until more than six years after the testator's death, his proof related back, so that he could not set up the statute: *Ingle v. Richards* (No. 2), 28 Beav. 366.

An exor may, before judgment, pay or retain a debt barred by statute: *Stahlchmidt v. Lett*, 1 Sm. & G. 415; *Hill v. Walker*, 4 K. & J. 166; and may take it out of the statute by admission: *Moodie v. Bannister*, 4 Drew. 432; *Blair v. Nugent*, 3 J. & Lat. 673; see also *inf.* p. 1531; or by entering it in the residuary account: *Smith v. Poole*, 12 Sim. 17; although by doing so he throws the debt upon realty devised to him as exor: *Lewis v. Rumney*, 4 Eq. 451; but he cannot, as exor, revive the debt as against other realty, though devised to him as trustee: *Briggs v. Wilson*, 5 D. M. & G. 12.

The Court will not order a fund to be paid out to an exor or admor merely in order to enable him to acquire a right of retainer thereout in respect of a statute-barred debt: *Trevor v. Hutchins*, (1896) 1 Ch. 844, C. A. (per Stirling, J.); or when the effect of so doing would be to defeat an inquiry which has been directed in the presence of the existing represve: *S. C.*

If the exor refuse to do so, the statute cannot be set up against the debt of the Plt in a creditor's suit by the residuary legatees: *Briggs v. Wilson*, 5 D. M. & G. 12, 21; nor by the other creditors either before or after judgment: *Adams v. Waller*, 14 W. R. 789; 35 L. J. Ch. 727; *Fuller v. Redman*, 26 Beav. 614; nor by the Plt in a legatee's suit against a debt barred in testator's lifetime, but on which judgment has been recovered against the exors: *Hunter v. Baxter*, 3 Giff. 214.

But after judgment an exor cannot revive a statute-barred debt, or pay such a debt after it has been declared by a Court of competent jurisdiction to be barred by the statute: *Midgley v. M.*, (1893) 3 Ch. 282, C. A.; *Phillips v. Beale*, 32 Beav. 26; and the objection may be taken against any debt but Plt's by any other creditor: *Fuller v. Redman*, 26 Beav. 614, 617; or, the exor refusing, by any one interested in the assets: *Shewen v. Vanderhorst*, 1 Rus. & M. 347; 2 Ib. 75; *Moodie v. Bannister*, 4 Drew. 432; and so where

the procedure is by originating summons: *Re Wenham, Hunt v. W.*, (1892) 3 Ch. 59; *Midgley v. M.*, *sup.*

And *quære*, whether one exor may pay a debt barred by the statute against the declared wish of his co-exor: *Midgley v. M.*, *sup.*

But if all the parties present consent, the Court is not bound to disallow the claim because some are absent: *Alston v. Trollope*, 2 Eq. 205; 35 Beav. 466.

The pendency of an action on behalf of creditors stayed the statute as against all creditors coming in under the judgment: *Coppin v. Gray*, 1 Y. & C. C. 205; *Purcell v. Blennerhassett*, 3 J. & Lat. 24; *Sterndale v. Hankinson*, 1 Sim. 393; Sugd. R. P. St. 123—126; Shelf. 237; but *semble*, did not save a debt not claimed under the judgment: *Tatam v. Williams*, 3 Ha. 347; *Humble v. H.*, 24 Beav. 535; and a single creditor's bill did not stay the statute: *Watson v. Birch*, 15 Sim. 523; nor, after six months, the mere issue of a writ: *Manby v. M.*, 3 Ch. D. 101; nor an imperfect and dormant suit: *Dixon v. Gayfere*, 17 Beav. 421.

But, since the Jud. Acts, as the statute affects Courts of Equity, as an action is no longer brought by one creditor on behalf of others *quoad* personal estate, and as an admon judgment can be expeditiously had on summons, the reasoning of the former cases no longer applies: *Re Greaves, Bray v. Tofield*, 18 Ch. D. 551, in which case a simple contract debt, being statute-barred, was not available for proof in an admon action brought by an exor against his co-exor before, but in which judgment was not pronounced until after, the statute had run.

The right to have the realty administered is not kept alive by the pendency of an action for admon of the personality: *Busby v. Seymour*, 1 J. & Lat. 527; and see *Thorne v. Kerr*, 2 K. & J. 54.

A creditor is entitled to a grant of admon although his debt is barred by the statute: *Re Coombs*, L. R. 1 P. & M. 193; *Coombs v. C.*, *ib.* 288; but has to give a bond to administer rateably: *S. C.* As to form of bond, *v. inf.* p. 1532.

The right to administer the estate of a deceased trustee for the purpose of taking the trust account is not barred in six years from his death, although the property he received is not ear-marked, and the breaches complained of do not create a specialty debt: *Obee v. Bishop*, 1 D. F. & J. 137; 6 Jur. N. S. 10, 132; *Brittlebank v. Goodwin*, 5 Eq. 545; *Woodhouse v. W.*, 8 Eq. 514; and see *Taylor v. Cartwright*, 14 Eq. 167.

As to the effect of the Trustee Act, 1888, s. 8, in the case of actions brought after the 1st January, 1890, *v. sup.* Chap. XLI., p. 1156; and that the section does not apply where the action is brought before and judgment for general admon served after that date, see *Re Harrison, Allen v. Cort*, W. N. (92) 148.

A receiver, though his final account has been passed and his recognizance vacated, is in a fiduciary position as regards a balance not accounted for, so that he cannot avail himself of the Statutes of Limitation: *Seagram v. Tuck*, 18 Ch. D. 296.

The obligation of a tenant for life to repair pursuant to a condition in the will is enforceable in equity, and the Civil Procedure Act, 1833 (3 & 4 W. IV. c. 42), s. 2, does not apply so as to bar a claim against his estate for non-repair made after the six months has elapsed: *Re Williams, Andrew v. W.*, 54 L. T. 105; 52 L. T. 41; and see *Blackmore v. White*, (1899) 1 Q. B. 293; and as to liability in respect of continuance of obstruction to light, see *Jenke v. Viscount Clifden*, (1897) 1 Ch. 694.

Under that statute, in the absence of evidence to the contrary, an exor will be deemed to have "taken upon himself the admon of the estate" at the time when probate is granted: *Re Williams, sup.*, per Kay, J., 52 L. T. 41.

A covenant to transfer a sum of stock to trustees was barred by the statute, but not a note to repay a trust fund to "the exors in trust," nor settlor's liability for a sum recited to have been paid to the trustees: *Spickernell v. Hotham*, Kay, 669, 675, 676; *Stone v. S.*, 5 Ch. 74.

A trust to pay debts from personality is inoperative to stop the statute: *Scott v. Jones*, 4 Cl. & F. 382; 1 Russ. & M. 255; *Freake v. Cranfeldt*, 3 My. & C. 499; *Evans v. Tweedy*, 1 Beav. 55; *Re Stephens, Warburton v. S.*, 43 Ch. D. 39; or where the testator leaves no real estate to support the trust: *Re Hepburn, Exp. Smith*, 14 Q. B. D. 396. The statute is stayed by an

express trust to pay debts out of realty, but not by a mere charge of them on the land: *Dickenson v. Teasdale*, 1 D. J. & S. 52; 9 Jur. N. S. 60, 237; *Jacquet v. J.*, 27 Beav. 332; *Re Stephens, Warburton v. S.*, 43 Ch. D. 39. And where real and personal estate are given together upon trust for sale and conversion and payment of debts thereout, the period of limitation as to the realty will be twelve years: *Re Stephens, sup.*, and *quere* as to apportionment of debts in such case: *S. C.*, at p. 45.

And notwithstanding a trust to pay debts, a debt may be lost by laches: *Harcourt v. White*, 28 Beav. 309; *Lewin*, 591, 1062.

As to claims of legatees being barred by lapse of time, *v. inf.* p. 1488.

As to set off of statute-barred debts, *v. sup.* pp. 1363, 1364; and in the case of legatees, *inf.* Sect. XXVI., p. 1652.

And as to the rejection of claims as stale demands, irrespectively of the Statutes of Limitation, see *Re Rutherford, Brown v. R.*, 14 Ch. D. 687, 692, C. A.; *Banfield v. Tupper*, 7 Exch. 27; *Masonic Ins. Co. v. Sharpe*, (1892) 1 Ch. 154, 167.

SECTION III.—CREDITOR'S ACTION—FURTHER CONSIDERATION.

1. *Assets sufficient—Paying in Balance—Payment of Costs and Debts with Interest.*

(*Preliminary part*, see Forms, pp. 361, 362.)—Let the Deft B., the exor of the will [*or admor of the effects*] of the testator [*or intestate*] A., on or before &c., lodge in Court, as directed in the lodgment and payment schedule hereto, the balance of £690, certified to be due from him in respect of the personal estate of the testator [*or intestate*].

Tax the costs of the Plts and the Defts of this action [*If so, incurred* subsequently to the last taxation; *If directed*, and the costs of the Deft B.; *If not described above*, the exor of the will, *or admor of the effects*] of the testator [*or intestate*], to be taxed as between solr and client [*If directed*, and to include any charges and expenses properly incurred by him and not already taxed or allowed, relating to the admon of the testator's [*or intestate's*] estate [*or the execution of the trusts of his will, beyond his costs of this action*]; And Let subsequent interest be computed on the debts of the testator [*or intestate*] mentioned in the — schedule to the Master's certificate, dated &c., at the respective rates already certified therein [*or at the rate of 4 p. c. per ann.*] from the foot of the said certificate to the day for payment; And Let the total of the amounts so due to the creditors therein named for principal, interest, and subsequent interest, the respective amounts so due, and the names of the persons to whom such amounts are payable,

be certified; And Let the funds so to be lodged in Court be dealt with as directed in the said schedules hereto.—Liberty to apply.

LODGMENT AND PAYMENT SCHEDULE.

In the High Court of Justice,
Chancery Division.

28th February, 1900.

Re Brown, Smith v. Brown. 1900. B. 210.

Ledger Credit. Said action. Personal estate account.

I.—Lodgment.

Particulars of Funds to be lodged.	Person to make the Lodgment.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Balance mentioned in this order.....	The Deft B.....	690 0 0	

II.—Payment.

Funds to be dealt with. Cash to be lodged as above.

Particulars of Payments, Transfers, or other operations ordered.	Payees, Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Carry over cash to ledger credit mentioned in second column.	Said action	690 0 0	

PAYMENT SCHEDULE I.

In the High Court of Justice,
Chancery Division.

Date of Order, 28th February, 1900.

Re Brown, Smith v. Brown. 1900. B. 210.

Ledger Credit. Said action. Proceeds of sale of real estate.

Funds in Court: £1,000 New Consols.

£60 : 15s. Cash.

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
A. B. (<i>purchaser</i>) named in order dated &c., has had notice.			
Carry over cash and New Consols to ledger credit mentioned in second column.	Said action	60 15 0	1,000 0 0

PAYMENT SCHEDULE II.

In the High Court of Justice,
Chancery Division.

Date of Order, 28th February, 1900.

Re Brown, Smith v. Brown. 1900. B. 210.

Ledger Credit: As above.

Funds in Court: Funds to be carried over under the Lodgment
and Payment Schedule and Payment Schedule I.

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Sell sufficient New Consols with the £750: 16s. 0d. cash and any interest to raise the amount of the costs to be taxed and the total amount to be certified as due to creditors under this order.			
Out of proceeds, said cash and inte- rest— Pay such costs Pay amounts to be certified by the Master's certificate to the per- sons to whom such amounts shall be certified to be payable.			
Carry over residue of funds and inte- rest.	Residue of estate of the testator B. subject to legacy duty.		

For an order directing the costs relating to realty to be distinguished and paid out of the proceeds of the sale of the realty, see *Naylor v. Wetherell*, V.-C. L. Cranworth, 25 July, 1851, B. 1119.

For an order apportioning costs between legal and equitable assets, see *Louthian v. Hasell*, L. C., 23 July, 1790, B. 693; 4 Bro. O. C. 168; 2 Dick. 737.

For an order apportioning debts between heir and customary heir, see *Walter v. Goring*, M. R., 21 June, 1757, B. 314.

Where the fund is ample to pay both costs and debts, or where there are only a few creditors, the amounts may be specified in the schedule and subsequent interest ascertained by affidavit, but no direction to the last effect is required in the order: S. C. F. R. r. 16. See following form.

2. *Assets sufficient—Executor to lodge Balance in Court—Payment of Costs and Debts with Interest (no direction to compute).*

This action coming on this day for further consideration, &c.
[In case of payment by Executor since Master's certificate: And it

appearing from the said affidavit of the Deft J. S. that the Deft J. S., the surviving exor of the will of the above-named testator, J. S. M. B., and the sole exor of the will of C. H. S. B., deceased, the other exor of the testator's will has paid the sum of £18 : 9s. 8d. since the date of the Master's certificate. And this Court being of opinion that such payment should be allowed to him.] This Court doth order that it be referred to the taxing master to tax the costs of the Plts and Defts of this action so far as the costs of the Plts and of the infant Deft have not been already taxed under the said judgment, the costs of the Deft J. S. to be taxed as between solr and client, and including therein any charges and expenses properly incurred by him, and not already taxed or allowed relating to the admon of the testator's estate beyond his costs of this action, and in taxing the costs of the Deft J. S., the taxing master is to certify the residue of such costs after deducting £245 : 7s. 6d. (being the balance of the sum of £263 : 17s. 2d., by the Master's said certificate, certified to be due from him after deducting the said sum of £18 : 9s. 8d.), or the residue of the said sum of £245 : 7s. 6d., as the case may be. And it is ordered that the Deft J. S. do lodge the residue (if any) of the said sum of £245 : 7s. 6d. in Court, as directed in the schedule hereto. And it is ordered that the funds in Court, and so to be lodged (if any), be dealt with as directed in the said schedule. And any of the parties are to be at liberty to apply as they may be advised.

LODGMENT AND PAYMENT SCHEDULE.

In the High Court of Justice,

Chancery Division.

10th day of July, 1899.

Re Banks, Dawes v. Sladen. 1895. B. 3293.

Ledger Credit : As above.

I.—Lodgment.

Particulars of Funds to be lodged.	Person to make the Lodgment.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Residue (if any) of £245 : 7s. 6d. to be certified by the taxing master.	The Deft J. S.		

II.—Payment.

Funds to be dealt with : £4,630 : 2s. 6d. New Consols and
Cash. £30 : 15s. 5d.

Funds (if any) to be lodged as above.

Particulars of Payments, Transfers, or other operations ordered.	Payees, Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Sell sufficient Consols, with £30 : 15s. 5d. cash, to raise £3,266 : 7s. 6d. and interest at 4 p. c. per ann. on £3,164 : 12s. 9d. part thereof, from 23rd February, 1899.			
Out of proceeds— Pay £2,291 : 10s. 7d. with like in- terest on £2,203 : 10s. 7d. part thereof.	The Plts W. D. and A. E. V.		
Pay £974 : 16s. 11d. with like in- terest on £961 : 2s. 2d. part thereof.	The Deft S. E. S. (spinster).		
Sell sufficient of the residue of the New Consols, with any interest, to raise the costs to be taxed under this order.			
Out of proceeds and interest— Pay such costs			
Carry over residue of New Consols and funds lodged.	Residue of estate of J. S. M. B., deceased, sub- ject to legacy duty.		

—*Re Banks, Dawes v. Sladen*, North, J., 10th July, 1899, A. 948 ;
S. C., 75 L. T. 387 ; 45 W. R. 206.

3. The like Order without fresh Certificate.

(*Preliminary parts as in Form 1, sup. p. 1443, down to and including direction to tax costs*): And Let the funds so to be lodged and in Court be dealt with as directed in the schedules hereto in payment (*inter alia*) to the creditors of the testator [*or intestate*] named in the schedule to the said Master's certificate, dated &c. of the amounts thereby certified to be due to them for principal and interest and of subsequent interest as mentioned in Payment Schedule II. hereto.—Liberty to apply.—[*Lodgment and Payment Schedule and Payment Schedule I., with directions as in Form 1, sup. p. 1444.*]

PAYMENT SCHEDULE II.

In the High Court of Justice,
Chancery Division.

Date of Order, 28th February, 1900.

Re Brown, Smith v. B. 1900. B. 210.

Ledger Credit: As above.

Funds in Court: Funds to be carried over under Lodgment
and Payment Schedule and Payment Schedule I.

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Sell sufficient New Consols with the £750:15s. 0d. cash and any interest to raise the amount of the costs to be taxed under this order and the following sums together with inter- est thereon respectively at the rate of 4 p. c. per ann. from the — day of — [the date of the Master's cer- tificate].			
Out of proceeds of said cash and inter- est—			
Pay costs to be taxed under this order.			
Pay £417:12s. 6d. together with interest as above.	A. B., of —		
Pay £17:1s. 9d. together with inter- est as above.	C. D., of —		
Carry over residue of funds and inter- est.	Residue of estate of testator B. subject to legacy duty.		

4. *Representative to retain and apply Balance for Costs, and
pay in Residue.*

Tax the costs of the Plts and the Defts of this action [Form 1, *sup.*];
And Let the Deft B. retain the amount of his said costs, when so taxed,
out of the balance of £—, certified to be due from him in respect
of the testator's [or intestate's] personal estate [If so ordered, And
Let the Deft B. thereout also pay to the Plt A., and to the Defts
C. and D., their said costs when taxed]; and if such balance shall be
insufficient, the said Deft is to retain the same in part payment of his
said costs, so far as it will extend; And Let the Deft B. within &c.
after the date of the taxing master's certificate, lodge the residue, if
any, of such balance, the amount to be certified by the taxing master,
in Court, as directed in the schedule hereto.—[Add Lodgment Schedule,
with directions as in Form 2, *sup.*]

5. *Another Form.*

Tax the costs of the Plts and the Defts of this action [*Form 1, sup.*]; And Let the Deft B. retain the amount of his said costs when so taxed [*If so ordered*, And pay to the Plt A. and the Defts C. and D. the amount of their said costs when so taxed out of the balance of £—certified to be due from him in respect of the testator's [*or intestate's*] personal estate or so much of the said costs as the said balance will satisfy]; And Let the residue of the said balance, after such retainer and payment, or of the said costs when so taxed, as the case may be, be certified; And Let the Deft B. lodge the residue of the said balance (if any) in Court as directed by the lodgment and payment schedule hereto; And Let the fund so to be lodged (if any) and the funds in Court be dealt with as directed in the Schedules hereto. —Liberty to apply.

LODGMET AND PAYMENT SCHEDULE.

In the High Court of Justice, 28th February, 1900.
Chancery Division.

Re Brown, Smith v. B. 1900. B. 210.

Ledger Credit: Said Action; Personal Estate Account.

I.—*Lodgment.*

Particulars of Funds to be Lodged.	Person to make the Lodgment.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Residue (if any) of balance of £—mentioned in this Order, after retainer and payment thereof of costs as directed by this Order.	The Deft B.		

II.—*Payment.*

Funds to be dealt with: Cash (if any) to be lodged as above.

Particulars of Payments, Transfers, or other operations ordered.	Payees, Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Carry over cash to ledger credit mentioned in second column.	Said action		

PAYMENT SCHEDULE.

[*Insert same directions as in Form 1, sup.*]

PAYMENT SCHEDULE II.

In the High Court of Justice, Date of Order, 28th February, 1900.
Chancery Division.

Re Brown, Smith v. B. 1900. B. 210.

Ledger Credit: As above.

Funds in Court: Funds to be carried over under Lodgment
and Payment Schedule, and Payment Schedule I.

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Sell sufficient New Consols with cash and any interest to raise the residue (if any) of the costs to be taxed under this Order after the retainer and payment thereby directed, and the total amount to be certified as due to creditors under this Order [<i>or</i> the following sums together with interest thereon, &c., as in Payment Schedule II., Form I., <i>sup.</i>]. Out of proceeds, cash, and any inte- rest— Pay the residue (if any) of the said costs. Pay sums to be apportioned to creditors by Master's certificate to the persons to whom such sums shall be certified to be payable [<i>or</i> specify the sums and name the payees, as in Payment Schedule II., Form 3, <i>sup.</i> , p. 1448].			

6. *Assets deficient—Apportionment by Certificate.*

AND it appearing that the assets of the testator [*or* intestate] will not be sufficient for the payment of his debts and funeral expenses in full: Tax the costs of the Plt and Deft of this action as between solr and client, including in the costs of the Deft any charges and expenses properly incurred by him, &c. [*see* Form 1, *sup.*]; And Let the funds in Court be dealt with as directed in the schedule hereto. And Let the residue of the said funds and interest, after payment thereof of the said costs, be apportioned among the creditors named in the said Master's certificate rateably in proportion to the amounts thereby certified to be due to them respectively; And Let the amounts so apportioned and the

SECT. III.] *Creditor's Action—Further Consideration.* 1451

names of the persons to whom such amounts are payable be certified.
—Liberty to apply.

PAYMENT SCHEDULE.

In the High Court of Justice, Date of Order, 5th August, 1900.
Chancery Division.

Re Smith, Jones v. S. 1889. S. 2003.

Ledger Credit : As above.

Funds in Court : £1,200 New Consols ;
£58 Money on Deposit ;
£32 Cash.

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Sell the New Consols	1,200 0 0
Out of proceeds, money on deposit, cash and interest—			
Pay costs to be taxed under this Order.			
Pay sums to be apportioned to creditors by Master's certificate to the persons to whom such sums shall be certified to be payable.			

By the Admon of Estates Act, 1869 (32 & 33 V. c. 46), all specialty and simple contract debts of persons dying on or after 1 Jan. 1870, stand in equal degree, whether the assets are legal or equitable; but where the testator or intestate died before that day, and the assets are legal, specialty creditors will still be paid in priority. For form of order in such a case, see Seton, 4th ed. p. 839.

Where it is doubtful whether the assets are sufficient, the order should be in the alternative. If it be doubtful whether there will be sufficient to pay the costs of all parties, the costs of the exor or admor will be provided for in priority.

For order where an ample fund was realized by the Plt's diligence, to tax his costs as between party and party, and also as between solr and client, and ascertain the difference, the former to be paid from the general fund, the difference out of a fund to be carried over equal in amount to the debts, and the residue of such fund to be apportioned among the creditors, see *Stanton v. Hutfield*, 1 Ke. 362; followed in principle in *Goldsmith v. Russell*, 5 D. M. & G. 556.

For form of affidavit verifying an apportionment, see D. C. F. 623, 624.

7. *Assets deficient—Apportionment without certificate.*

(*Preliminary parts*, Form 1, p. 1443.)—And it appearing that the assets of the testator [*or* intestate] will not be sufficient &c. [Form 5, *sup.*]; Direction to tax costs [Form 5, *sup.*]; And Let the funds in Court be dealt with as directed in the schedule hereto.

PAYMENT SCHEDULE.

In the High Court of Justice, Date of Order, 23rd July, 1897.
Chancery Division.

Re Lacy, Willett v. Cazenove. 1896. L. 1197.

Ledger Credit: As above.

Funds in Court: £350: 15s. 6d. Cash.

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Pay costs to be taxed under this order.			
Pay residue to creditors named in second column rateably in proportion to the amounts set opposite to their names in this column—			
£ s. d.			
27 18 8	Messrs. F. R. & Co., of —.		
43 18 0	M. A. S., of —, wife of —, on her sole receipt.		
27 7 6	The Plt W. W., of —.		
1 3 0	Messrs. M., of —.....		
16 0 0	A. S. of —, wife of —, on her sole receipt.		
2 7 11	W. I., of —.....		
1,740 14 9	The M. L. & E. Co., Ld., of —.		
6 16 0	The P. of W. Laundry, of —.		

—*Re Lacy, Willett v. Cazenove*, 23 July, 1897, B. 1539.

8. Payment of Debts by Representative out of Residue after Payment of Costs.

LET the Deft D. within — days after the date of the taxing master's certificate, out of the residue of the balance of £— certified to be due from him in respect of the personal estate of the testator [*or* intestate], pay to the creditors named in the first schedule to the Master's certificate, dated &c., the amounts certified to be due to them as creditors of the testator [*or* intestate], with subsequent interest at such rates of interest as the same respectively carry, from the &c., the date of the Master's said certificate, until payment.—See *Re Gledstanes, G. v. Croyden*, V.-C. M., 29 April, 1874, A. 1033.

If the fund is ample, the debts may be paid at once, and the amounts stated in a schedule.

9. *Executor to apportion the Residue when Assets deficient.*

LET the Deft B. [*exor*] within &c. out of &c. [Form 8, *sup.*], apportion the residue of the said sum of £— among the creditors of &c., named in the schedule to the Master's certificate, dated &c., rateably to the amounts certified to be due to them.

10. *Executor to make a Dividend.*

LET the Deft B. [*exor*] within &c. [Form 8, *sup.*], pay to the several creditors of &c., named in the schedule to the Master's certificate, dated &c., a dividend of 6s. 6d. in the pound on the amounts certified to be due to them as creditors of the testator.

11. *Return of Stamp Duty.*

LET the Deft be at liberty to apply to the Commrs of Inland Revenue for a return of stamp duty paid in excess on the probate of the testator's will, he by his solr undertaking to apportion the amount to be received by him, after deducting his costs, charges, and expenses of receiving and of distributing the same among the creditors of the testator named in the schedule hereto [*or to the Master's certificate, dated &c.*], rateably in proportion to the amounts due to them, and to pay the same accordingly.—*Harper v. Brown*, V.-C. H. at Chambers, 3 July, 1875, A. 2089.

This direction is necessary in all cases, as the commrs refuse to allow any return of duty unless the whole amount on which it is claimed has been actually paid over. As to estate duty, *v. sup.* pp. 1404 *et seq.*

12. *Executor to apportion outstanding Estate among Creditors.*

AND Let such outstanding personal estate, as and when the same shall be got in, be apportioned by the Deft rateably among and paid to the creditors named in the first schedule to the Master's certificate, dated &c.—*Re Hooper, H. v. Mansfield*, V.-C. M. at Chambers, 7 July, 1875, A. 1778.

13. *After Sale by Consent of Incumbrancers still Unpaid.*

LET subsequent interest, at the rate of £— p. c. per ann., be computed on the principal sum of £—, certified to be due to A. in respect of his mortgage in the Master's said certificate mentioned, from &c., the date of the said certificate to the day for payment; And Let the amount of such subsequent interest and the total amount due to the said A. in respect of the said mortgage be certified; And it is ordered that the funds in Court be dealt with as directed in the schedule hereto.

PAYMENT SCHEDULE.

In the High Court of Justice,

Chancery Division.

Date of Order, 5th November, 1900.

Jenkins v. Cross. 1900. J. 105.

Ledger Credit. As above. Proceeds of sale of testator's [*or intestate's*] real estates.

Funds in Court. £2,000 New Consols.

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Sell sufficient new consols to raise amount to be certified to be due to A. in respect of his mortgage [<i>or, sell sufficient new consols to raise £— certified to be due to A. in respect of his mortgage in the Master's certificate mentioned, together with interest thereon at the rate of £— p. c. per ann. from the — day of — 18—</i>].			
Pay proceeds of such sale [<i>If any subsequent incumbrancers, insert similar directions according to their priorities appearing by Master's certificate.</i>]	A. of, &c. in discharge of mortgage.		
Carry over residue of funds	Personal estate account		

If the amount of subsequent interest on the mortgage is agreed on to a given day, insert it.

As to mortgagee consenting to sale, *v. sup.* p. 1428.

14. *If Realty not previously ordered to be Sold, or Proceeds of Sale insufficient.*

(*Preliminary part*, see Forms 1—3, pp. 361, 362.)—DIRECTIONS for taxation of costs, and for application of personal estate, and the proceeds of any realty already sold, towards funeral expenses and debts, and, if necessary, for apportionment [Forms 1, 3, pp. 1443, 1447]:—

1. And it appearing that the testator's *or* intestate's personal estate [*If so*, and the proceeds of the testator's *or* intestate's real estate at &c., which has been sold pursuant to the said judgment *or* order, dated &c.] will be insufficient for the payment of his debts and funeral expenses, together with the subsequent costs of this action; Let a sufficient part of the testator's [*or* intestate's] real estates remaining unsold [*or mention any particular estate next to be resorted to, as the testator's, or intestate's, real estate at &c., in the Master's said certificate mentioned*] to make good the deficiency of his personal estate (and the proceeds of his real estate already sold) for the payment of

his debts and funeral expenses, or, if necessary, the whole of such real estate, be sold with the approbation of the Judge [*If any incumbrances*, free from the incumbrances of such of the incumbrancers in the said certificate named as shall consent to the sale, and subject to the incumbrances of such of them as shall not consent; And if any of such incumbrancers shall so consent, Let the following &c.; 2. An account of what is due to such of the incumbrancers as shall consent to the sale in respect of their incumbrances; 3. An inquiry what are the priorities of such last-mentioned incumbrancers; *or, if the incumbrancers appear and consent*; And A. and B., the mortgagees of the testator's or intestate's real estate at —, in the Master's certificate, dated &c., mentioned, by their counsel appearing and consenting to the sale, Let a sufficient part of &c. be sold &c., free from the mortgages of A. and B. in the said certificate mentioned; And Let the following &c.; 2. An account of what is due to A. and B. respectively, in respect of their said mortgages]; And Let the money to arise by such sale be paid into Court to the credit of this action, *A. v. B.* 1895, A. 1003, to an account to be entitled "Proceeds of sale of &c." subject to further order and if such money &c. (Form 2, p. 1391).

For forms and notes as to the order in which assets are applied in payment of debts, see Sect. XXIX., pp. 1672 *et seq.*

As to the necessity for making the heir-at-law of the intestate a party so far as the real estate is concerned, *v. sup.* pp. 1392, 1397.

15. *Leave to apply in Chambers for Payment of Purchase-money.*

AND any of the parties are to be at liberty to apply in Chambers for the application of the money to arise by such sale (and otherwise to apply) as they shall be advised.

Where the value of the property to be sold is small, and nothing further remains to be done in the suit, the Court sometimes gives leave to apply in Chambers for payment out of the purchase-money, without adjourning further consideration; notice of the application being given to the purchasers: see *Thorp v. Owen*, 2 S. & G. i.; *Leathert v. Thorne*, *Ib.* ii.

16. *Account of Rents of Realty.*

AND in case the money to arise by such sale shall not be sufficient to make good the deficiency of the testator's personal estate, Let an account be taken of the rents and profits of his real estates at &c., received by &c.

See note, *sup.* p. 1429; and *Davies v. Topp*, Form 2, *inf.* Sect. XXIX., p. 1663.

17. *Account of Personal Estate (and Rents) carried on.*

AND Let the accounts of the testator's [*or* intestate's] personal estate [*If so*, and of the rents and profits of his real estates] directed by the judgment be carried on from the foot of the account (accounts) marked &c., referred to in the Master's certificate [*or* Let the accounts directed by the said judgment and numbered &c. be continued].

18. *Deficiency to be raised by Mortgage, and applied.*

(*Preliminary part, see Forms 1—3, pp. 361, 362.*)—It appearing by the Master's certificate, dated &c., that the personal estate of the testator is insufficient for payment of his debts and funeral expenses, and the costs of this action, tax the costs of the Plt and Deft of this action, as between solr and client; Let subsequent interest be computed on the debts of the testator mentioned in the schedule to the Master's certificate, dated &c., at the respective rates already certified therein [*or at the rate of 4 p. c. per ann.*] from the foot of the said certificate to the day for payment; And Let the amounts due to the several creditors therein named for principal and interest in respect of their debts, and the total amount thereof be certified; And Let, for the purpose of providing for payment of such debts, interest, and costs, such a sum as the Judge shall direct be raised by mortgage of a sufficient part of the testator's real estate mentioned in the schedule to the said certificate, or if necessary on the whole thereof, with the approbation of the Judge; And Let such mortgage be settled by the Judge, and be executed by such parties as the Judge shall direct; And Let A., the tenant for life of the said estate [*and the tenant for life thereof for the time being, or C. and D., the trustees*] under the will of the testator [*or the person or persons for the time being entitled to the receipt of the rents and profits of the said estate*], keep down the interest of such mortgage; And Let the mortgagee or mortgagees be at liberty to lodge the money to be raised by such mortgage in Court, as directed in the schedule hereto, the name or names of such mortgagee or mortgagees and the amount so to be lodged to be certified; And Let, upon the execution of such mortgage by such parties thereto as the Judge shall direct being certified, the funds to be so lodged in Court be dealt with as directed in the schedule hereto.

LODGMET AND PAYMENT SCHEDULE.

In the High Court of Justice,

Chancery Division.

Date of Order, , 19 .

Tompsett v. Harmer. 1871. T. 1001.

Ledger Credit. As above.

I.—Lodgment.

Particulars of Funds to be Lodged.	Person to make the Lodgment.	Amounts.	
		Money.	Securities.
Money directed by this order to be raised by mortgage, amount to be certified.	Mortgagee or mortgagees to be named in Master's certificate.	£ s. d.	

II.—Payment.

Funds to be dealt with. Funds to be lodged as above.

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	
Upon the execution of the indenture of mortgage in the order mentioned by such parties as the Judge shall direct being certified— Pay costs to be taxed under this order. Pay the several amounts which shall be certified to be payable to the several creditors to be named in the schedule to the Master's certificate in respect of their debts and interest as above (here follow rest of debts certified by the Master's certificate).	The persons to whom the same shall be certified to be payable.		

—See *Tompsett v. Farmer*, V.-C. B., 22 July, 1871, B. 2548.

N.B.—This Form has been remodelled to suit S. C. F. R.
For forms of application, see D. C. F. 620 *et seq.*

19. Deficiency to be raised by Mortgage or Sale.

TAX the costs of the Plts and Defts, and of the said persons attending, of this action, the costs of the Defts, the exors and trustees of the testator's will, to be taxed as between solr and client, and to include any charges and expenses properly incurred &c. [see Form 1, p. 1446]; compute subsequent interest on debts &c. [Form 18, *sup.*]; And It appearing by the said Master's certificate that the personal estate of the testator is insufficient &c. [Form 18, *sup.*]: Let, for the purpose of providing for payment of such costs, debts, and interest, such a sum as the Judge shall direct be raised by mortgage or sale of a sufficient part of the testator's real estate mentioned in the (second) schedule to the said certificate, or if necessary of the whole thereof, with the approbation of the Judge; And in case the same shall be raised by mortgage, Let such mortgage be settled &c. [Form 18 *to end, sup.*]; And Let, in case the same shall be raised by sale, the money to arise by such sale be paid into Court to the credit of this action &c. to an account to be intituled "Proceeds of Sale of the Testator's Real Estate," subject to further order, and any of the parties are to be at liberty to apply in Chambers for the application thereof as they may be advised [*or Adjourn &c.*].—[*Insert similar Lodgment and Payment Schedule to Form 18.*].—*Beamon v. Swain*, M. R. at Chambers, 27 April, 1877, A. 1264.

N.B.—This Form has been remodelled to suit S. C. F. R.

In practice an order directing a mortgage, as in Forms 18 and 19, will be thus worked out: subsequent interest will be computed on the debts; and the costs will be taxed by anticipation, and certified; the total amount to be raised having been thus ascertained, the draft of the mortgage for securing the same will be settled at Chambers, and the engrossment will be signed by

the Master, who will certify the amount to be paid in and the name of the mortgagee (Form 18, *sup.*); the mortgagee will then pay the amount into Court, and on such payment being made the mortgage will be executed by the parties; the Master will then make a certificate of the computation of interest, of the amount due to each creditor, and of the execution of the mortgage, and on such certificate being produced to the Paymaster, he will pay. The costs of the mortgage will be taxed as part of the costs of action, and included in the taxation without any express direction. The costs of the mortgagee should be included in the costs of the Plt or other party having the conduct of the action.

Sometimes the mortgagee pays the amount into Court under a second order obtained at Chambers instead of under a certificate. But the course indicated above is more convenient.

If the money be raised by sale the proceedings will be the same as in other cases of sales by the Court, as the money cannot be directed to be applied till the purchasers have had their conveyances delivered; but the application for the distribution of the proceeds may be made at Chambers, if authorized by the order, as in Form 18, *sup.*

20. Claim of Mortgagees admitted in Administration Action of Insolvent Estate.

VARY the Master's certificate, dated &c., by allowing the claim of the said H. E. T. and G. R. T. [*mortgagees of the testator*] as creditors of the testator's estate for [five hundred pounds].—See *Re Hardy, H. v. Farmer*, Chitty, J., 16 April, 1896, A. 797; (1896) 1 Ch. 904.

NOTES.

FORM OF ORDER.

It is not necessary to direct the amount of subsequent interest to be verified by affidavit; if the Paymaster requires an affidavit he will call for it: S. C. F. E. r. 96.

If there be any surplus, it should be carried to the account of the persons interested in the estate, subject to duty, or if the Court think fit, paid to the legal pers. *represve*. The debts and costs may be raised by separate sales, and either of them first, if the assets are ample.

For notes as to the mode of dealing with funds in Court, and the form of order to be acted upon by the paymaster, *v. Chap. XVI., Vol. I. p. 200 et seq.* "LODGMET AND PAYMENT OF FUNDS."

SUBSEQUENT INTEREST.

It was formerly held that interest, when computed, became principal, and would carry interest: see *Bacon v. Clark*, 1 P. Wms. 480; but afterwards no interest was given on interest reported due except in the case of a mortgage: *Turner v. T.*, 1 Jac. & W. 47; *Perkyns v. Baynton*, 1 Bro. C. C. 574; and see *Brown v. Barkham*, *Butler v. Duncomb*, 1 P. Wms. 653, 453; *Astley v. Powis*, 1 Vez. 495.

For the general rules as to what debts carry interest, *v. sup.* p. 1386; and as to allowing interest on debts proved in admon suits, *sup.* p. 1425.

Subsequent interest is not allowed on sums ordered to be paid but left in Court by the neglect of the creditor; but is allowed as against funds subsequently coming in on balances remaining due after the original funds had been distributed: *Ashley v. A.*, 1 Ch. D. 243; 4 Ch. D. 757, C. A.

Where creditors cannot be found, a sum representing their debts, with interest to the date of carrying over, may be carried over and retained in Court, the residue of the fund being fully administered: *Macalpin v. Macdonald*, 59 L. J. Ch. 231, 232; 62 L. T. 541, where see form of order.

MODE OF PAYMENT.

The Plt's solr is bound to attend at the Pay Office with the order and Master's certificate, on payment of the usual fee: *Lechmere v. Brazier*, 1 Russ. 73; and see *Shortley v. Selby*, 5 Madd. 417.

A solr who refused to produce an order for payment to a married woman until he had been paid alleged advances, was ordered to do so and pay the costs of the motion: *Benyon v. Amphlett, Re Sidney*, 8 Jur. N. S. 759.

Where after a judgment in a creditors' suit, a deficient estate has been ordered to be apportioned among certain named creditors who have proved their debts, but some of the funds have remained unclaimed for many years, and other funds have since accrued, the Court can only deal with the estate on the footing of the original order for payment. All the creditors named in that order have a vested interest in the funds then or subsequently distributable, and after some creditors have disappeared, those who appear cannot be paid in full, but only their proportion of capital and interest: *Alderson v. Petrie*, 25 W. R. 361, n.; *Ashley v. A.*, 1 Ch. D. 243; 4 Ch. D. 757, C. A.; and see *Wheeler v. Gill*, 19 Eq. 316; *Mucalpin v. Macdonald*, 69 L. J. Ch. 231; 62 L. T. 541.

As to payment under powers of attorney, *v. sup.* Vol. I. p. 237; and as to payment of statute-barred debts, *v. sup.* p. 1441.

For the mode by which creditors obtain payment of the sums certified due to them, see *Lechmere v. Brazier*, 1 Russ. 73; D. C. F. 936.

COSTS OF ACTION—ASSETS DEFICIENT.

Though in *Swale v. Milner*, 6 Sim. 572, the costs of all parties having been ordered to be taxed and paid from a fund in Court, the Court would not give the Defts, the heir and admor, priority as to costs, in *Gunt v. Taylor*, 2 Ha. 413, after a similar order, priority was still given to the exor; and it may be given by the order: *Young v. Everest*, 1 Russ. & M. 426; although he has exhausted the assets by confessing judgments: *Sanderson v. Stoddard*, 23 Beav. 155.

Where the assets are deficient (the costs of the exors as between solr and client having been first provided for: *Henderson v. Dodds*, 2 Eq. 532; *Wetenhall v. Dennis*, 33 Beav. 285; *Dodds v. Tuke*, 25 Ch. D. 617), the costs of the Plt creditor and of the Defts (beneficiaries) are taxed between party and party and paid *pari passu* out of the fund, which is next applied to pay Plt's extra costs as between solr and client, and then the debts: *Henderson v. Dodds, sup.*; *Ferguson v. Gibson*, 14 Eq. 379; *Re Leng*, (1895) 1 Ch. 652, C. A.

And the same rule applies where the action is by a creditor of a deceased partner, and the estate is sufficient for payment of separate, but not of partnership debts: *Re McRea, Norden v. M.*, 32 Ch. D. 613; and where the action was originally commenced by a legatee or next of kin, and the creditor subsequently obtains the conduct of it: *Re Richardson, R. v. R.*, 14 Ch. D. 611.

As to costs where the Plt is a mortgagee, *v. inf.* p. 1507; and where he is a beneficiary, *inf.* p. 1507 *et seq.*

In *Stanton v. Hatfield*, 1 Keen, 358, *et sup.* p. 1451, the assets being mainly realized by Plt's diligence, and more than paying debts, his costs, as between party and party, were paid out of the assets, and his extra costs by the other creditors *pro rata*. As to contribution, see *S. C.*; and see *Goldsmith v. Russell*, 5 D. M. & G. 556, in which the principle of this case was followed: *Adames v. Hullett*, 6 Eq. 468; and the Court would not let the other parties carry off a fund realized by Plt, though his claim failed, without detracting his costs: *Wedgwood v. Adams*, 8 Beav. 108, 104, n.

A creditor suing, in spite of full information of no assets to meet his debt, will be ordered to pay costs of action: *King v. Bryant*, 4 Beav. 460; *Fuller v. Green*, 24 Beav. 217; and in a creditor's action, it being found there were no assets, Plt had to pay costs, as between party and party: *Blake v. Simpson*, V.-C. W., 14 July, 1854; Reg. Min. 210. There being no assets unadministered, the bill was dismissed, but not with costs, the account given by the answer not being confirmed by the report: *Robinson v. Elliott*, 1 Russ.

599; and where the Plt, a simple contract creditor, did not know the state of the assets he was entitled to his costs, though there was not enough to pay specialty debts: *Larkins v. Paxton*, 2 My. & K. 320.

The leaning of the Court is to give the Plt in a creditors' action his costs as far as may be, provided there are assets: *Abell v. Screech*, 10 Ves. 358; and the costs of administering the estate, whether in or out of Court are a first charge on it: *Loomes v. Stotherd*, 1 S. & S. 461; and rank before costs of probate litigation: *Major v. M.*, 2 Drew. 281; *Re Mayhew*, *Rowles v. M.*, 5 Ch. D. 696, C. A.; and see *Adames v. Hallett*, 6 Eq. 468; *Hare v. Rose*, 2 Vez. 558.

Ordinarily Plt is only allowed costs as between party and party: *Lechmere v. Brazier*, 1 Russ. 81; where the funds are sufficient: *Brodie v. Bolton*, 3 My. & K. 168; unless under special circumstances: *Stanton v. Hatfield*, and other cases, *sup.*; but where they are deficient, costs are usually given as between solr and client: *Hood v. Wilson*, 2 Russ. & M. 687; *Barker v. Wardle*, 1 My. & K. 818; *Toutal v. Spicer*, 4 Sim. 610; *Sutton v. Doggett*, 3 Beav. 9; *Henderson v. Dodds*, 2 Eq. 532; *Re Richardson*, R. v. R., 14 Ch. D. 611; *Re McKee*, 32 Ch. D. 613 (Plt separate creditor, and assets insufficient to pay joint creditors of testator's firm).

As to costs in suits for general admon when the assets are deficient, *v. inf.* p. 1512.

INSOLVENT ESTATE.

By the Jud. Act, 1875 (38 & 39 V. c. 77), s. 10 (substituted for Jud. Act, 1873, s. 25 (1)), "in the admon by the Court of the assets of any person who may die after the commencement of this Act" (Nov. 1st, 1875), "and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any co. under the Cos. Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such co., may come in under the decree or order for the admon of such estate, or under the winding-up of such co., and make such claims against the same as they may respectively be entitled to by virtue of this Act."

The section is not retrospective: *Sherwin v. Selkirk*, 12 Ch. D. 68; *Re Joseph Suche & Co.*, 1 Ch. D. 48.

The words "prove to be" insufficient mean only that there is good reason to believe that the estate will turn out to be insolvent: *Re Hopkins*, *Williams v. H.*, 18 Ch. D. 370, C. A.

In *Re Smith*, *Green v. S.*, 22 Ch. D. 586, the Court, before applying the rules in bankruptcy to the admon of an estate, directed an inquiry whether the estate was insolvent.

The section applies to an estate of a deceased person which is sufficient for payment in full of his debts and liabilities apart from the costs of admon, but becomes insufficient by reason of such costs: *Re Leng*, *Tarn v. Emerson*, (1895) 1 Ch. 652, C. A.

Application of Rules in Bankruptcy.—It is quite settled that this enactment has introduced into the admon of insolvent estates only some and not all of the rules of bankruptcy, and considerable difficulty has arisen in determining which of those rules apply to admons: *Re Heywood*, (1897) 2 Ch. 593, per Stirling, J. In particular, it is settled that the section does not alter or enlarge the assets to be administered, although it varies the rights as to the admon of them: *Re D'Epineuil*, *Tadman v. D'E.*, 20 Ch. D. 217; *Gorringe v. Irwell Syndicate*, 34 Ch. D. 128; *Re Leng*, *Turn v. Emerson*, (1895) 1 Ch. 652, C. A.; *Re Whitaker*, *W. v. Palmer*, (1901) 1 Ch. 9, C. A.; *S. C.*, (1900) 2 Ch. 676; *Hasluck v. Clark*, (1899) 1 Q. B. 699, C. A.

And an unregistered bill of sale is not rendered void as against the unsecured creditors of a deceased insolvent: *Re D'Epineuil, Tadman v. D'Ep.*, 20 Ch. D. 217.

The sections of the Bankruptcy Act, 1883, relating to debts and liabilities provable are sects. 37 (as to the description of debts provable), 38 (as to mutual dealings and set-off, *v. sup.* pp. 1365, 1366), and 39, referring to Sched. II. (as to secured creditors).

The word "liability" in sect. 37 of the Act of 1883, includes a liability under a covenant for the payment of money out of the estate of the covenantor after his death, and the value of such liability may be proved for on his bankruptcy: *Barnett v. King*, (1891) 1 Ch. 4, C. A.; and proof by way of damages may be made in respect of a covenant by a settlor to insure, though his life has become uninsurable: *Re Arthur, A. v. Wynne*, 14 Ch. D. 603; and for the estimated value of the liability to future calls on shares standing in the name of the deceased: *In re McMahon, Fuller v. McM.*, (1900) 1 Ch. 173; but no action will lie in respect of damages to a man's estate arising out of injury to his person: *Pulling v. G. E. Ry. Co.*, 9 Q. B. D. 110.

A sum due from a promoter in respect of a secret profit is a demand arising by reason of contract (see Bankruptcy Act, 1883, s. 37, sub-s. 1), and therefore provable: *Enma Silver Mining Co. v. Grant*, 17 Ch. D. 126.

It was held in *Re Williams, Jones v. W.*, 36 Ch. D. 373 (following *Re Maggi*, 20 Ch. 545; which, however, was questioned in *Re Leng*, (1895) 1 Ch. 652, and treated as overruled in *Re Whitaker*, (1901) 1 Ch. 9), that sect. 40 of the Bankruptcy Act, 1883, as to priorities of certain debts, is not imported into admons; but it has recently been held on the authority of *Re Leng, sup.*, that the priority as to rates and wages conferred by the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1, sub-s. 6, and s. 3, applies in the case of a deceased insolvent dying after the commencement of the Act of 1888: *Re Heywood, Parkington v. H.*, (1897) 2 Ch. 593. Sect. 45 of the Act of 1883, restricting the rights of creditors under execution or attachment, has been held not to be imported: *Pratt v. Inman*, 43 Ch. D. 175; and see *Hasluck v. Clark*, (1899) 1 Q. B. 699, C. A.; (1898) 2 Q. B. 28.

In *Re Maggi*, 20 Ch. D. 545, it was held that the section did not import sect. 32 of the Bankruptcy Act, 1869, into the admon of insolvent estates, and that, therefore, the priority of a creditor who had recovered judgment against the exor (as to which *v. sup.* p. 1421) was not affected; but this decision was questioned in *Re Leng, sup.*, and in *Re Whitaker* was treated as overruled. In *Re Leng, sup.*, it was held that the provision in sect. 3 of the Married Women's Property Act, 1882 (*v. sup.* p. 921), whereby a loan by a married woman to her husband for the purposes of his trade or business is postponed in the event of his bankruptcy, was one of the rules of bankruptcy which is now imported by sect. 10 of Jud. Act, 1875, into the admon of insolvent estates; and in *Re Whitaker, sup.*, it was held that the section has, in effect, abrogated the old rule of the Court postponing voluntary debts (*v. sup.* p. 1422), and that such debts must now, as against an insolvent estate, rank equally with other debts and be paid *pari passu*. The distinction is thus drawn between rules in bankruptcy which augment the assets and those which relate to the distribution of the assets, the former being held to be inapplicable and the latter to be applicable.

The statute, for the purpose of proof, converts an annuity into a lump sum, and proof must be for better or worse; and where a deceased annuitant had received a dividend on her proof, there could be no refunding of excess of dividends over the payments of the annuity which had accrued due: *Exp. Bates, Re Pannell*, 11 Ch. D. 914; distinguishing *Exp. Wardley*, 6 Ch. D. 790; but where an annuitant, who had estimated the value of her annuity, died before any dividend was paid, the proof was reduced to the amount of the unpaid instalments: *Re Dodds, Exp. Pritchard*, 25 Q. B. D. 529.

An annuity payable under a separation deed to a wife *dum casta* is a liability capable of being estimated: *Exp. Neal, Re Batry*, 14 Ch. D. 579, C. A.

The rules of bankruptcy under sect. 38 appear to be applicable where the estate under admon is proved to be insolvent: *Re Smith, Green v. S.*, 22 Ch. D. 586; and see *Watkins v. Lindsay*, W. N. (98) 22; 67 L. J. Q. B. 362; and that these rules are clearly imported into the winding-up of cos. see

Mersey Steel and Iron Co. v. Naylor, 9 App. Ca. 434; *Eberle's Hotel v. Jonas*, 18 Q. B. D. 459, C. A.; *Sovereign Life Ass. Co. v. Dodd*, (1892) 1 Q. B. 405, 410, 411.

Where there are mutual credits, the line as to set-off must be drawn, as a general rule, in the absence of special circumstances, at the commencement of the bankruptcy: *Re Gillespie, Exp. Reid*, 14 Q. B. D. 963; i.e., at the date of the receiving order and not that of the act of bankruptcy: *Re Daintrey, Exp. Mant*, (1900) 1 Q. B. 546, C. A.; and see *Sovereign Life Ass. Co. v. Dodd*, (1892) 1 Q. B. 405, 411; *Palmer v. Day*, (1895) 2 Q. B. 618.

Semble, the effect of sect. 38 of the Bankruptcy Act, 1883, is not to enlarge the rights of secured creditors so as to enable them to tack sums not secured to sums secured: *Eberle's Hotel v. Jonas*, 18 Q. B. D. 459, C. A.; and money paid to a solicitor as security for future costs cannot, under the section, be retained by him, as against the trustee in bankruptcy of the client, in payment for professional work done after the act of bankruptcy: *Re Pollett, Exp. Minor*, (1893) 1 Q. B. 175, 455.

Rights of secured Creditor.—The rule settled by the case of *Mason v. Boyg*, 2 My. & C. 443, 450, 451 (and see *Armstrong v. Storer*, 14 Beav. 535, 538, 539, and *Tuckley v. Thompson*, 1 J. & H. 126), as to the mortgagee's right of proof against the general estate, was, that he could prove for the whole of his original debt and interest, without reference to what he could get by his security, but so as not to receive in all more than 20s. in the pound. But now, by Jud. Act, 1875, s. 10, *sup.*, in the admon by the Court of the assets of any person whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules are to prevail and be observed, as to the respective rights of secured and unsecured creditors, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt. The rule of the Court, therefore, is now assimilated to that in bankruptcy (*Re Withernsea Brick Works*, 16 Ch. D. 337; *Re Whitaker, W. v. Palmer*, (1901) 1 Ch. 9, C. A.; *S. C.*, (1900) 2 Ch. 676; *Hasluck v. Clark*, (1899) 1 Q. B. 699, C. A.), under which the mortgagee, if he has realized his security, can only prove for the balance, or if he has not, may either give it up and prove for the whole debt, or state in his proof the particulars of his security, and the value at which he assesses it, and prove for the balance. In this case, if the security realizes more than the assessed value, the creditor must forthwith repay any excess of dividend which he may have received; but if it realize less, he is entitled to be paid, out of any money for the time being available for dividend, the amount of the deficiency of dividend received, before that money is made applicable to the payment of any future dividend, but he is not to be entitled to disturb the distribution of any dividend already declared.

The valuation and proof may be amended at any time on its being shown to the satisfaction of the Court that they were made *bond fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation. As to amendment of proof, see *Exp. Bayshaw, Re Ker*, 13 Ch. D. 304, C. A.; *Exp. King*, 20 Eq. 273; *Exp. Ashworth*, 18 Eq. 705 (under the Act of 1869); *Re Newton, Exp. Nat. Bk. of England*, (1896) 2 Q. B. 403 (under the Act of 1883).

Until a secured creditor has valued or realized his security, he has no debt provable in respect of which any reserve is to be made on declaration of dividend: *Exp. Good, Re Lee*, 14 Ch. D. 82, C. A.; and see *Re Ulogherry*, 21 L. R. Ir. 388.

A secured creditor is only entitled to interest on the amount at which he values his security from the date of valuing it, and not from the judgment for admon, which is the equivalent of an adjudication in bankruptcy, and money received by secured creditors on foot of such interest before the estate was found to be insolvent was deducted from the amount payable to them for principal: *Ross v. R.*, 25 L. R. Ir. 362; and the landlord's right to distrain for six months' rent from the date of the order of adjudication, under the Bankruptcy Act, 1883, s. 42 (as amended by the Bankruptcy Act, 1890, s. 28), extends, by sub-s. 2, to the case of an order for admon under sect. 125, but not to an admon judgment in the Ch. Div.: *Re Fryman's Estate, F. v. F.*, 38 Ch. D. 468.

A joint and several creditor of a joint estate holding security on the

property of one of the debtors, may prove against the joint estate for the whole debt, without giving up his security, or prove his whole debt against the separate estate, without giving up a security on joint property: *Robson*, 730; *Lee & Wace*, 250; *Re Plummer*, 1 Ph. 56; *Exp. Caldicott*, *Re Hart*, 25 Ch. D. 716, C. A.; and a creditor against a firm, holding security given by one of them for joint and separate debts, was entitled to apportion the proceeds of his security between his debts in any way most for his advantage: *Exp. Dickinson*, *Re Foster*, 20 Eq. 767. A security given on separate property is not affected by its afterwards becoming joint property: *Re Connell*, 3 Mont. & A. 581; 3 Dea. 201; but a security on shares in the name of one, but the property of the firm, was only a joint security for the purposes of proof as between the mortgagees and the other joint creditors, though the mortgagees had no notice that the shares belonged to the firm: *Re Collie*, 3 Ch. D. 481, C. A. It is a question of fact whether the property is joint or separate estate, and misleading conduct of the bankrupt will not enhance the creditor's right: *S. C.*; *Wms. Bkcy.* 158.

And a creditor on two estates for the same debt receives dividends on the whole from both till satisfied: *Bonser v. Cox*, 6 Beav. 84.

Where interest on a mortgage debt was to accumulate for five years at compound interest, and then to be capitalized and added to the debt, a proof before the five years had expired for the aggregate sum, deducting the value of the security, was disallowed as to the interest: *Re Fane*, W. N. (88) 231; following *Exp. Bath*, 22 Ch. D. 450; *Exp. Robinson*, 31 L. J. Bkcy. 12; 6 L. T. 143; 10 W. R. 360.

The mere issuing of a writ of sequestration against a Deft and service of it on a debtor to him, is not enough, in the absence of some attornment by the debtor, to make the Plt a secured creditor: *Exp. Nelson*, *Re Hoare*, 14 Ch. D. 41, C. A.

Where a bill of exchange, indorsed by a customer, is held by bankers "pending discount," the test whether it is valid or not as a security is whether the intention of the parties was that he should be liable as indorser, i.e., whether the indorsement was complete or practically *sans recours*: *Exp. Schofield*, *Re Firth*, 12 Ch. D. 337, C. A.

For the definition of "secured creditor," see the Bankruptcy Act, 1883, s. 168; and see *Deering v. Bank of Ireland*, 12 App. Ca. 20, 26; *Re Hullett & Co.*, *Exp. Cocks*, *Biddulph & Co.*, (1894) 2 Q. B. 256, C. A.

The drawer of a dishonoured bill of exchange can prove against the acceptor in respect of his contingent liability to pay damages to the holder: *Re Gillespie*, *Exp. Roberts*, 18 Q. B. D. 286, C. A.; 16 Q. B. D. 702.

Where a sum is payable on a contingent event, which happens after judgment and before certificate, the creditor is entitled to prove for the full amount, less a rebate of interest at 4 p. c. for the period between the judgment and the event: *Re Bridges*, *Hill v. B.*, 17 Ch. D. 342; and see *Re Northern Counties of England Fire Ins. Co.*, 17 Ch. D. 337.

An assignee's liability to indemnify his assignor for breaches of covenant in a lease may be proved for as a contingent liability in the absence of an order declaring it to be a liability incapable of being fairly estimated: *Hardy v. Fothergill*, 13 App. Ca. 351.

ADMINISTRATION IN BANKRUPTCY.

By the Bankruptcy Act, 1883, s. 125 (as amended by sect. 21 of the Bankruptcy Act, 1890), "(1.) Any creditor of a deceased debtor, whose debt would have been sufficient to support a bankruptcy petition against such debtor, had he been alive, may present to the Court a petition in the prescribed form, praying for an order for the admon of the estate of the deceased debtor according to the law in bankruptcy.

"(2.) Upon the prescribed notice being given to the legal pers. repesve of the deceased debtor, the Court may, in the prescribed manner, upon proof of the Petr's debt, unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the admon in bankruptcy of the deceased debtor's estate, or may, upon cause shown, dismiss such petition with or without costs.

"(3.) An order for admon may be made under the section before the expiration of two months from the date of the grant of probate or letters of admon without the concurrence of the legal pers. reprieve of the debtor. or proof that the debtor committed an act of bankruptcy within three months prior to his decease: see Act of 1890, s. 21 (1), altering s. 125, sub-s. 3, of the Act of 1883.

"(4.) A petition for admon under the section is not to be presented to the Court after proceedings have been commenced in any Court of justice for the admon of the deceased debtor's estate, but that Court may, *without the application of any creditor, and whenever satisfied that the estate is insufficient to pay its debts* (see Act of 1890, s. 21 (2), altering s. 125, sub-s. 4, of the Act of 1883), transfer the proceedings to the Court exercising jurisdiction in bankruptcy, and thereupon such last-mentioned Court may, in the prescribed manner, make an order for the admon of the estate of the deceased debtor, and the like consequences shall ensue as under an admon order made on the petition of a creditor.

"(5.) Upon an order being made for the admon of a deceased debtor's estate, the property of the debtor shall vest in the official receiver of the Court. as trustee thereof, and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of this Act.

"(6.) With the modifications hereinafter mentioned, all the provisions of Part III. of this Act, relating to the admon of the property of a bankrupt, shall, so far as the same are applicable, apply to the case of an admon order under this section, in like manner as to an order of adjudication under this Act.

"(7.) In the admon of the property of the deceased debtor under an order of admon, the official receiver shall have regard to any claim by the legal pers. reprieve of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate, and such claims shall be deemed a preferential debt under the order, and be payable in full out of the debtor's estate in priority to all other debts.

"(8.) If, on the admon of a deceased debtor's estate, any surplus remains in the hands of the official receiver, after payment in full of all the debts due from the debtor, together with the costs of the admon and interest as provided by this Act in case of bankruptcy, such surplus shall be paid over to the legal pers. reprieve of the deceased debtor's estate, or dealt with in such other manner as may be prescribed.

"(9.) Notice to the legal pers. reprieve of a deceased debtor of the presentation by a creditor of a petition under this section shall, in the event of an order for admon being made thereon, be deemed to be equivalent to notice of an act of bankruptcy, and after such notice no payment or transfer of property made by the legal pers. reprieve shall operate as a discharge to him as between himself and the official receiver; save as aforesaid, nothing in this section shall invalidate any payment made or any act or thing done in good faith by the legal pers. reprieve before the date of the order for admon.

"(10.) Unless the context otherwise requires, 'Court' in this section means the Court within the jurisdiction of which the debtor resided or carried on business for the greater part of the six months immediately prior to his decease; 'creditor' means one or more creditors qualified to present a bankruptcy petition, as in this Act provided."

And by the Act of 1890, s. 21 (3), the creditors are to have the same powers as to appointment of trustees and committees of inspection as they have in other cases where the estate of the debtor is being administered or dealt with in bankruptcy.

As to the effect of sect. 125, see *Re Williams, Jones v. W.*, 36 Ch. D. 573; *Lee & Wace*, 549; and for rules under the section, *ibid.* 694.

As the section is confined to the estate of the deceased debtor, it does not enable the Court to deal with the property of third persons, and, therefore, the provisions of sect. 47 of the Bankruptcy Act, 1883, avoiding voluntary settlements, are not rendered applicable: *Exp. Official Receiver, Re Gould*, 19 Q. B. D. 92, C. A.; and in the case of such an admon there is no power, either under sect. 27 or Bankruptcy Rules, 1883, r. 58, to summon a person to be examined for the purpose of discovering the deceased debtor's estate: *Re Hewitt, Exp. H.*, 15 Q. B. D. 159.

An order for admon under the section is not equivalent to a receiving order,

so as to import sect. 45 of the Bankruptcy Act, 1883, and thus disentitle an execution creditor of the deceased debtor to retain, as against the trustee of the debtor's estate, the benefit of an execution not completed before the date of the admon order: *Husluck v. Clark*, (1899) 1 Q. B. 699, C. A.; (1898) 2 Q. B. 28; and see *Watkins v. Barnard*, (1897) 2 Q. B. 521.

The power of transfer under sect. 125, sub-sect. 4 is discretionary: *Re Weaver, Higgs v. W.*, 29 Ch. D. 236; *Re Baker, Nichols v. B.*, 44 Ch. D. 262, C. A.; and the Court declined to exercise it where the estate was small, the number of creditors small, and considerable expense had been incurred in Chambers in proceedings under the judgment: *Re Weaver, sup.*; and although the Court in bankruptcy had jurisdiction to proceed in the bankruptcy under sect. 108 and sect. 18, sub-sect. 11, of the Act of 1883, on the Plt in a creditor's action submitting to abide by the judgment of the Court as to what would be the result if the proceedings were taken in bankruptcy, the claim of mortgagees was entertained and admitted in the admon action: *Re Hardy, H. v. Furmer*, (1896) 1 Ch. 904; and the circumstances that the exor has a right of retainer, and a liberty not to plead the Statute of Limitations to a debt which might be taken away by the transfer, are not a ground for ordering the transfer: *Re Baker, sup.*; though it may have to be decided hereafter whether the transfer of an admon to bankruptcy will prejudice or injure an exor in his right of retainer, and if so, whether that may be a ground for not exercising the power of transfer: *S. C., per Cotton, L. J.*, referring to *Re York, Atkinson v. Powell*, 36 Ch. D. 233; and *semble*, previously to the Act of 1890, an application for transfer could only be made by a creditor who had absolutely proved his debt: *Re Weaver, Higgs v. W.*, 29 Ch. D. 236.

A debt due to a savings bank from its actuary under the Savings Bank Act, 1863 (26 & 27 V. c. 87), s. 14, not being the subject of any express exception in sect. 40 of the Act of 1883, has no priority: *Re Williams, Jones v. W.*, 36 Ch. D. 573.

The expression "context," in sub-sect. 10 of sect. 125, is not limited to the context in that section, but embraces the whole Act; and, therefore, though the debtor has been resident abroad for more than six months immediately prior to his decease, sect. 95 applies, and the High Court has jurisdiction to entertain the petition for admon: *Re Evans, Exp. E.*, (1891) 1 Q. B. 413, C. A.

The practice of the Ch. Div. in admon is to be followed: *Re Crowther*, 20 Q. B. D. 38; and as to the procedure, see *Lee & Wace*, 548 *et seq.*; *Robson*, 398 *et seq.*

SECTION IV.—GENERAL ADMINISTRATION—ORIGINAL JUDGMENT OR ORDER.

1. *Administration of Intestate's Personalty—At the Hearing or on Summons under O. xv, 1—Inquiry for Next of Kin under Statute of Distribution (22 & 23 Car. II. c. 10).*

[*Preliminary part*, Forms 1, 2, p. 141, and Forms 1, 2, 3, 4, and 6, pp. 183, 184, *sup.*].—LET the following inquiries and accounts be made and taken, that is to say: 1. An inquiry who were the persons entitled by virtue or according to the Statute of Distribution to the estate of A., deceased, the intestate, in the pleadings [*or writ, or originating summons*] named, living at the time of his [*or her*] death, and whether any of them are since dead, and, if so, who are their re-

spective legal pers. represves [*For other forms of inquiry for statutory next of kin*, see Forms 1 and 2, p. 1568, and note]; 2. An account of the intestate's personal estate, come to the hands of the Defts B., C., and D., the admors of his effects, or of any [*or if two only*, either] of them; or to the hands of any other person or persons by the order or for the use of the said Defts, or any [*or either*] of them; 3. An account of the intestate's debts; 4. An account of the intestate's funeral expenses; 5. An inquiry what parts, if any, of the intestate's personal estate are outstanding or undisposed of.

And Let the intestate's personal estate be applied in payment of his debts and funeral expenses, in a due course of admon.—Adjourn further consideration.—Liberty to apply.—[Form 1, *sup.* p. 183.]

2. *If at suit of Administrator.*

AND the Plt, the admor of the effects of the intestate A., by his counsel, &c., submitting to account, Let the following accounts and inquiry &c.—[Form 1, *sup.*, with consequent alterations.]

3. *Administration of Testator's Personalty at suit of Person interested.*

[*Preliminary part*, see Form 1, *sup.*].—LET the following accounts and inquiry be taken and made, that is to say: 1. An account of the personal estate (not specifically bequeathed) of the testator A., come to the hands of the Defts B., C., and D., the [*If so*, surviving, or acting] exors of his will [*If admon granted with will annexed*, admors of his effects], or of any [*or if two only*, either] of them; or to the hands of any other person or persons by the order or for the use of the said Defts or any [*or either*] of them; 2. An account of the testator's debts; 3. An account of the testator's funeral expenses; 4. An account of the legacies and annuities given by the testator's will; 5. An inquiry what parts, if any, of the testator's said personal estate are outstanding or undisposed of.

And Let the testator's personal estate not specifically bequeathed be applied in payment of his debts and funeral expenses, in a due course of admon, and then in payment of the legacies and annuities, if any, given by his will.—Adjourn, &c.—Liberty to apply.

For decree without prejudice to the rights of absent parties, see *Maybery v. Brooking*, 7 D. M. & G. 680.

For order on motion before decree, on affidavit and answer, to pay a jointure and annuity and legacy duty, the estate being large, but not the pecuniary legacies, see *Digby v. Boycott*, 4 Ha. 445.

For inquiries as to testator's property and application of income for children's benefit, see *Longmore v. Elcum*, 2 Y. & C. C. 371.

For declaration limiting debt due on bond to price for which purchased, and inquiry if made for value, and for particular inquiries and declarations as to debts and legacies, and certain transactions and securities being good

or not against creditors, see *Ellice v. Goodson*, V.-C. K. B., 30 April, 1845, A. 1321.

For order where account was limited to capital of personality, see *Coventry v. Wright*, M. B., 13 Nov. 1875, A. 2863.

For orders limited to personality in England, see *Re Leite, L. v. Ferreira*, V.-C. M., 20 Dec. 1876, B. 2110.

4. *Testator's Personality and Realty in Action by Person interested, or by Trustees and Executors.*

[*Preliminary part*, see Form 1, *sup.*].—DECLARE that the trusts of the will of the testator A., dated &c., ought to be performed and carried into execution, and order and adjudge the same accordingly; [*If trustees*, submission to account, Form 2, *sup.*] and Let the following accounts and inquiry be taken and made, namely [*insert account 1, 2, 3, and 4, and inquiry 5, and direction to apply personal estate*, Form 3, *sup.*]. And Let the following further inquiries and accounts be made and taken, that is to say :—

6. An inquiry what real estate the testator was seised of or entitled to at the time of his death.

7. [*If account of rents directed*] An account of the rents and profits of the testator's real estate received by the Plts [*or Defts*] B., C., and D., the trustees of the testator's will, or any [*if two only*, either] of them, or by any other person or persons by the order or for the use of the said Plts [*or Defts*] or any [*if two only*, either] of them.

8. An inquiry what incumbrances, if any, affect the testator's real estate, or any and what parts thereof.

9. An account of what is due to such of the incumbrancers, if any, as shall consent to the sale hereinafter directed in respect of their incumbrances.

10. An inquiry what are the priorities of such last-mentioned incumbrances.

11. And Let the testator's real estate be sold with the approbation of the Judge, free from the incumbrances, if any, of such of the incumbrancers as shall consent to the sale, and subject to the incumbrances of such of them as shall not consent.

And Let the money to arise by the sale of the testator's real estate be paid into Court &c.—See Form 2, *sup.* p. 1390.

For order limited to realty and personality in England, see *Rees v. Drane*, M. B., 25 Feb. 1871, B. 572.

For order (the Judge being of opinion that it would be for the benefit of the infants that the vouching of certain accounts should be dispensed with) that several items claimed by the Deft, as disbursements properly made on account of the testator's real and personal estate, should be allowed without production of vouchers, see *Rayment v. R.*, V.-C. H. at Chambers, 24 April, 1875, B. 2089.

5. *General Administration—Certain Accounts and Inquiries not to proceed without the leave of the Judge in Person—O. LV, 10A, B.*

[*Preliminary part, see Form 1, sup.*].—Let the following inquiries and accounts be made and taken, namely :—

1. An inquiry whether there has been any, and, if any, what, valid appropriation made to answer the legacy of £—, by the will of A. B. bequeathed for the benefit of his daughter C. D. (the Plt) and her children.

2. A like inquiry as to the legacy bequeathed to E. F.

3. An account of personal estate &c., to hands of exor of will [see Form 3, account 1, *sup.* p. 1466].

4. An account of personal estate &c. to hands of trustees of will [see Form 3, account 1, p. 1466, *mutatis mutandis*].

5. An account of testator's debts.

6. An account of the testator's funeral expenses.

7. An account of the legacies and anns given by the testator's will.

8. An inquiry what parts, if any, of the testator's personal estate are outstanding or undisposed of.

Let testator's personal estate not specifically bequeathed be applied in payment of debts &c. [Form 3, *sup.*].—And Let the following further inquiries and accounts be made and taken, that is to say,

9. An inquiry as to real estate [Form 4, *sup.*, inquiry 6].

10. [*If account of rents directed*] An account of the rents &c. [Form 4, *sup.*, inquiry 7].

11. An inquiry what incumbrances &c. [Form 4, *sup.*, inquiry 8].

And none of the accounts or inquiries hereinbefore directed, except those numbered 1 and 2, are to be prosecuted in Chambers except with the leave of the Judge in person.—Reserve further consideration &c.—See *Re Morgan, Ashmole v. M.*, Chitty, J., 31 Oct. 1891, B. 2091.

For similar order, see *Re Atty, Ibbetson v. A.*, Kekewich, J., at Chambers, 23 Feb. 1891, A. 261; *Re Greig, G. v. G.*, Stirling, J., at Chambers, 2 May, 1892, A. 689.

6. *Special Directions as to Accounts by Trustee, and Objections to Items by Plaintiffs—O. LV, 10A—Declaration of Right of Solicitor Trustee to charge for Professional Services.*

UPON the appeal &c., Let this action, so far as it seeks relief against the Deft G. in respect of the continuance of the business of H. & Co. after the death of the testator, stand dismissed out of this Court with costs &c.; And Let the Deft G. produce to the Plts or their solrs, at the office of the solr of the Deft G., all books of account relating to the trust estate, which are to be deemed accounts for all the purposes of the inquiry required by the Plts, and all day-sheets relating to costs, charges, and expenses charged by the Deft G. against the trust estate of H. & Co. since the death of the testator, or paid since the death of

the testator, but not disturbing accounts settled with the testator, and also deliver to the Plts or their solrs all bills of costs, charges, and expenses not already delivered, and not already covered by or comprised in the said day-sheets; Declare that the Deft G. is entitled, under the will of the testator, to the usual professional costs and charges for all work done by him as trustee, notwithstanding such work might have been done by a person who was not a solr, and that he ought to be paid or allowed all such costs and charges accordingly; And Let the Plts be at liberty within three months from the passing of this order (at their risk) to deliver to the Deft G. a notice in writing specifying the items (if any) to which they object, and the grounds of their objection to any such item, either in the said books of account or in the said day-sheets, to be so produced, and to bring in surcharges, and if there should be then any item objected to as aforesaid, and as to which the said parties are unable to agree, the same is to be dealt with by the Judge in Chambers.—Reference to tax bills of Deft G. already delivered.—Tax Deft G. his costs as between solr and client, and as between party and party, of the action down to and including trial so far as it seeks relief against him in respect of the continuance of the business of H. & Co., and his costs of appeal.—Plts to pay said party and party costs of Deft G.—Defts, the co-trustees to pay difference between party and party and solr and client costs of Deft G.—*Re Fish, Bennett v. B.*, O. A., 27 April, 1893, A. 854; *S. C.*, (1893) 2 Ch. 413.

7. *Real Estate to be applied only in case of Deficiency of Personality to pay Debts or Legacies.*

[*Administration of personal estate*, Form 3, *sup.*].—AND in case it shall appear that the testator's personal estate will be insufficient for the payment of his debts and the legacies and anns by his will charged upon [or payable out of] his real estates, Let the following five inquiries and accounts be made and taken, viz. [*insert inquiry 6, account 7, inquiry 8, account 9, inquiry 10, from Form 4, sup.*], And it is ordered that a sufficient part of the testator's real estate to make good the deficiency of his personal estate, or, if necessary, the whole of his real estate, be sold, with the approbation of the Judge, free from the incumbrances, if any, of such of the incumbrancers as shall consent to the sale, and subject to the incumbrances of such of them as shall not consent, And Let the money to arise by such sale be paid into Court &c. [follow Form 2, *sup.* p. 1390].

As to applying corpus and rents in their proper order, see Forms in Sect. XXIX., "*MARSHALLING ASSETS*," *inf.* p. 1663.

8. *Inquiry as to Rents and Account.*

An inquiry by whom the rents and profits of the intestate's real estate have been received [*If so, and in what character and under what*

circumstances]; And in case it shall appear that the same have been received by any party or parties to this action, an account of such rents and profits received by such party or parties, or by any other person or persons by the order or for the use of such party or parties or any or either of them.

9. *Specific Devises distinguished—Other Realty and Leaseholds to be sold.*

[*Preliminary part, see Form 1, sup.*].—Accounts of personality: 6. Inquiry as to leaseholds [Form 14, *inf.*]; 7. "An inquiry what real estate the testator was seised of or entitled to at the time of his death, distinguishing such parts thereof as are specifically devised;" 8. Account of rents and profits of the real estate not specifically devised; 9. Inquiry what incumbrances affect the realty not specifically devised; 10. Account of what is due to such incumbrancers as consent to sale; 11. Inquiry as to their priorities; 12. "And Let the testator's leasehold estates, and his real estate not specifically devised, be sold with the approbation of the Judge &c.; And Let the money to arise by such sale be paid into Court to the credit of &c., to separate accounts to be respectively intituled, 'The proceeds of the testator's leasehold estates,' and 'The proceeds of the testator's real estates not specifically devised,' subject &c."—Adjourn &c.—*Scholfield v. Midgeley*, V.-C. S., 13 Feb. 1858, B. 520; and see *Hewison v. Francis*, M. R., 27th May, 1871, A. 1305.

For special decree, declaring testator's personality the primary fund to pay debts, &c., and testamentary expenses, that his son assuming to act as trustee was, under the circumstances, not entitled to any benefit from the execution of the trusts, and that the personality, including colliery and canal shares, ought to have been sold, with inquiry as to rent realized one year after his death, and value of part not realized, with declaration that the colliery, which was exhausted, ought to be valued at the aggregate amount of net annual profits, treated as deferred payments, and the canal shares at the present value, and the aggregate amount of the net annual income treated as deferred payments, and directing them to be so valued, and Debt to be charged with interest at 4l. p. c. on the amounts and value of such realized and unrealized personality, after deducting debts, &c., with declarations and inquiries as to real estate, and amount of income applicable to purposes of will, and amount due to Plt in respect of her annuity and moiety of surplus income, &c., see *Lord v. Wightwick*, 4 D. M. & G. 811; S. C., *inf.* p. 1692.

For decree on bill by legatee of legacy charged on specified fund, payable out of specified land (part of estates devised to successive tenants for life, with remainder over) on death of first tenant for life, against second tenant for life and remaindermen, and a stranger, who had taken possession, and claimed under title paramount to testator, dismissing bill against the stranger, but, as against the devisees, declaring Plt entitled to his legacy, and to have it raised out of the land by sale or mortgage, with direction for a receiver, and with leave for Plt to bring such action and take such proceedings as advised for the recovery of the land, and to use the names of the devisees for that purpose, first indemnifying them, see *Daniel v. Davies*, 5 D. & S. 616.

For admon decree, after setting aside settlement, as void against mortgagees, see *Barton v. Vanheythuysen*, 11 Ha. 126, 134.

For decree declaring Plt, the posthumous heir of an intestate, entitled to

the rents of descended estates only from the day of his birth, with inquiry what rents received before the intestate's death and his son's birth, and as to merger of charges, see *Richards v. R.*, John. 754.

For admon decree, subject to issue sent as to the realty, the accounts of the personalty to be proceeded with meanwhile, see *Talbot v. E. Radnor*, 3 My. & K. 253, 254.

For inquiry who were entitled to surplus proceeds of mortgaged estate sold to pay Plt mortgagee, see *Richards v. Griffiths*, 13 July, 1861, B. 1805.

10. *Inquiry where the testator had been dead many Years.*

1. An inquiry of what particulars the estate of A., the testator, &c., so far as remaining unadministered, now consists; 2. An inquiry whether there is any debt of the testator remaining unpaid.—*Horsley v. Baddeley*, V.-C. M., 20 Feb. 1875, A. 508.

11. *Administration of Personalty of an Intestate who died more than Twenty years before Suit—Law of Property Amendment Act, 1860 (23 & 24 V. c. 38), s. 13.*

LET the following &c.—Inquiry as to next of kin of intestate; 2. An account of intestate's personal estate subsequently to the 19th Aug. 1851 (*twenty years before bill filed*) come to the hands of P., deceased, the admor of his effects, or to the hands, &c.; 3. An account of the intestate's personal estate come to the hands of the Deft, the admor *de bonis non* of his effects, or to the hands, &c.; 4. Inquiry as to outstanding estate; And Let what in taking the said account, &c., shall appear to have come to the hands of the said P. be answered by the Deft, his exor, and if he does not admit assets for that purpose an account of the personal estate of the said P. come to the hands of the Deft &c.—Adjourn &c.—*Larkins v. Phipps*, M. R., 18 Nov. 1873, B. 3171; *S. C.*, W. N. (73) 207, *v. inf.* p. 1488.

12. *Inquiry as to Residuary Personal Estate.*

An inquiry of what particulars the residuary personal estate of the testator consisted at the time of his death, and of what the same now consists.—*Clark v. Dalrymple*, V.-C. M., 16 July, 1870, A. 2154.

13. *Inquiry as to Property subject to Will—Conversion of Leaseholds.*

UPON the application by originating summons of A. B. &c., Declare that the estate of the testator C. D. ought to be administered under the direction of the Court, and order the same accordingly; Let the following inquiry &c.:—An inquiry of what the property now subject to the trusts of the will consists.—And the Plt by his solr desiring that the leaseholds belonging to the testator's estate should be converted, Let him be at liberty to lay proposals before the Judge in Chambers for such conversion.—Liberty to apply for further accounts and in-

quiries, and generally.—*Re Stocken, Jones v. Hawkins*, North, J., 27 Feb. 1888, B. 401; *S. C.*, 38 Ch. D. 319, C. A.

14. *Inquiry as to Leaseholds.*

1. An account of the personal estate not specifically bequeathed, exclusive of leaseholds, of the testator come to the hands of &c.;
2. An inquiry what leasehold estates the testator was possessed of or entitled to at the time of his death, and upon what leases, determinable upon what lives, and for what terms of years such leasehold estates were respectively holden by the testator at the time of his death, and under what leases the same are now respectively holden, and to what tenancies the same are now respectively subject.—Usual admon decree.—*Garlick v. Leslie*, V.-C. M., 29 April, 1871, A. 1145.

15. *Inquiry whether Shares incumbered.*

An inquiry whether any, and which, of &c., the residuary legatees of the testator, have in any way, and how, mortgaged, charged, or incumbered their respective shares in the testator's residuary estate, and if so, what is due, and to whom, in respect of such mortgages, charges, or incumbrances.—*Meek v. Saw*, V.-C. S., 24 June, 1857, B. 1235.

As to costs in respect of incumbered shares, *v. inf.* p. 1518. For forms, see D. C. F. 571.

16. *Inquiry as to Settlements.*

An inquiry whether any and what settlements or agreements for a settlement were made or entered into before, upon or since the respective marriages of such of the testator's daughters as have married.—*Gale v. G.*, M. R., 25 Feb. 1871, A. 468; see note, *inf.* p. 1509.

17. *Inquiry as to Advances by Testator.*

An inquiry whether any and which of the children of the testator derived or received from him in his lifetime any and what sum of money, or other estates or property in the nature of an advancement in the world.—*Fearon v. Atkinson*, V.-C. M., 20 April, 1872, A. 1448.

18. *Inquiry as to Advances to Children of Intestate—Statute of Distribution (22 & 23 Car. II. c. 10), s. 5.*

An inquiry whether any and which of the children of the intestate have received any estate by settlement from the intestate, and the

value thereof, and whether any and which of the children of the intestate have been advanced by the intestate in his lifetime by portion, and what are the respective amounts of such advancements.—See *Re Ennis, Westerton v. E.*, 31 July, 1880, A. 1903; 28 W. R. 885.

19. *Inquiry as to Advances by Executors out of Shares.*

AN inquiry whether any and what payments or advances have been made by the Defts, or either of them (since the death of the testator's widow), to or on account of the children of the testator, or any and which of them, in respect of their shares in the testator's residuary estate (distinguishing payments and advances out of principal from those out of income).—*Re Edmonds, E. v. Granger*, V.-C. M., at Chambers, 1 July, 1876, A. 1925.

20. *Inquiry as to Advances generally.*

AN inquiry whether any and what advances or payments have been made to any and which of the testator's children on account of their respective shares and interests (in his estate), or the income thereof, or whether any and what deductions ought to be made from their respective shares, or the income thereof, distinguishing advances and payments and deductions from or out of principal from those from or out of income.—*Re Wetherhead, W. v. Cavalier*, V.-C. H., 16 Dec. 1876, B. 2055.

21. *Wilful Default.*

AN account of the intestate's [testator's] personal estate [not specifically bequeathed] received by the Deft B. the admor of &c. [or exor of &c.], or by any other person &c., or which without the wilful neglect or default of the Deft B. might have been so received.—*Edwards v. Griffiths*, V.-C. B., 29 Jan. 1875, A. 268.

For other Forms, and as to charging wilful default against trustees, see Chap. XLI., "TRUSTEES," p. 1157 *et seq.*

22. *Payment of Legacy on Admission of Assets.*

AND the Deft B., the exor of the will of the testator A., by his affidavit [or counsel, or solr], admitting assets of the testator, for the purposes of this action; [*If amount admitted*: And that the sum of £— is now due to the Plt C. for principal and interest in respect of £— bequeathed to him by the testator's will;] Let the Deft B., within one month from the date of this order, pay to the Plt C. the said sum of £—, with subsequent interest on the principal sum of £—, part

thereof, at the rate of £— p. c. per ann., from the — day of — to the day of payment, less income tax; [*If costs given*: And Let the Deft B. pay to the Plt C. his costs of this action, to be taxed &c.—Liberty to apply.] [*If amount not admitted*: Let an account be taken of what is due to the Plt C. for principal and interest in respect of the legacy of £— bequeathed to him by the testator's will.—Adjourn &c.]

For order declaring a previous order to be an admission of assets except so far as any deficiency might be caused by the Petr's claim, see *Brown v. Lake*, 1 D. & S. 150.

23. *The like—Feme Covert Legatee consenting—Payment to Husband less Duty.*

"AND the Deft W., the exor of the testatrix, by his counsel admitting assets of the testatrix for the purposes of this action, and the Plt E., the wife of the Plt. A., being present in Court and examined, and consenting and desiring that the legacy of £1,000 and interest hereinafter mentioned should be paid to her said husband; Let the Deft W., on or before &c., pay to the said A., in right of his said wife E., the sum of £900, being the amount of the legacy of £1,000 bequeathed to her by the will of the testatrix, less the sum of £100 for legacy duty paid thereon, together with the sum of £25 for interest on the said sum of £900, at the rate of £4 p. c. per ann."—No costs on either side.—Liberty to apply.—*Re Loveday, Aylmer v. Winterbotham*, V.-C. W., 25 Jan. 1858, B. 410.

24. *Deposit of Bonds in Court in Payment of Legacy.*

AND the Deft J. P. P. by his solr admitting assets to satisfy the Plt's legacy under the will of the testatrix, and admitting that he has purchased the Bonds hereinafter mentioned to secure and provide for such legacy, Let the Deft J. P. P. on or before &c. lodge in Court as directed in the schedule hereto the following Bonds (with the coupons attached thereto), namely: one Bond of the Victoria (Australia) Railway Loan (1899—1901) Four p. c. for five hundred pounds, numbered 13418, eight Bonds of the same issue for one hundred pounds each respectively numbered 2722 to 2729, both inclusive, one South Australian Government Four p. c. Bond (1894—1916) for two hundred pounds, numbered 1555, and ten South Australian Government Revenue Security (1876) Four p. c. Bonds, numbered 1127 to 1136, both inclusive; And it is ordered that the funds when so lodged be dealt with as directed in the said schedule; And Let the Deft J. P. P. pay the Plt's costs of action, Upon such lodgment and payment of costs stay all further proceedings in action.—Liberty for any persons interested in the said funds to apply.

LODGMET AND PAYMENT SCHEDULE.

In the High Court of Justice,
Chancery Division.

30th May, 1877.

Re Wück, Smithers v. Pocock. 1877. W. 116.

Ledger Credit as above. The legacy provided for the Plt G. C. S.
and his children, with remainders over.

I.—*Lodgment.*

Particulars of Funds to be Lodged.	Person to make the Lodgment.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
One Bond of the Victoria (Australia) Railway Loan (1899—1901) Four p. c. for £500, numbered 13418.	The Deft J. P. P.	500 0 0	
Eight Bonds of the same issue for £100 each, numbered 2722 to 2729, both inclusive.	The same	800 0 0	
One South Australian Government Four p. c. Bond (1894—1916) for £200, numbered 1555.	The same	200 0 0	
Ten South Australian Government Revenue Security (1876) Four p. c. Bonds, numbered 1127 to 1136, both inclusive.	The same	1,000 0 0	

II.—*Payment.*

Funds to be dealt with. Funds to be lodged as above.

Particulars of Payments, Transfers, or other operations ordered.	Payees, Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Pay interest as it accrues during the life of G. C. S. and during so long as he shall remain free to receive the same for his own use and benefit and shall not have assigned the same or any part thereof or anticipated the growing income thereof, and shall not have become bankrupt or entered into an arrangement with his creditors under any Act or Acts of Parliament relating to bankrupt or insolvent debtors, or otherwise have deprived himself of the personal enjoyment of the said income, the fact that the said G. C. S. has not become disqualified to receive the said interest to be verified by his affidavit.	The Plt. G. C. S...		

—See *Re Wück, Smithers v. Pocock*, M. R., 30 May, 1877, B. 1488.

N.B.—This form has been redrawn to suit S. O. F. R.

For inquiry if legacies or any part thereof were then due and payable, and if necessary to take an account of them, see *Campbell v. Graham*, 1 Russ. & M. 455.

25. *Costs of Action defended by leave under O. XVI, 9, made Costs of Administration.*

AUTHORIZE the Deft C. D. to defend in this action on behalf of all persons beneficially interested in the real estate of X.; And the Court being of opinion that the amount of the taxed costs paid by the Plt to the Plt in the action in the Queen's Bench Division of *Q. v. R. &c.*, and also the costs of the Plt of the same action, as between solr and client, ought to be allowed to the Plt as costs, charges and expenses properly incurred; Let it be referred to the taxing master to tax the costs of the Plt of the said action, and also his costs of this action as between solr and client, including in such taxation any charges and expenses properly incurred by him in relation to the execution of the trusts of the real estate devised by the will of X., and also to tax the costs of the Deft C. D. of this action as between solr and client; Let the Plt retain and pay as well the taxed costs so paid to the Plt in the said action of *Q. v. R.* as aforesaid as also all the said other costs when taxed, out of the moneys arising from the sale of the testatrix's real estate.—*Re Beddoe, Downes v. Cottam*, Kekewich, J., 28 April, 1892, A. 639.

Although this order was reversed on appeal, (1893) 1 Ch. 547, the form will serve in cases where it is applicable.

NOTES.

RIGHT TO JUDGMENT, OR ORDER FOR ADMINISTRATION.

By O. LV, 10, "it shall not be obligatory on the Court or Judge to pronounce or make a judgment or order, whether on summons or otherwise, for the admon of any trust, or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order."

Where a trustee of a creditor's deed appeared to be in default in three particulars, but no case of fraud or wilful default was established, the Court, in the exercise of its discretion under the rule, declined to order a common account, but gave judgment for the Plt for the three items of default: *Campbell v. Gillespie*, (1900) 1 Ch. 225.

By r. 10A, "Upon an application for admon or execution of trusts by a creditor or beneficiary, under a will, intestacy, or deed of trust, where no accounts, or insufficient accounts, have been rendered, the Court or a Judge may, in addition to the powers already existing:—

"(a) Order that the application shall stand over for a certain time, and that the exors, admors, or trustees, in the meantime, shall render to the applicant a proper statement of their accounts, with an intimation that if this is not done, they may be made to pay the costs of the proceedings:

"(b) When necessary, to prevent proceedings by other creditors, make the usual judgment or order, with a proviso that no proceedings are to be taken under any such judgment or order without leave of the Judge in person."

For instances of orders under clause (b) of these rules, see *sup.* p. 1468, Form 5 and notes thereto, and for an instance under clause (a), see *Re Fish, Bennett v. B.*, (1893) 2 Ch. 413, 427, C. A., Form 6, *sup.* p. 1468. Orders under clause (a) are not in general drawn up.

The Court will not make an order under r. 10 on a summons taken out in any action when the point raised upon the summons is one which should be

properly determined at the trial of the action: *Borthwick v. Ransford*, 28 Ch. D. 79.

As to the principles on which the Court will exercise its discretion under O. LV, 10, whether or not to make a general order for admon, see *Re Wilson, Alexander v. Calder*, 28 Ch. D. 457; *Re Blake, Jones v. B.*, 29 Ch. D. 913, C. A.

And that in the exercise of the discretion under the rule regard will be had to a direction by the testator, that his exors shall commence an admon action, see *Re Stocken, Jones v. Hawkins*, 38 Ch. D. 319, C. A., Form 13, *sup.* p. 1471, where the Court, thinking it right that the direction should be carried out, so as to make the infant children wards of Court, but desiring to save expense, made a limited order, directing an inquiry of what the estate then consisted.

And that an infant is not entitled, as a matter of right, to an admon judgment at the expense of the estate, see *Re Blake, sup.*, dissenting from *Re Wilson, sup.*

Allegations of fraud and wilful default ought, in general, to be disposed of at the hearing: *Smith v. Armitage*, 24 Ch. D. 727.

In general, the Court has declined to decide on the construction of a will before the accounts were taken: *Gaskell v. Holmes*, 3 Ha. 438, 447; unless the persons interested were all parties and *sui juris*, and waived the accounts, and the exors admitted assets for all purposes: *Say v. Creed*, 3 Ha. 455.

As to multifariousness, see *Pointon v. P.*, 12 Eq. 547; *Coates v. Legard*, 19 Eq. 56; and see O. XVIII, 2, *inf.* p. 1480.

A member of a class of possible future next of kin of a living person cannot maintain an admon action: *Re Parsons, Stockley v. P.*, 45 Ch. D. 51; *Fussell v. Dowding*, 27 Ch. D. 237; *Clowes v. Hilliard*, 4 Ch. D. 413; nor need they be served with the judgment: *Fowler v. James*, 1 Ph. 803; but a member of a contingent class, *e.g.*, surviving brothers and sisters of A., who will take if he dies without leaving issue, has a sufficient interest: *Peacock v. Colling*, 54 L. J. Ch. 743; 53 L. T. 620; 33 W. R. 528.

And the admor cannot avoid a judgment by alleging that Plt is illegitimate, and that search is being made for documents which would prove it: *Felstead v. Gray*, 18 Eq. 92.

In *Chancellor v. Morecroft*, 11 Beav. 262, trust funds received by a deceased exor, also a beneficiary, could not be recovered without a general admon suit.

If there is delay in prosecuting a judgment for general admon by a legatee or next of kin, leave may be given to a creditor to prosecute it: *Powell v. Wallworth*, 2 Madd. 183; *Sims v. Ridge*, 3 Mer. 464.

The Court will not interfere in favour of legatees till the debts are paid: *Exp. Sulter*, 2 Dick. 771; or the Court sees there is a clear fund: *Warter v. —*, 13 Ves. 94; and see "PAYMENT OUT," *inf.* p. 1503.

But a legatee may maintain an action within the year from the testator's death: *Prosser v. Mosser*, W. N. (81) 38; 29 W. R. 439.

The decree was made, though it was alleged by a Deft, and not denied on the pleadings, that the suit was collusive: *Humble v. Shore*, 3 Ha. 119.

Though accumulation is directed, or payment deferred, a legatee (whether an individual or a charity) can require payment, if entitled absolutely, as soon as he can give a discharge: *Saunders v. Vautier*, 4 Beav. 115; *Hilton v. H.*, 14 Eq. 468; *Wharton v. Masterman*, (1895) A. C. 186, H. L.; affirming C. A., (1894) 2 Ch. 184; *Re Thompson, Griffith v. T.*, 44 W. R. 582; and where a discretion is reposed in trustees for the exclusive benefit of a legatee absolutely, he may, on attaining full age, take the legacy free from the exercise of the discretion: *Re Johnston, Mills v. J.*, (1894) 3 Ch. 204; and see p. 1636, *inf.*

Exors filing a bill to ascertain Defts' rights in the residue, not asking, nor offering to account, but admitting a residue, the Court would not at the hearing direct an account: *Blathwayt v. Taylor*, 11 Sim. 455.

Matters not directly in issue might be proved by affidavit at the hearing, *e.g.*, the presence of a class of children: *Bush v. Watkins*, 14 Beav. 33; *Howard v. Chaffers*, 11 W. R. 585; *et sup.* Vol. I. p. 136. See now, O. XXXVII, 1.

One co-Plt in an admon suit being bound by a settled account, the Court would only direct accounts on the footing of that settlement: *Lambert v. Hutchinson*, 1 Beav. 277; and Plt was barred from administering the estate

of A. by having accepted benefits under B.'s will, which prohibited questioning an irregular execution of the trusts of A.'s will: *Egg v. Devey*, 10 Beav. 444; and see *Portlock v. Gardner*, 1 Ha. 594.

Where a decree had been made in an admon action on a will, probate of which was afterwards recalled, the Court of Appeal made an order dismissing the action: *Re Dean, D. v. Wright*, 21 Ch. D. 581, C. A.

As to the County Court jurisdiction, *v. sup.* p. 1396.

COURT FEES.

As to the Court fees on taking accounts of exors, admors, &c., see Order as to Fees, 1884, Sched. item, 72; and that, notwithstanding the words "found due" in the explanatory part of that item, the Court fees on a trustee's periodical accounts are taken on a percentage on the amounts found from time to time to have been received, see *Re Crawshaw, Dennis v. C.*, 39 Ch. D. 552.

Where an account is lodged, and no further step is taken, no Court fee is payable. Where an account is lodged, and partly proceeded with, but not certified, the Court fee is to be proportionate to the work done: *S. C.*

And as to the mode of calculating the fees, where separate accounts of receipts and payments of exors and of trustees are required, see *Armitage v. Elworthy*, 13 Ch. D. 191, C. A.

FORM OF ACCOUNT OF ANNUITIES—ADDITIONAL ACCOUNTS AND INQUIRIES.

An account of the anns involves an account of the arrears, and under this account the certificate now states what anns are given, and what is due for arrears.

For the provisions of O. XXXIII, 2, and O. XVI, 40, as to directing additional accounts and inquiries, see Vol. I. pp. 193, 194.

Under the old Cons. Ord. 35, r. 19, the Court, on an application by summons, might order further accounts and inquiries to be taken or made, and the application did not require to be supported with formal evidence: *Mutter v. Hudson*, 2 Jur. N. S. 34; 26 L. T. 116; but such accounts could not be ordered so as to go beyond the decree (*West v. Laing*, 3 Drew. 331), by charging wilful default (*Partington v. Reynolds*, 4 Drew. 253, *et sup.* p. 1162), or by deciding on an alleged admission of assets by the exor (*Re Wiltshire*, 8 W. R. 133), or directing inquiries as to conversion (*West v. Laing*, 3 Drew. 331), or adding after judgment in a partnership action an inquiry as to return of premium which might have been asked for at the hearing: *Edmonds v. Robinson*, 29 Ch. D. 170.

ADMINISTRATION ORDER ON ORIGINATING SUMMONS—O. LV, 3, 4.

By O. LV, 3, "The exors or admors of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, next of kin, or heir-at-law or customary heir of a deceased person, or as *c. q. t.* under the trust of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out, as of course, an originating summons returnable in the Chambers of a Judge of the Chancery Division for such relief of the nature or kind following, as may by the summons be specified and as the circumstances of the case may require (that is to say), the determination, without an admon of the estate or trust, or any of the following questions or matters:—

- "(a) any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or *c. q. t.*;
- "(b) the ascertainment of any class of creditors, legatees, devisees, next of kin, or others;
- "(c) the furnishing of any particular accounts by the exors or admors or trustees, and the vouching (when necessary) of such accounts:

- “(d) the payment into Court of any money in the hands of the exors or admors or trustees:
- “(e) directing the exors or admors or trustees to do or abstain from doing any particular act in their character as such exors or admors or trustees:
- “(f) the approval of any sale, purchase, compromise, or other transaction:
- “(g) the determination of any question arising in the admon of the estate or trust.”

By r. 4, “Any of the persons named in the last preceding rule may in like manner apply for and obtain an order for—

- “(a) the admon of the personal estate of the deceased:
- “(b) the admon of the real estate of the deceased:
- “(c) the admon of the trust.”

Upon such a summons the Court has the same jurisdiction as in an admon action, and may deal with the question of costs as in an ordinary admon action, although no estate or fund is sought to be administered: *Re Medland, Eland v. M.*, 41 Ch. D. 476, 492, C. A.; *Re Chapman's Estate, Fardell v. C.*, W. N. (86) 17.

But there is no jurisdiction to decide adversely any question which would not be so decided in an admon action; e.g., whether or not a sum standing in the widow's name belonged to the estate or was a gift to her: *Re Royle, R. v. Hayes*, 43 Ch. D. 18, C. A.; approving *Re Davies, D. v. D.*, 38 Ch. D. 210; or whether money has been rightly retained by the exor as a *donatio mortis causæ* to him by the testator: *Neilan v. Farrell*, 29 L. R. Ir. 12; or whether the reprieve of the testatrix was bound to account to the reprieve of A. for income of A. received by the testatrix: *Herrick v. Cooper* (1899), 1 I. R. 321; though the Court may entertain such questions when the parties consent to the jurisdiction: *Re Royle, sup.*

And an admon summons ought not to be used to obtain payment of a disputed debt, unless the question depends merely on a point of law: *Re Powers, Lindsell v. Phillips*, 30 Ch. D. 291, C. A.; or to obtain an order founded on breach of trust or inquiries pointing to wilful default: *Dowse v. Gorton*, (1891) A. C. 202; even as against Plts submitting to account: *Re Hengler, Frowde v. H.* (No. 2), W. N. (93) 37; *Re Stuart, Smith v. Stuart*, 74 L. T. 546 (q. v. as to the course to be adopted where on summons an inquiry as to breaches of trust has been directed and not objected to).

But a claim by an heir-at-law, named as devisee, to real estate as undisposed of, can be entertained: *Re Hargreaves, Midgley v. Tatley*, 43 Ch. D. 401, C. A.

A person who is not a creditor cannot proceed by originating summons, although if an admon order were made he might be entitled to prove under Jud. Act, 1875, s. 10: *Re Hargreaves, Dicks v. Hare*, 44 Ch. D. 236, C. A.

Whether a joint creditor of a partnership firm can so proceed for admon of the estate of a deceased partner, *quære*: *Re Barnard, Edwards v. B.*, 32 Ch. D. 447, C. A.

As to service of such a summons out of the jurisdiction, *v. sup.* Vol. I. p. 17.

The procedure under O. LV, in common with the former procedure under the Chancery Procedure Act, 1852 (15 & 16 V. c. 86), s. 5, does not apply to complicated cases: *Rump v. Greenhill*, 20 Beav. 512; *Re Giles, R. & P. Advance Co. v. Michell*, 43 Ch. D. 391, C. A.; *Re Powers, Lindsell v. Phillips*, 30 Ch. D. 291, C. A.; and other cases cited *sup.* Vol. I. p. 321.

But any question necessary for ascertaining what the personality consists of, e.g., the validity of a settlement, might be decided: *Wadham v. Rigg*, 2 Dr. & S. 78.

A suit against the Crown may be instituted by summons: *Polini v. Gray*, W. N. (74) 3.

ADMINISTRATION OF REALTY.

By O. LV, 4, an order may be made for the admon of the realty only.

And where, on the account being taken, it appeared that the estate consisted exclusively of realty, the exor, being a necessary party, was entitled to

his costs thereout: *Barry v. Hamilton*, 21 L. R. Ir. 11; and see now the provisions of the Land Transfer Act, 1897, *sup.* p. 1398.

An action can be sustained against the legal pers. reprieve for an account of rents wrongfully received by his testator, and if assets not admitted an account of the testator's estate: *Caton v. Coles*, 1 Eq. 581.

As to the destination of rents undisposed of by the will until the happening of an event, see *Re Moulem*, 18 Eq. 9; *Andrew v. A.*, 1 Ch. D. 410, C. A.; *Wade-Gery v. Handley*, 3 Ch. D. 374, C. A.; *Re Williams, Spencer v. Brighthouse*, 54 L. T. 831.

Where the disposition of the trust estate depends on the trustee's discretion, the Court will, in a proper action, inquire if such discretion has been fairly and honestly exercised, and not interfere while it is so, but where this might be liable to question, may, to avoid new actions, require it to be exercised under its own view: *Costabadie v. C.*, 6 Ha. 410; and see *A. G. v. Harrow Sch.*, 2 Vez. 551.

The Court cannot anticipate the time of sale directed by the will: *Johnstone v. Baber*, 8 Beav. 233; *Curlyon v. Truscott*, 20 Eq. 348.

Legatees failing to prove the existence of their primary fund for want of account books, the realty (being the secondary fund) was ordered to be sold to pay them, without prejudice to any claim or liability as to the primary fund: *Rowley v. Adams*, 7 Beav. 548.

The Court may sell in one lot properties subject to different trusts, and can apportion the purchase-money: *Cavendish v. C.*, 10 Ch. 319, *et sup.* p. 1126; and for later cases, see *Re Cooper*, 4 Ch. D. 802; *Tolson v. Sheard*, 5 Ch. D. 19, C. A.

By O. XVIII, 2, no cause of action is, unless by leave of the Court, to be joined with an action for the recovery of land except claims for mesne profits, or arrears of rent, or double value and damages for breach of the contract under which the premises are held, or for any wrong or injury to the premises claimed.

An objection to improper joinder of causes of action made at the trial is too late: *Re Derbon, D. v. Collis*, 36 W. R. 667; 58 L. T. 519.

Under this rule leave must be obtained to join in one action a claim to realty by construing a will, which formerly would have been the subject of ejectment, and for admon of the same testator's personalty: *Whetstone v. Lewis*, 1 Ch. D. 99; but see *Gledhill v. Hunter*, 14 Ch. D. 492, that an action to establish title to land not claiming possession is not an action for the recovery of land; and *sup.* Vol. I. p. 2; and a claim by heir-at-law and next of kin to recover realty in possession of admix, and to administer the personalty: *Kitching v. K.*, 24 W. R. 901. As to adding claim for a receiver, see *Allen v. Kennet*, 24 W. R. 845.

PARTIES.

By O. XVI, 33, it is provided that any residuary legatee or next of kin entitled to a judgment or order for the admon of the personalty, may have the same without serving the remaining residuary legatees or next of kin.

By r. 34, "Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold" may, without serving the others, have a judgment or order for the admon of the estate.

By r. 35, any residuary devisee or heir may, without serving any co-residuary devisee or co-heir, have the like judgment or order. By r. 36, any one of several *cs. q. t.* under any deed or instrument may, without serving any other of them, have a judgment for the execution of the trusts: see *Macleod v. Annesley*, 17 Jur. 608; 16 Beav. 200; *Jocoy v. James*, 9 Ha. lxxx.

By r. 38, any exor, admor, or trustee may obtain a judgment against any one legatee, next of kin, or *c. q. t.* for the admon of the estate or the execution of the trusts. All the exors, however, must be parties: *Latch v. L.*, 10 Ch. 464, *et sup.* pp. 1416, 1417.

By r. 39, in all the above cases the Court or Judge may require any other person or persons to be made a party or parties to the action, and may give the conduct of the action to such person as he may think fit, and may make

orders for placing the Deft on the record on the same footing in regard to costs as the other parties having a common interest with him.

By r. 40, the Court or a Judge may direct that any persons interested shall be served with notice of the judgment or order, and such persons shall then be bound by the proceedings as if they had been originally made parties, and shall be at liberty to attend the proceedings; and any person so served may within one month apply to the Court or Judge to discharge, vary, or add to the judgment or order. On the hearing of a suit by one legatee, others who are not made parties have no *locus standi*: *Lloyd v. Cross*, W. N. (71) 101.

By O. LV, 5, the persons to be served with the summons under rr. 3 and 4, in the first instance, shall be the following; (that is to say)—

A. Where the summons is taken out by an exor or admor or trustee—

- (a) For the determination of any question, under sub-sects. (a), (e), (f), or (g) of r. 3, the persons, or one of the persons, whose rights or interests are sought to be affected;
- (b) For the determination of any question, under sub-sect. (b) of r. 3, any member or alleged member of the class;
- (c) For the determination of any question, under sub-sect. (c) of r. 3, any person interested in taking such accounts;
- (d) For the determination of any question, under sub-sect. (d) of r. 3, any person interested in such money;
- (e) For relief under sub-sect. (a) of r. 4, the residuary legatees, or next of kin, or some of them;
- (f) For relief under sub-sect. (b) of r. 4, the residuary devisees, or heirs, or some of them;
- (g) For relief under sub-sect. (c) of r. 4, the *cs. q. t.* or some of them;
- (h) If there are more than one exor, or admor, or trustee, and they do not all concur in taking out the summons, those who do not concur.

B. Where the summons is taken out by any person other than the exors, admors, or trustees, the said exors, admors, or trustees.

Further inquiries may be added after Master's certificate filed: *Reeve v. R.*, W. N. (71) 52.

Trustees of a settled share of residue may be brought before the Court by notice of the judgment: *White v. Steward*, W. N. (66) 83.

Notice of the judgment binds the interest of the person served in the subject-matter of the suit, but does not make him a party for all purposes, such as a motion for injunction against him in the suit: *Walker v. Seligmann*, 12 Eq. 152; and see *Re Parkes, Simpson v. P.*, 66 L. T. 151.

Persons served with notice of the judgment, but not attending proceedings, need not have notice before the Master's certificate is signed: *Green v. Measures*, W. N. (66) 122; and persons abroad once served are affected with notice of all the subsequent proceedings: *Lee v. Sturrock*, W. N. (76) 226.

By O. LV, 27, the appointment of a guardian *ad litem* in the case of an infant or person of unsound mind so served is provided for. O. XVI, 43, provides for the form of the notice of the decree or order.

For the mode in which the directions of the Court are obtained, as to what parties are to be served with the order or decree, and service of infants, see *De Balinhard v. Bullock, Clarke v. C.*, 9 Ha. xiii.

An order was made for leave for persons not parties to appear at the hearing: see *Lewis v. Clowes*, 10 Ha. lxii.

For the practice where a party served objected to the decree, see *Kidd v. Cheyne*, 18 Jur. 348; 2 W. R. 316; 2 Eq. Rep. 475.

For form of order in a beneficiary's action, where an exor who had not proved at first afterwards came in and proved, see *Re Dracup, Field v. D.*, W. N. (92) 43.

By O. XVI, 8, trustees, exors, and admors may sue and be sued on behalf of or as representing the property or estate of which they are trustees or represes without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may at any stage of the proceedings order any such persons to be made parties either in addition to or in lieu of the previously-existing parties.

By O. XVI, 9, any one or more of numerous parties having the same interest may sue or be sued, or may be authorized by the Court to defend on behalf or for the benefit of all.

Interested persons not made parties, whose rights may be affected by an order directing accounts and inquiries, are not bound by that order (at any rate when they ought to be served) unless served with notice of it, or order made appointing a member of their class to represent them in the action: *May v. Newton*, 34 Ch. D. 347.

As to the practice of the Court generally in reference to binding absent parties in an admon action, see *S. C.*

Where it was impossible without an inquiry to ascertain who were the next of kin, the Court appointed the legal pers. represve of the exor and trustee to represent them: *Re Hake, Pownall v. Pryor*, W. N. (95) 116.

Where, under O. XVI, 46, the Court has dispensed with the represve or appointed a person to represent the estate, the order should show this on its face: *Re Richerson, Scales v. Heyhoe*, (1893) 3 Ch. 146.

And as to representation orders, *v. sup.* Vol. I. p. 119.

Persons having notice of the decree cannot be treated as co-Plts, but at most as Defts, and they are only entitled to such inquiries as they could have had as co-Defts: *Whitney v. Smith*, 4 Ch. 513; and see Jud. Act, 1873, s. 24 (3).

A purchaser of real estate in no way affected by the judgment, having been served with it, was right in appearing, and entitled to have his appearance vacated, with all costs to be paid by the Plts who served him: *Re Symons, Betts v. B.*, 54 L. T. 501.

As to making an exor who has distributed the estate a party to proceedings with reference to it, see Sect. XXVIII., "REFUNDING LEGACIES," *inf.* pp. 1657 *et seq.*

Where an exor abroad remitted a clear fund for distribution among legatees, the Court determined their rights in a suit to which the consignee was a party, but not the exor: *Arthur v. Hughes*, 4 Beav. 506.

Some residuary legatees being out of the jurisdiction, the Court made a declaration of right as to the others only: *Morley v. Rennoldson*, 2 Ha. 570; *Mores v. M.*, 6 Ha. 125, where the absentee's legacy was ordered into Court, and an inquiry directed as to him; and see the three courses open to the Court in such case: *Ib.*; and see *Simmons v. S.*, *Ib.* 360.

O. XVI, 6, enabling Plt to proceed against one or more persons severally, or jointly and severally, liable, does not, *semble*, apply to an admon action, so as to enable a Plt to sue one exor alone for admon of the estate: see *Hall v. Austin*, 2 Coll. 570, *et v. sup.* p. 1416.

The assignee of a Deft residuary legatee, before service of the bill, had to be made a party: *Humble v. Shore*, 3 Ha. 119.

One exor may proceed against the other alone for account and payment of money due from him to the estate: *Peake v. Ledger*, 8 Ha. 313; but see cases cited, *sup.* p. 1139.

One of two exors having absconded, the other sued a mortgagor, and the Court refused, on the application of the Deft, to add the absconding exor as party: *Drage v. Hartopp*, 28 Ch. D. 414.

Legatees and annuitants are bound by proceedings in an admon action between exors, residuary legatees, and devisees: *Jennings v. Paterson*, 15 Beav. 28.

And as the exor fully represents the estate in a suit by a creditor, leave cannot be given to a residuary legatee to appeal from a decree made against the exor: *Re Youngs, Doggett v. Revett*, 30 Ch. D. 421, C. A.

And where the question was whether a debt was payable out of income or out of corpus, the exor sufficiently represented the estate without joining the reversioners: *Re Ward, Bemment v. Bulls*, 47 L. J. Ch. 781.

A receiver in an admon action will not be permitted to carry on another admon action in the name of a bankrupt exor or admor: *Re Hopkins, Dowd v. Hawtin*, 19 Ch. D. 61, C. A.

The trusts of a document may be partially executed: *Parnell v. Hingston*, 3 Sm. & G. 337; *Abrey v. Newman*, 17 Jur. 153; 10 Ha. App. lviii.; 22 L. J. Ch. 827; and a suit was confined to property of which testator was a trustee for a firm of which he was a partner: *Prentice v. P.*, 10 Ha. xxii.

As to bringing before the Court mortgagees *pendente lite* of shares in the estate, see *Freeman v. Pennington*, 3 D. F. & J. 295; *Brandon v. B.*, 3 N. R. 287.

As to the necessity for making the legal pers. reprieve a party to an admon action, *v. sup.* p. 1416.

CLASSIFICATION ORDER.

By O. LV, 40, "Where, upon the hearing of the summons to proceed, or at any time during the prosecution of the judgment or order, it appears to the Judge, with respect to the whole or any portion of the proceedings, that the interests of the parties can be classified, he may require the parties constituting each or any class to be represented by the same solr, and may direct what parties may attend all or any part of the proceedings, and where the parties constituting any class cannot agree upon the solr to represent them, the Judge may nominate such solr for the purpose of the proceedings before him; and where any one of the parties constituting such class declines to authorize the solr so nominated to act for him, and insists upon being represented by a different solr, such party shall personally pay the costs of his own solr of and relating to the proceedings before the Judge, with respect to which such nomination shall have been made, and all such further costs as shall be occasioned to any of the parties by his being represented by a different solr from the solr so to be nominated."

GENERAL PECUNIARY BEQUESTS.

In an action by a single legatee for his own legacy, unless the pers. reprieve of the testator, by admitting assets, warrants a personal judgment against himself, the Court will direct a general account of all the legacies, and payment of the legacy claimed, rateably only with the rest, no preference being allowed: *Mitt. Pl.* 168; and a legatee's suit is taken to be for himself and others, whether so expressed or not: *Thomas v. Jones*, 1 Dr. & S. 134.

The Plt is not a judgment creditor, within the Judgments Act, 1864 (27 & 28 V. c. 112), of the Deft exor who has disobeyed an order for payment into Court of money due from him: *Johnson v. Burgess*, 15 Eq. 398.

A legatee is entitled to an explanation of the assets, and inspection of the accounts, but not to a copy at the expense of the estate: *Ottley v. Gilby*, 8 Beav. 602; and see *Thompson v. Dunn*, 5 Ch. 573, *et sup.* Vol. I. p. 88.

In *Day v. Croft*, 14 Beav. 29, after decree, though the parties were numerous and the expenses great, the Court would not exclude any residuaries from attending on taking the accounts. *Secus*, as to a Deft who had no interest in the result: *Pearce v. Crutchfield*, 16 Ves. 48.

A Deft made a party to a suit, only in respect of an annuity charged on the real estate, was not allowed costs of attendances: *Tharp v. T.*, 3 Mer. 510.

On inquiry as to incumbrances on shares, a Deft could impeach an alleged assignment by him: *Lennard v. Curzon*, 1 D. & S. 350.

A bequest to make good testator's debts unpaid in bankruptcy did not lapse as to predeceasing creditors, but was liable to legacy duty: *Turner v. Martin*, 7 D. M. & G. 429; as to interest, see *Askew v. Thompson*, 4 K. & J. 620.

As to the exor's right when sued for a legacy to set off sums due from the legatee to the estate, see Sect. XXVI., *inf.* p. 1652 *et seq.*

WILL IN EXECUTION OF POWER.

By the Land Transfer Act, 1897 (60 & 61 V. c. 65), s. 1, sub-ss. 1 and 2 (*v. sup.* p. 1397), it is in effect provided that any real estate over which a person executes by will a general power of appointment, shall, notwithstanding any testamentary disposition, devolve to and become vested in his pers. represes or reprieve from time to time as if it were a chattel real vesting in them or him.

By the Wills Act, s. 27, general bequests are to execute general powers of appointment unless a contrary intention appears. Under this section general pecuniary legacies were held payable out of a fund which a *feme sole* had a general power to appoint by will: *Hawthorn v. Shedden*, 3 Sm. & G. 293;

Wilday v. Barnett, 6 Eq. 193; *Re Wilkinson*, 4 Ch. 587; 8 Eq. 487; *Hayes v. Oatley*, 14 Eq. 1; and see *Re Davies*, 13 Eq. 163; *Williams v. W., Re Hartley*, (1900) 1 Ch. 152, *et inf.* p. 1674.

When a power otherwise general requires that the appointor should expressly refer to it, a bequest not referring to the power will not operate as an execution of it under sect. 27 of the Wills Act: *Phillips v. Cayley*, 43 Ch. D. 222, C. A. (overruling *Re Marsh, Mason v. Thorne*, 38 Ch. D. 630); *Charles v. Burke*, 60 L. T. 380; 43 Ch. D. 223, n.; W. N. (88) 244; *Re Tarrant's Trusts*, 58 L. J. Ch. 780; *Re Davies, D. v. D.*, (1892) 3 Ch. 63.

And a power to appoint to any person "except A." is not a general power within sect. 27; but *semble*, it may become so by the death of A. before the power is exercised: *Re Byron's Settlement, Williams v. Mitchell*, (1891) 3 Ch. 474.

A general devise of real estate will not, *per se*, amount to an exercise of a power of revocation and new appointment contained in a previous deed made in exercise of a general power to appoint by deed or will: *Re Brace, Welch v. Colt*, (1891) 2 Ch. 671; *Charles v. Burke*, 43 Ch. D. 223, n.; or reserved to the donee by the original instrument creating the power: *Re Goulding's Settlement*, W. N. (1900) 51; 48 W. R. 183.

A general gift or a gift in execution of all powers, may operate as an exercise of a power subsequently created: see *Re Old, Pengelly v. Herbert*, 54 L. T. 677; *Boyes v. Cook*, 14 Ch. D. 53, C. A.; *Airey v. Bower*, 12 App. Ca. 263; but a general gift of property over which the testator should have a disposing power did not operate as an exercise of a special power of appointment to a widow conferred by a subsequent will: *Re Hayes, Turnbull v. H.*, (1900) 2 Ch. 332; W. N. (01) 175, C. A.; 49 W. R. 659.

A general power to appoint by will by way of mortgage or charge is not exercised by a general gift in the will not referring to the power or otherwise shewing an intention to charge: *Re Wallinger's Estate* (1898), 1 I. R. 139, O. A. And a general gift in favour of a wife will not operate as an exercise of a special power to appoint income of real estate to her: *Re Williams, Foulkes v. W.*, 42 Ch. D. 93, C. A.; *Re Mills, M. v. M.*, 34 Ch. D. 186.

A fund appointed by a married woman to a person who died in her lifetime passed as in default of appointment: *Re De Lusi's Trusts*, 3 L. R. Ir. 232, following *Re Davies' Trusts*, 13 Eq. 163. And an appointment under a general power was held to make the appointed property part of the property of the appointor for all purposes, so that lapsed shares passed to her next of kin: *Re Ickeringill, Hinsley v. I.*, 17 Ch. D. 151; and see *Willoughby Osborne v. Holyoake*, 22 Ch. D. 238; disapproving *Hoare v. Osborne*, 33 L. J. Ch. 586; 12 W. R. 66.

Upon the question how far general words in a will expressing an intention to exercise all powers are sufficient to make the will operate as an execution of a special power, see *Re Cotton, Wood v. C.*, 40 Ch. D. 41; *Von Brockdorff v. Malcolm*, 30 Ch. D. 172; *Re Boyd, Neild v. B.*, 63 L. T. 92; *Re Davies, D. v. D.*, (1892) 3 Ch. 63; *Re Rickman, Stokes v. R.*, 80 L. T. 518; *Re Milner, Bray v. M.*, (1899) 1 Ch. 563; *Re Rew, R. v. Wippell*, (1899) 2 Ch. 536; *Re Hodgson, Darley v. H.*, (1899) 1 Ch. 666; *Re Mayhew, Spencer v. Cutbush*, (1901) 1 Ch. 677.

The word "appoint" being used, and it being shewn that the testatrix had one special power and no other, the power was held to be exercised: *Re Mayhew, sup.*

As to execution by a document "purporting to be" a will, see *Re Broad, Smith v. Draeger*, (1901) 2 Ch. 86.

A codicil confirming a will may have the effect of giving validity to the will as an appointment: *Re Blackburn, Smiles v. B.*, 43 Ch. D. 75.

ADMISSION OF ASSETS—ASSENT TO BEQUEST.

If the exor or admor has, by admitting assets or assenting to a legacy, made himself personally liable to pay the debt or legacy, payment is ordered without taking the accounts, whether in the case of a creditor (*Woodgate v. Field*, 2 Ha. 211) or pecuniary legatee (*Whittle v. Henning*, 2 Beav. 396), and in the case of a specific legatee, delivery of the legacy is ordered: see Sect. XXII., "SPECIFIC BEQUESTS," *inf.* p. 1609.

If one of several exors admits assets, an account may still be directed against the others: *Norton v. Turvill*, 2 P. Wms. 145.

Admission of assets does not prevent the exor from disputing the debt: *Re Beynon*, W. N. (73) 186. As to disputing Plt's right to arrears of annuity, see *Roch v. Callen*, 6 Ha. 531.

Exors have been held to have rendered themselves liable by various acts of admission or assent: see *Barnard v. Pumfrett*, 5 My. & C. 63, and cases there cited; *Dinsdale v. Dudding*, 1 Y. & C. C. 265; *Rogers v. Soutten*, 2 Keen, 598; *Crowe v. Menton*, 28 L. R. Ir. 519; Wms. Exors. 1893. By letters or memoranda: *Holland v. Clark*, 1 Y. & C. C. 151; 2 Y. & C. C. 319; *Payne v. Tanner*, 55 L. J. Ch. 611; 55 L. T. 258; W. N. (86) 112. By a promise to pay, acted on by the legatee: *Hutton v. Rossiter*, 7 D. M. & G. 9. By paying interest on the legacy: *A. G. v. Higham*, 2 Y. & C. C. 634; *A. G. v. Chapman*, 3 Beav. 255 (but see *Rowley v. Adams*, 7 Beav. 395, *et inf.*); notwithstanding the passing of a residuary account showing no available assets: *Payne v. Tanner*, *sup.* By making payments on account: *Payne v. Little*, 22 Beav. 69. By crediting the legatee with the amount of the legacy in partnership books: *Townend v. T.*, 1 Giff. 201; 5 Jur. N. S. 506 (but not if the accounts were expressly kept open: *Hutton v. Rossiter*, 7 D. M. & G. 9). Or by passing a residuary account showing a sufficient fund: *Whittle v. Henning*, 2 Beav. 396; *Brewster v. Prior*, 55 L. T. 771; 35 W. R. 251; and giving the legatee the receipt for duty on his legacy: *Lazonby v. Rawson*, 2 Sm. & G. 267; but this is not conclusive: *Hutton v. Rossiter*, 7 D. M. & G. 9; and see *Miller v. Douglas*, 56 L. J. Ch. 91; 35 W. R. 122; 55 L. T. 583; and the mere fact that an exor has made general payments to or for a legatee of leaseholds and other property not specially out of or on account of the rents is not sufficient to prove an assent: *Thorne v. T.*, (1893) 3 Ch. 196.

An admission of assets by answer in Chancery, in a suit asking that the accounts might be taken, did not entitle the Plt to an immediate decree for payment: *Savage v. Lane*, 6 Ha. 32; *Thwaites v. Foreman*, 1 Col. 409; and see *Wall v. Bushby*, 1 Bro. C. C. 484.

Such acts or admissions may be explained away as made by mistake (which must be clearly shown: *Drewry v. Thacker*, 3 Sw. 548); or otherwise: *Hutton v. Rossiter*, 7 D. M. & G. 9, *et sup.*; *Postlethwaite v. Mounsey*, 6 Ha. 33, n.; *Rowley v. Adams*, 7 Beav. 395; *Miller v. Douglas*, *sup.*; and mere payment of one legacy, without regard to the state of the assets, is no admission of assets to pay the others: *S. C.*; *Cadbury v. Smith*, 9 Eq. 37; but see *Cook v. Martyn*, 2 Atk. 2; but it is otherwise as to payment of shares of residue: *Dinsdale v. Dudding*, 1 Y. & C. C. 265.

An exor is not bound by an admission of assets made on an erroneous construction of the will: *Clark v. Bates*, 2 D. & S. 203; nor where new claims afterwards arise: *Payne v. Little*, 22 Beav. 69; and see *Brown v. Lake*, 1 D. & S. 144, *et sup.*; or assets are lost without his default: *Horsley v. Chaloner*, 2 Vez. 83, 85.

Statements in a residuary account do not necessarily constitute, as against exors, an admission of assets for payment of all legacies in full: *Morewood v. Currey*, 28 W. R. 213.

Payments to beneficiaries, for which the estate was at the time sufficient, will be allowed, although the estate afterwards becomes insufficient: *Lloyd v. L.*, 23 W. R. 787; *Re Bacon's Settlement*, *Hutton v. Anderson*, 42 Ch. D. 559; and *v. inf.* p. 1487.

In *Heves v. H.* 4. Sim. 1, an exor who had received nothing, was allowed to correct an inadvertent admission of joint receipts with his co-exor; and, in *Holland v. H.*, V.-C. E., 24 Feb. 1844, A. 619, exors were allowed, on their affidavit, and with Plt's consent, to file supplemental answer, to reduce the amount admitted by answer by mistake; but see *Maddeford v. Austwick*, 11 Sim. 209.

An exor charging himself, on examination, with aggregate amounts, subject to deductions, should be charged only with the difference, subject to the deductions being impeached: *Inge v. Kenny*, 4 Ha. 452; and is not liable to pay in what he states by answer is retained for a debt to himself: *Middleton v. Poole*, 2 Col. 246.

Exors, who have admitted assets for a legacy, are also liable for any interest payable on it: *Dinsdale v. Dudding*, 1 Y. & C. C. 265; *Rogers v. Soutten*, 2 Keen, 598; *Horsley v. Chaloner*, 2 Vez. 83. But see *Davenport v. Stafford*, 14 Beav. 319; 2 D. M. & G. 901.

An admission of assets for legacies is so for costs: *Philanthropic Soc. v. Hobson*, 2 My. & K. 357; *Roch v. Callen*, 6 Ha. 531; or debts: *Dinsdale v. Dudding*, 1 Y. & C. C. 265.

Where A., the exor of B., died, his exor could not, after proving his will, renounce the exorship under B.'s will: *Brooke v. Haymes*, 6 Eq. 25.

Exors of an exor admitting assets, are liable to the same extent he would have been, if living, in respect of his testator's assets: *Davenport v. Stafford*, 2 D. M. & G. 901.

Where A.'s residuary estate has devolved on B., the exors of A. should be parties to an action to administer B.'s estate, and the account of both estates be taken in one action: *Young v. Hodges*, 10 Ha. 158; and see *Cowman v. Harrison*, *Id.* 234.

On assenting to a bequest, given them in trust, exors become trustees of it: *Dix v. Burford*, 19 Beav. 409, 412; but by merely assenting to a legacy, as by signing a residuary account, an exor does not convert himself into a trustee: *Re Rowe*, 58 L. J. Ch. 703; 61 L. T. 581; and the right to recover such legacy will be barred in twelve years, under 37 & 38 V. c. 57: *Re Davis, Evans v. Moore*, (1891) 3 Ch. 119, C. A.

In the case of a legatee of residue, the assent of the exor is as effectual as in the case of a specific or general legatee, and no assignment is necessary to perfect the title of the residuary legatee, and the consent of the exor as to part only is good as to that part: *Austin v. Beddoe*, W. N. (93) 78.

Assent to devise and transfer to heir or devisee.—By the Land Transfer Act, 1897 (60 & 61 V. c. 65), s. 3 (1): "At any time after the death of the owner of any land, his pers. represves may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the pers. represves are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the pers. represves are liable to pay, all liabilities of the pers. represves in respect of the land shall cease, except as to any acts done, or contracts entered into by them before such assent or conveyance."

(2.) "At any time after the expiration of one year from the death of the owner of any land, if his pers. represves have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the pers. represves, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the pers. represves."

(3.) "Where the pers. represves of a deceased person are registered as proprietors of land on his death, a fee shall not be chargeable on any transfer of the land by them unless the transfer is for valuable consideration."

(4.) "The production of an assent in the prescribed form by the pers. represves of a deceased proprietor of registered land shall authorize the registrar to register the person named in the assent as proprietor of the land."

As to the effect of a conveyance by exors expressly made subject to a charge as mentioned in s. 3 (1), see *Re Cary and Lott*, 70 L. J. Ch. 653; 84 L. T. 859.

As to the right of the represve to give an assent in preference to conveying, see *Re Pix*, W. N. (01) 165.

APPROPRIATION OF LEGACY.

An exor has, *ex officio*, and without express authority, power to agree with a legatee to appropriate to him a specific portion of the estate: *Re Lepine, Dowsett v. Culver*, (1892) 1 Ch. 210, C. A.

Where a fund had been severed from the assets, the exor became trustee, and interest was allowed beyond six years, the case not being within the 3 & 4 W. IV., c. 27: *Phillipo v. Munnings*, 2 My. & C. 309; and see *Mudlow v. Bigg*, 18 Eq. 246; 1 Ch. D. 385, C. A.; *Re Smith, Henderson-Roe v. Hitchins*, 42 Ch. D. 302, *et inf.* p. 1505. Where debts were to be paid, and English exors to transmit the residue (which was given to residents in Italy) to co-exors there, the latter became trustees of the fund: *Weatherby v. St. Giorgio*, 2 Ha. 624; and as to appropriation, and the merger of exor in trustee, see *Willmott v. Jenkins*, 1 Beav. 404; *Davenport v. Stafford*, 14 Beav. 319, 331; *Pothecary v. P.*, 2 D. & S. 738; *Lewin*, 218.

An exor paying over the residue was not entitled against appropriated legacies to costs of proceedings as to a subsequent debt: *Noble v. Brett*, 26 Beav. 233; 5 Jur. N. S. 4.

An assignee of a legacy or share of residue may sue for admon at any time before it is set apart as appropriated: *Cufe v. Bent*, 5 Ha. 24.

Until the funds are carried to separate accounts, the testator's represves must be parties: *Salmon v. Anderson*, 9 Beav. 445, 449. In *Handley v. Metcalfe*, 9 Beav. 495, a fund was carried to several contingent accounts, to save the expense of serving different parties, and this is often done; and as to carrying funds in Court to separate accounts, *v. sup.* Vol. I. p. 244.

A direction for payment from a particular fund amounts to a declaration that the fund is liable, and for interest directed to be computed: *Davis v. Browne*, 14 Beav. 127, 128.

A legacy having been handed over to trustees for the tenant for life, and then to fall into the residue, the reversion was treated as so much assets unadministered: *Pennington v. Buckley*, 6 Ha. 451, 457; and exors and trustees, assigning a lease to themselves and a new trustee, became trustees only: *Smith v. S.*, 1 Dr. & S. 384; 7 Jur. N. S. 652.

An exor may appropriate a mortgage to pay a legacy directed to be put out on mortgage: *Ames v. Parkinson*, 7 Beav. 379; unless the security is deficient: *Ib.* 384; and see *Re Murray*, W. N. (68) 195.

Where an exor agreed to appropriate a mortgage to a share of residue, and handed over the mortgage deed to the residuary legatee, but executed no transfer, the appropriation was held complete: *Re Lepine, Dowsett v. Culver*, (1892) 1 Ch. 210, C. A.

An exor assenting unconditionally to a specific bequest of a lease is not entitled to an indemnity from the general estate as to the covenants: *Shadbolt v. Woodfall*, 2 Col. 30; and as to implying such assent, see *Cole v. Miles*, 10 Ha. 179; *Re Charig, Abrahams v. C.*, W. N. (89) 91; and as to indemnity as to leaseholds, see Sect. VIII. *inf.* p. 1527.

Exors or trustees *virtute officii* may appropriate specific assets or investments to a trust share of residue, or transfer them to the legatee of a share, or to one of themselves *bonâ fide* as legatee, before the period of final division without making any corresponding appropriation to the other shares: *Re Nickels, N. v. N.*, (1898) 1 Ch. 630 S.; *Re Richardson, Morgan v. R.*, (1896) 1 Ch. 512; and see *Taylor v. London & County Bk.*, C. A., (1901) 2 Ch. 231.

And as the doctrine of appropriation is based on sale and set-off, it applies to chattels real, and to real estate which is subject to a trust for sale: *Re Beverly*, (1901) 1 Ch. 681.

When an appropriation has been validly made in respect of specific or pecuniary legacies, the legatees must bear any loss arising from the diminution of the fund set apart: *Fraser v. Murdock*, 6 App. Ca. 855, 865, 878; *Re Waters, Preston v. W.*, W. N. (89) 39; *Lewin*, 688 n.; and so as between shares of residue settled and unsettled: *Re Richardson, Morgan v. R.*, *sup.*; *Re Nickels, sup.*; *Re Lepine, Dowsett v. Culver*, (1892) 1 Ch. 210, C. A. In the absence of appropriation to their legacies, legatees must be paid in full before the residuary legatee receives anything: *Baker v. Farmer*, 3 Ch. 537; and see *Re Lyne, Sands v. L.*, 8 Eq. 482. Where the exor and trustee invested shares of infants, and misapplied them after having paid the others, assets falling in afterwards went first to make up the infants' shares: *Willmott v. Jenkins*, 1 Beav. 401.

And after exors have appropriated assets to meet a legacy, they cannot retain or impound any part to meet a debt due from the legatee to the testator: *Ballard v. Marsden*, 14 Ch. D. 374; but there is no rule whereby a legatee whose legacy has not been severed is entitled, as against a beneficiary who is also trustee, to share in the increased value of the investments of the general estate: *Re Campbell, C. v. C.*, (1893) 3 Ch. 468.

An appropriation by means of an unauthorized investment in respect of a trust legacy is invalid: *Re Waters, sup.*; and see *Lewin*, 653.

Assent to life estates in leaseholds is assent to the estates in remainder: *Stevenson v. Mayor of Liverpool*, L. R. 10 Q. B. 81.

And as to the exor's assent to legacies, see Wms. Exors. 1225 *et seq.*; and as to appropriation of legacies payable *in futuro*, *Ib.* 1256.

Appropriation of land in satisfaction of legacy or share in estate.—By the Land Transfer Act, 1897 (60 & 61 V. c. 65), s. 4 (1): "The pers. represves of a deceased person may, in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person, or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the

consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the Court, and such valuation and appropriation shall be conclusive save as otherwise directed by the Court."

(2.) "Where any property is so appropriated a conveyance thereof by the pers. represes to the person to whom it is appropriated shall not, by reason only that the property so conveyed is accepted by the person to whom it is conveyed in or towards the satisfaction of a legacy or a share in residuary estate, be liable to any higher stamp duty than that payable on a transfer of personal property for a like purpose."

(3.) "In the case of registered land, the production of the prescribed evidence of an appropriation under this section shall authorize the registrar to register the person to whom the property is appropriated as proprietor of the land."

The section applies to personal as well as real estate, and does not take away from exors and trustees any existing power of appropriation, where there is a trust for sale and conversion: *Re Beverly*, (1901) 1 Ch. 681.

STATUTES OF LIMITATIONS.

By the Real Property Limitation Act, 1833 (3 & 4 W. IV. c. 27), s. 40, *sup.* p. 1436, the right to recover any legacy was barred after twenty years.

By the Jud. Act, 1873 (36 & 37 V. c. 66), s. 25, sub-s. 2, no claim by a c. q. t. against his trustee in respect of any breach of an express trust shall be barred by any Statute of Limitations.

By the Real Property Limitation Act, 1874 (37 & 38 V. c. 57), s. 8, the period of limitation after 1st Jan. 1879, is reduced to twelve years; and a legacy, or gift of residue amounting to a legacy, will now be barred in twelve years in the absence of an express trust; a mere constructive trust will not prevent the statute being a bar: *Re Davis, Evans v. Moore*, (1891) 3 Ch. 119, C. A.; *Re Barker, Buxton v. Campbell*, (1892) 2 Ch. 491; and as to the effect of the Trustee Act, 1888 (51 & 52 V. c. 59), s. 8, see *Lewin on Trusts*, 1079 *et seq.*; *Re Swain, S. v. Bridgeman*, (1891) 3 Ch. 233, *sup.* p. 1156; *Went v. Campain*, 9 Times L. R. 254; *Re Page, Jones v. Morgan*, (1893) 1 Ch. 304. By sect. 10 of the 37 & 38 V. c. 57, no money or legacy charged on any land or rent shall, though secured by an express trust, be recoverable but within the time allowed for recovery had there been no express trust. This enactment applies as between the land charged and the persons entitled to the charge, while 36 & 37 V. c. 66, s. 25, sub-s. 2, applies as between trustee and c. q. t.: *Fearnside v. Flint*, 22 Ch. D. 579; *Hughes v. Coles*, 27 Ch. D. 231.

The 3 & 4 W. IV. c. 27, s. 40, applies to legacies payable out of personality, as well as to legacies charged on real estate: *Sheppard v. Duke*, 9 Sim. 567; *Christian v. Devereux*, 12 Sim. 264; *Watson v. Birch*, 15 Sim. 523; *Henry v. Smith*, 2 D. & War. 391; *Bullock v. Downes*, 9 H. L. C. 1, 14; and to a share of residue: *Prior v. Horniblow*, 2 Y. & C. Ex. 201; *Christian v. Devereux, sup.*; and as to part of the residue which came to the exor's hands more than twenty years before, but not as to the rest: *Adams v. Barry*, 2 Coll. 290; *Larkins v. Phipps*, W. N. (73) 207, *sup.* Form 11, p. 1471; and see *Binns v. Nichols*, 2 Eq. 256. And although the exor has died without paying the legacy, and has charged his realty with his debts: *Piggott v. Jefferson*, 12 Sim. 26; and see *Briggs v. Wilson*, 5 D. M. & G. 12; *secus*, where there is an express trust: *Thomson v. Eastwood*, 2 App. Ca. 215; *Ward v. Arch*, 12 Sim. 472; *Cresswell v. Dewell*, 4 Giff. 460; 12 W. R. 123; until after 1st Jan. 1879: see 37 & 38 V. c. 57, s. 10, *sup.* As to what is an express trust, see *Thomson v. Eastwood*, 2 App. Ca. 215; *Re Barker, sup.*; and see p. 1154, *sup.*

By the Law of Property Amendment Act, 1860 (23 & 24 V. c. 38), s. 13, the application of 3 & 4 W. IV. c. 27, s. 40, was extended to proceedings to "recover the personal estate, or any share of the personal estate," of any person dying intestate. The section is retrospective, and therefore the right of next of kin to general admon of the estate of an intestate, who died in 1848, was barred at the end of twenty-one years from the death; but as regards particular assets there is no "present right to receive" within the Act until they have been actually recovered by the admor: *Re Johnson, Sly v. Blake*, 29 Ch. D. 964; but part payment out of a particular asset will not revive the right to sue for general admon: *S. C.*

Legacies charged on realty subject to prior charges are not affected by time so long as those charges subsist: *Faulkner v. Daniel*, 3 Ha. 212; and in *Ravenscroft v. Frisby*, 1 Coll. 16, legacies charged on realty were held payable after more than forty years.

The statute was held not to apply to lapse of time after the Chief Clerk's certificate finding the legacies due, and order on further consideration giving liberty to apply for payment: *Prowse v. Spurgin*, 5 Eq. 99.

While the same person was exor of two estates, the statute did not run against a debt due from one estate to another: *Obee v. Bishop*, 1 D. F. & J. 137; 6 Jur. N. S. 10, 132.

Bill lay by devisee of mortgaged estate against the heir for exoneration thirty years after testator's decease, but two years only after the personalty appeared deficient: *Newhouse v. Smith*, 2 Sm. & G. 344.

Payment of interest by the devisee of one moiety did not stay the statute as against the devisee of the other: *Dickenson v. Teusdale*, 1 D. J. & S. 52; 9 Jur. N. S. 60, 237.

A bond with penalty being an interest-bearing security, where money, liable to be invested in interest-bearing securities, and held in trust for the separate use of a *feme covert*, is lent by trustees to her husband on such a bond, non-payment of interest while the spouses are living together in amity will not be effectual to bar the debt under the Civil Procedure Act, 1833 (3 & 4 W. IV., c. 42), s. 5; *Re Dixon, Heynes v. D.*, (1900) 2 Ch. 561, C. A.

Under an express trust some *ca. q. t.* were not barred by the trustee paying the whole rent to the others: *Knight v. Bowyer*, 2 D. & J. 421; an express trust of a charge is as much saved as a trust of the land: *Burrowes v. Gore*, 6 H. L. C. 907; 4 Jur. N. S. 1245; and see *Sturgis v. Morse*, 3 D. & J. 1; *Blower v. B.*, 5 Jur. N. S. 33; 7 W. R. 101.

After long acquiescence, account of rents only ran from time of filing bill: *Schroder v. S.*, 18 Jur. 621; or for six years: *Thomson v. Eastwood*, 2 App. Ca. 215.

SECTION V.—GENERAL ADMINISTRATION—FURTHER CONSIDERATION.

1. *Assets Sufficient—Payment of Debts, Costs, Duty, and Legacies, and Division of Residue.*

THIS action coming on this day for further consideration &c. (*Preliminary part from Forms 1 and 2*, pp. 361, 362, *sup.*).—Declaration of right, if any; Let the Deft J. W. on or before &c. lodge in Court, as directed in the Lodgment and Payment Schedule hereto (£500), by the said Master's certificate certified to be the balance due from him on account of the testator's personal estate. Tax the costs of the Plt and Deft and of the persons attending of this action, the costs of the Deft, the executor and trustee of the testator to be taxed as between solicitor and client, and to include any charges and expenses properly incurred by him as such executor and trustee, and not already taxed or allowed, beyond his costs of this action; but in taxing the said costs only one set of costs is to be allowed in respect of each share of the testator's estate,

and the taxing master is not to allow to the parties representing any share any additional costs incurred by reason of such share having been assigned or incumbered, and the amount to be allowed in respect of the costs of any incumbered share is to be applied in the first place in or towards payment of the costs of assignees or mortgagees of such share according to their priorities; And Let any costs of this action properly incurred by such assignees or mortgagees beyond the costs which may be allowed to them respectively in the taxation hereinbefore directed, including therein any costs, charges and expenses properly payable to such assignees or mortgagees by virtue of their mortgage securities, be also taxed by the taxing master, who is to certify out of whose share such additional costs are payable [*if ordered*: Discharge the restraints dated the 9th September and the 4th May, 1899]; And Let the funds so to be lodged and in Court be dealt with as directed in the schedules hereto. Liberty to apply as to funds carried over to account of X. L., an infant, and generally.

LODGMET AND PAYMENT SCHEDULE.

In the High Court of Justice,
Chancery Division.

5th Nov. 1900.

Re Smith, Smith v. Wells, 1900. S. 1001.

Ledger Credit, said action: Personal Estate Account.

I.—Lodgment.

Particulars of Funds to be Lodged.	Person to make the Lodgment.	Amounts.	
		Money.	Securities.
		£ s. d.	
Balance mentioned in this order.....	The Deft J. W.	500 0 0	

II.—Payment.

Funds to be dealt with. Cash to be lodged as above.

Particulars of Payments, Transfers, or other operations ordered.	Payees, Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	
Carry over cash	Said action.....	500 0 0	

PAYMENT SCHEDULE I.

In the High Court of Justice,
Chancery Division.

5th Nov. 1900.

Re Smith, Smith v. Wells. 1900. S. 1001.

Ledger Credit. Said action "Proceeds of Sale of Testator's Real Estate."

Funds in Court. £1,200 New Consols.

£300 cash.

£600 money on deposit.

Particulars of Payments, Transfers, or other operations.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
The restraints dated the 9th Sept. 1898, and 4th May, 1899, requiring notice to A. B. and C. D., are hereby discharged [or A. B. and C. D. respectively named in the restraints dated the 9th September, 1898, and the 4th May, 1899, have had notice].			
Carry over money on deposit, cash, and New Consols.	Said action	900 0 0	1,200 0 0
Carry over any interest	Said action.		

PAYMENT SCHEDULE II.

In the High Court of Justice,
Chancery Division.

5th Nov. 1900.

Re Smith, Smith v. Wells. 1900. S. 1001.

Ledger Credit. As above.

Funds in Court. £5,000 New Consols.

3,000 Rupees India 3 p. c. Loan of 1896—1897.

30 Grand Russian Railway 3 p. c. Bonds (third issue), 1881, numbered 11027 to 11056, both inclusive.

250 Ordinary £1 shares fully paid in Vickers, Sons & Maxim, Ltd., numbered 1286401 to 1286650, both inclusive.

£425 money on deposit.

And the funds carried over under Lodgment and Payment Schedule and Payment Schedule I.

Particulars of Payments, Transfers, or other operations.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	
Sell sufficient New Consols, with £1,825 cash and money on deposit in Court and to be carried over, to raise £5,039 : 8s. 9d.			
Out of proceeds and such cash pay the creditors of the testator J. S.	W. T. K. of &c...	989 1 3	
Sell residue of New Consols in Court and to be carried over.	Q. T. of &c.....	1,015 7 6	
Out of the proceeds pay costs of Plts and Defts and persons attending to be taxed under this order.	The official liquidator of the A. S. Co., Ltd.	3,035 0 0	
Pay duty on testator's estate.			
Out of £500 principal and interest thereon at 4 p. c. per ann. from the day of .			

Particulars of Payments, Transfers, or other operations.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
Pay duty (if any) payable on legacy to W. Y.		£ s. d.	
Pay residue of £500 and interest.... [or Pay £500 principal and interest, &c., as above, subject to duty (if any)]. [Similar directions in case of other legacies].	W. Y. (legatee).		
Add to residue of proceeds and interest £300, for purpose of computation, divide aggregate into equal thirds and apply as follows:—			
Out of one-third less £150 (advanced to A. B.)—			
Pay	R. S. of &c., mortgagee of A. B. (residuary legatee).	130 12 6	
Pay costs (if any) to be certified as payable out of share of A. B.			
Pay residue of such one-third	Thesaid A. B. of &c.		
Out of one-third less £50 (advanced to C. D.)—			
Pay costs (if any) to be certified as payable out of share of C. D.			
Pay residue of such one-third	Bank of Scotland, assignees of C. D. (residuary legatee).		
Out of one-third less £150 (advanced on account of X. L., residuary legatee)—			
Pay costs (if any) to be certified as payable out of share of X. L.			
Carry over residue of such one-third.	Account of X. L., an infant, born the day of , duty paid.		
Sell one share in Vickers & Maxim, numbered 1286401.			
Transfer India Loan	A. B. of &c.	1,000 Rs.
Deliver ten Russian Railway Bonds, numbered 11027 to 11036, inclusive	The same.		
Transfer eighty-three shares in Vickers & Maxim, numbered 1286402 to 1286484, inclusive.	The same.		
Pay one-third of proceeds of sale of share in Vickers & Maxim.	The same.		
Transfer India Loan	Bank of Scotland.	..	1,000 Rs.
Deliver ten Russian Railway Bonds, numbered 11037 to 11046, inclusive.	The same.		
Transfer eighty-three shares in Vickers & Maxim, numbered 1286485 to 1286667, inclusive.	The same.		
Pay one-third of proceeds of sale of share in Vickers & Maxim.	The same.		
Carry over India Loan	Account of X. L., an infant, born on the day of , duty paid.	..	1,000 Rs.
Carry over ten Russian Railway Bonds, numbered 11047 to 11056, inclusive.	Same account.		
Carry over eighty-three shares in Vickers & Maxim, numbered 1286668 to 1286660, inclusive.	Same account.		
Carry over one-third of proceeds of sale of share in Vickers & Maxim.	Same account.		
Invest all cash and interest in funds to be carried over and accumulate in (New Consols).			

N.B.—The Paymaster requires full particulars of the numbers, dates of issue (if more than one), and rate of interest in the case of bonds, and of the

numbers and description in the case of shares, and will supply the necessary information on request with regard to securities already lodged.

As to the mode of lodging the securities of any co. not established in the United Kingdom, or shares not fully paid, see note to S. C. F. R.R., r. 30, A. P., Vol. II., Pt. III.

2. *Another Form—Assets sufficient.*

THIS action coming on this day for further consideration (*preliminary part from* Forms 1 and 2, pp. 361, 362, *sup.*). Declarations of right, if any. Direction to lodge £500 balance of personal estate (Form 1, *sup.*). Direction to tax costs (Form 1, *sup. down to words* “beyond his costs of this action”). Let the funds to be lodged and in Court be dealt with as directed in the schedules hereto.—Liberty to apply.

LODGMET AND PAYMENT SCHEDULE.

In the High Court of Justice,
Chancery Division. Date of Order, — day of — 18—.

A. v. B. 1898. A. 1003.

Ledger Credit, as above. Personal Estate Account.

I.—*Lodgment.*

Particulars of Funds to be lodged.	Persons to make Lodgments.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Cash.....	S. T. of &c.....	500 0 0	

II.—*Payment.*

Funds to be dealt with. Cash to be lodged, as above.

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Carry over cash	A. v. B. 1898 A. 1003.	500 0 0	

PAYMENT SCHEDULE I.

In the High Court of Justice,
Chancery Division.

Date of Order, — day of — 18—.

A. v. B. 1898. A. 1003.

Ledger Credit. As above.

Funds in Court { £3,333 : 6 8....New Consols .. } In Court.
 £50 : 0 0....Money on deposit }
 £35 : 0 0....Cash

Funds to be carried over as directed in Schedule I.

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Sell New Consols.	3,333 6 8
Pay costs to be taxed under this order.			
Pay £417 : 12s. 6d. together with interest on £400, part thereof at the rate of 4 p. c. per ann. from the — day of — [date of the Master's certificate].	C. D. of &c.		
Pay £17 : 1s. 9d. together with interest on £16, part thereof as above.	E F. of &c.		
Pay duty on testator's estate.			
Pay or invest the following legacies, together with interest thereon at 4 p. c. per ann. from the — day of —, 18—, subject to duty (if any).			
Pay £200 and interest as above....	A. B. of &c.		
Invest £100 and interest as above, less duty, and accumulate in New Consols.	Account of G. H., an infant, duty paid.		
Divide residue of funds in Court and interest into equal 19ths, and apply as follows:—			
Pay 1-19th	J. K. of &c.		
Carry over 5-19ths	The account of A. for life with remainders over.		

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Divide 10-19ths into eight equal shares.			
Pay one share.....	P. Q. of &c.		
Pay three shares	A. C. K. of &c., wife of W. T. K., on her separate receipt.		
Pay three shares	P. E. R. of &c., in right of his wife B. R.		
Pay one share.....	K. F. of &c., spinster.		
Add for purpose of computation to residue of funds in Court and any interest £375: 10s. 0d. (<i>total of advances</i>).			
Divide aggregate into four equal parts.			
Out of residue of funds and interest—			
Pay 1-4th, less £200.....	C. C. M. D. of &c.		
Pay 1-4th	H. S. and J. K. trus- tees of an indenture of settlement dated &c. (made on the marriage of X. and Y.).		
Pay 1-4th	I. J. and K. L., trus- tees of the will of B. L., deceased.		
Pay 1-4th, less £175: 10s. 0d.....	H. G. S. of &c.		

PAYMENT SCHEDULE II.

In the High Court of Justice,
Chancery Division.

Date of Order, — day of — 18—.

A. v. B. 1898. A. 1003.

Ledger Credit, as above. The account of A. for life, with remainders
over.

Funds to be dealt with. Funds to be carried over as directed in
Sched. I.

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Invest funds in India £3 p. o. Stock			
Pay interest as it accrues on such stock during life of payee or further order.	A. of &c., widow.		

3. *Assets deficient—Sale of Realty.*

[*Preliminary part*, Form 1, p. 361.].—DIRECTIONS for taxation, payment of costs and application of personal estate and apportionment of residue and proceeds of any real estate sold [Forms 1—7, pp. 1443—1451]. *If real estate not directed to be sold under original judgment*, And it appearing that the testator's personal estate will not be sufficient for the payment of the testator's debts and funeral expenses (and legacies charged on or payable out of his real estate), together with the subsequent costs of this action, Let the following further enquiries and accounts be made and taken, namely [*insert Inquiry 6, if necessary*, Account 7, Inquiry 8, Account 9, Inquiry 10, *from Form 4, sup. p. 1467*]; Let a sufficient part of the testator's real estate to make good the deficiency of his personal estate, or, if necessary, the whole of such real estate be sold, &c. [Form 7, p. 1469]. Adjourn further consideration, &c.

If the realty or a sufficient part has been sold, the assets will be first applied as in a creditor's action (Form 14, *sup. pp. 1454 et seq.*), and then in payment of the legacies, payable out of realty (see Form 1, *sup. p. 1489*), and the surplus, if any, subject to legacy or succession duty, paid over to the persons entitled to the realty, or carried to their separate accounts (and see Form 14, *pp. 1454 et seq.*), according to what remains to be done in the action.

4. *Declaration as to right to Interest on Legacy to Infant, applicable for Maintenance.*

DECLARE that according to the true construction of the said will the legacy of £—— in the summons mentioned bequeathed to the infant Deft carries interest at the rate of (four) p. c. per ann. from the date of the death of the said testator, so long as the same forms part of the estate of the said testator, and that the said interest is applicable for the maintenance of the infant Deft.—See *Re Moody, Woodroffe v. Moody*, Kekewich, J., 7 Nov. 1894, B. O. 345, (1895) 1 Ch. 101.

For declarations as to accumulating, and interests vesting, subject to letting in future children, see *Ellis v. Maxwell*, 12 Beav. 112.

For declaration as to legacies charged on realty vesting, and direction to raise money by mortgage or sale, see *Salisbury v. Petty*, 3 Ha. 94.

5. *Bringing Advances into Hotchpot.*

[See Payment Schedule, Form No. 50, p. 221, and Forms 1 and 2, *sup.*]

Where it is probable that any of the legatees have received advances in excess of their shares, the residue should be apportioned in Chambers.

Where the apportionment is to be made at Chambers, the Payment Schedule will simply direct payment of the amounts to be mentioned in the Master's certificate to the persons to whom the same shall be certified to be payable.

S. v.] General Administration—Further Consideration. 1497

For an instance of apportionment between capital and income with hotch-pot provisions, see *Ackroyd v. Ackroyd*, M. R., 10 June, 1874, A. 2005; *S. C.*, 18 Eq. 313, pp. 868 and 875, 4th Edit., Seton.

6. Directions as to Costs where Shares incumbered—One Set to be allowed in respect of each Share.

Tax the costs of the Plts and the Defts, and of the said persons having liberty to attend the proceedings of this action [*If so*, as between solr and client], including in the costs of the plts any charges and expenses properly incurred by them as trustees, etc., beyond their costs of this action; but, in taxing the said costs, not more than one set of costs is to be allowed in respect of each tenth share of the testator's estate, and the taxing master is not to allow to the parties representing any share any additional costs incurred by reason of such share having been assigned or incumbered, and the amount to be allowed in respect of the costs of any incumbered share is to be applied in the first place in or towards payment of the costs of the assignees or mortgagees of such share, according to their priorities. And Let any costs of this action properly incurred by the assignees and mortgagees of the shares of the said E. R. and C., or by the said E., beyond the costs which may be allowed to them respectively on the taxation hereinbefore directed, including therein any costs, charges, and expenses, properly payable to such mortgagees by virtue of their several mortgage securities be taxed by the taxing master, who is to certify out of whose shares such additional costs are payable. And it is ordered that the funds in Court be dealt with as directed in the schedule hereto.

PAYMENT SCHEDULE.

In the High Court of Justice,
Chancery Division.

23rd March, 1877.

Thomson v. Wingrove. 18—, T. 801.

Ledger Credit. As above.

Funds in Court. £3,000 New Consols.
£60 Cash.

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Sell New Consols	3,000 0 0
Out of proceeds and cash— Pay costs to be taxed under this order Pay duty.....			

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Divide residue of funds into equal tenths.			
Pay one-tenth (<i>unincumbered shares</i>) to each of the following persons	A. B. of —. C. D. of —. E. F. of —. G. H. of —. I. K. of —. L. M. of —. N. O. of —.		
Out of one-tenth (<i>R.'s share</i>)— Pay £337, together with subsequent interest on £330 at the rate of p. c. per ann. from the — day of —.	P. The Secretary of the S. U. Insurance Co. in satisfaction of their mortgage security in the Master's certificate mentioned.		
Thereout also pay the additional costs, if any, certified to be payable to the said S. U. Insurance Co.			
Out of the residue— Pay £58 : 16s. certified to be due to A. together with subsequent interest on £55 part thereof at the rate of p. c. per ann. from the — day of —, and the additional costs, if any, of the said A. certified to be payable out of such last-mentioned share.	A. of —.		
If such residue shall be insufficient— Pay such residue	The same in part satisfaction of the amount due to him.		
Out of the residue, if any, of the said last-mentioned one-tenth— Pay the additional costs, if any, of the Deft G. W. to be certified to be payable out of the share of the said R.			
If such residue shall be insufficient— Pay the whole of such residue in part satisfaction of such last-mentioned costs. Pay ultimate residue, if any, of the said one-tenth. [<i>Similar directions, mutatis mutandis, as to the remaining two incumbered tenth shares.</i>]	Deft G. W. as assignee of the share of R.		

—See *Thomson v. Wingrove*, V. C. M. 23 March, 1877. B. 1313.

N.B.—This Form has been redrawn to suit S. C. F. R.

7. Priority of Incumbrances on Shares declared—Costs apportioned on two Funds.

SPECIAL directions for taxation of costs, certain shares being incumbered.—“ And Declare that, as between the Defts L., G., and V., the respective mortgagees &c., on the share of C., one of the children of the testator, the Deft L. is entitled, in the first place, to be paid the amount due to her in respect of the mortgage debt and interest in the Master’s certificate, dated &c., mentioned (including such costs, if any, as pursuant to the declarations and directions hereinbefore contained, are to be added to such debt), out of the 1-11th share of C., in so much of the £4,350 Consols in Court &c. as arises from the purchase-money of the D. farm; And that the Deft G. is entitled, in the second place, to be paid the amount due to him in respect of his mortgage debt and interest &c.; And that the Deft. V. is entitled, in the third place, to be paid the amount due to him in respect of his mortgage debt and interest &c.; But as to the 1-11th share of the said C. in so much of the said anns and cash as arises from the purchase-money of the residuary real estate of the testator, Declare that the said Defts are entitled to be paid thereout in the manner following, that is to say, the Deft V. in the first place, the Deft. L. in the second place, and the Deft G. in the third place; And it appearing that £555 Cons., part of the said £4,350 Cons., is the amount purchased with the proceeds of the sale of the testator’s residuary real estate and the interest accumulated thereon; And that £3,795 Cons., the residue of the said £4,350 Cons., is the amount purchased with the proceeds of the D. farm, and the interest accumulated thereon; Let the taxing master apportion all the costs that shall be ascertained to be payable out of the testator’s estate, between the respective amounts to arise by the sales of the Consols directed by the schedules hereto in proportion to such amounts, and certify the proportions of such costs properly payable out of the proceeds of the sale directed by Schedule 1 and out of the proceeds of the sale directed by Schedule 2; And Let the funds in Court be dealt with as directed in the said schedules; And Let the taxing master certify the proportions to be paid out of the money to arise by the sale of the said £555 Cons., and out of the money to arise by the sale of the said £3,795 Cons., respectively.—And Let the taxing master tax the costs of any of the mortgagees &c., on the respective shares of the testator’s estate whose mortgagors &c. are parties to this action, and certify the amount thereof, and of the taxed costs of any of the mortgagees &c. that may not be allowed as against the testator’s estate, and apportioned and paid thereout under the directions hereinbefore contained; And Let the several amounts of such costs be added to the amounts due to the said mortgagees &c.”

[PAYMENT SCHEDULE.

PAYMENT SCHEDULE I.

**In the High Court of Justice,
Chancery Division.**

Date of Order, 1st May, 1856.

Lee v. Howlett.

Ledger Credit. As above.

Funds in Court. £4,350 New Consols.

[illegible]

8. *Declaration against preferring Creditors.*

DECLARE that the assets of the above-named intestate, F. A. H., deceased, available for the payment of his debts ought to have been apportioned by the Deft, M. E. H., the administratrix, rateably between the specialty creditors and the simple contract creditors of the intestate, and that the said Deft was not entitled to apply in payment of any simple contract debts any part of the estate apportioned to the payment of the specialty debts of the intestate.—See *Re Hankey, Smith v. H.*, North, J., 25 Jan., 1899, A. 453, (1899) 1 Ch. 541.

9. *Personal Estate Deficient—Mortgages charged on whole of Real Estate, certain Freeholds having been sold to provide for Deficiency—Freeholds specifically devised free from Mortgage to contribute—Special Form for Distribution of Assets.*

TAX costs of Plts and Defts of second above-mentioned action: *Re E. W. v. E.* 1890, E. 131; And it appearing by the said Master's certificate that the deficiency of the said testator's personal estate not specifically bequeathed for the payment of the debt and costs referred to in the said order, amounted to the total sum of £919 : 0s. 11d., and that the said sum of £919 : 0s. 11d. has been paid out of the sum of £1,311 : 14s. 1d., the balance of the purchase-money of the freehold houses [*describing them*] after the mortgages had been paid off and discharged, which sum on the 27th May, 1898, was paid into Court to the credit of the second mentioned action pursuant to the direction of the Judge in that behalf, and that there is now remaining in Court to the said credit the sum of £377 : 10s. 2d. New Consols and £10 : 0s. 8d. cash; And it also appearing from the said certificate that the said mortgages were charged on the whole of the testator's real estate, this Court doth declare that, according to the true construction of the testator's will, the freehold properties [*describing them*] specifically devised by the testator's will free from mortgage ought to contribute towards making good the said deficiency; And it appearing from the said certificate that a balance of £20 : 10s. 4d. is due from the Defts C. E. and T. R. E. in respect of rents and income of certain premises therein mentioned, It is ordered that the last-named Defts be at liberty to retain the said balance in their hands on account of their costs of the action hereinbefore directed to be taxed, and the taxing master is to certify the balance of the costs of the said Defts; And it appearing from the said certificate that a balance of £34 : 12s. 7d. is due to the Defts C. E. and T. R. E. in respect of the rents and income of the leasehold

premises [*describing them*] since the death of the testator's widow down to the 26th March, 1898, and that a balance of £57 : 10s. 10d. is due from them in respect of such rents and profits accrued subsequently to the 26th March, 1898, It is ordered that the said Defts C. E. and T. R. E. be at liberty to set off the said balance of £34 : 12s. 7d. in part payment against the balance of £57 : 10s. 10d.; And it is ordered that the said Defts C. E. and T. R. E. do, within seven days after service of this order, pay so far as not already paid the balance of £22 : 18s. 3d. remaining due from them after such set-off to the Plts C. J. W. and M. A. D. in further part payment of their respective annuities of £25 each; And it is ordered that the said Defts C. E. and T. R. E. do apply the rents and income of the said leasehold premises from the foot of the account upon which the said sum of £57 : 10s. 10d. is due, so far as necessary in keeping down the said annuities and pay any balance of such rents and income to the Deft W. E.; And It also appearing from the said certificate that, having regard to the said declaration, the devisees and legatees, their assignees or incumbrancers of the freehold messuages [*describing them*] and the leasehold and other personal properties specifically devised and bequeathed by the testator's will, ought to contribute towards payment of the deficiency of the said sum of £919 : 0s. 11d., and the certified balance after the aforesaid credit of the costs hereinbefore directed to be taxed in the sums of cash, and the proportion of the said certified balance of costs when taxed set opposite to their respective names in the order schedule hereto; And it also appearing from the said certificate that there is due to the Defts, C. E. and T. R. E. and E. G. E., out of the said sum of £1,311 : 14s. 1d. the sum of £413 : 8s. 1d., It is ordered that the last-named Defts be at liberty to retain the sum of £59 : 6s. 1d. mentioned in the said order schedule in part payment of the said sum of £413 : 8s. 1d.; And it also appearing from the said certificate that there is due to the Plt W. W. W., out of the said sum of £1,311 : 14s. 1d., the sum of £151 : 6s. 5d., being three-fifths of £252 : 4s. 0d., and to the Deft K. W. the sum of £50 : 8s. 10d., and to the Deft F. E. E. the sum of £50 : 8s. 9d., being respectively one-fifth of the said sum of £252 : 4s. 0d., It is ordered that the Plt W. W. W. be at liberty to retain the sum of £107 : 15s. 7d., being three equal fifth parts of the sum of £179 : 12s. 7d. mentioned in the said order schedule in part payment of the said sum of £151 : 6s. 5d.; And It is ordered that the Defts, K. W. and F. E. E. respectively, be at liberty to retain the sums of £35 : 18s. 6d. and £35 : 18s. 6d., being respectively one-fifth of the two other sums of £179 : 12s. 7d. mentioned in the said order schedule, in part payment of the sums which are respectively due to them as aforesaid; And It also appearing from the said certificate that there is due to the Deft W. E. and his children (if any) out of the said sum of £1,311 : 14s. 1d. the sum of £265 : 4s. 0d., It is ordered that the Deft W. E. be at liberty to set off the sum of £38 : 0s. 10d. mentioned in the said order schedule in part payment against the said sum of £265 : 4s. 0d.; And It also appearing from the

said certificate that there is due to the Deft W. E. out of the said sum of £1,311: 14s. 1d. the sum of £258: 14s. 0d., It is ordered that the Deft W. E. be at liberty to set off the sum of £223: 11s. 11d. in part payment of such sum, and to set off £35: 2s. 1d. the balance of such sum, in part payment of the proportion of costs to be paid by him; And it also appearing from the said certificate that there is due to the Defts C. E. and T. R. E. as trustees of the testator's will in trust for the Deft G. E. out of the said sum of £1,311: 14s. 1d. the sum of £122: 4s. 0d., It is ordered that the Defts C. E. and T. R. E. be at liberty to set off the sum of £100: 0s. 3d. mentioned in the said order schedule in part payment of such sum, and to set off £22: 3s. 9d., the balance of such sum, in part payment of the proportion of costs to be paid by them under this order; And It is ordered that the several persons next hereinafter named do, within fourteen days after filing of the taxing master's certificate, lodge in Court, as directed by the Lodgment and Payment Schedule hereto, the sums of cash and the proportions of the said balance of costs next hereinafter appearing after their names (the said sums of cash and proportions of balance of costs being the amounts due from the parties making such lodgments, having regard to the respective values of the several properties certified to have been devised and bequeathed to the said parties) that is to say:—The Deft C. E. £64: 11s. 1d. and .070239 of balance of costs; the Plt W. W. three-fifths of .195451 of balance of costs; the Deft K. W. (wife of F. W.) one-fifth of .195451 of balance of costs; the Deft F. E. E. one-fifth of .195451 of balance of costs; the Deft W. E. .243292 of balance of costs, less the said sum of £35: 2s. 1d.; the Defts C. E. and T. R. E. .108824 of balance of costs, less the said sum of £22: 3s. 9d.; the Deft W. E., in the event of £258: 14s. 0d. exceeding in amount 259 parts of the sum ordered by the Payment Schedule hereto to be divided into 1,311 parts, the amount of such excess; the Defts C. E. and T. R. E. (as trustees of the testator's will in trust for the Deft G. E.), in the event of £122: 4s. 0d. exceeding in amount 122 of the said 1,311 parts, the amount of such excess; the Plt M. A. D. and the Defts M. L. D. and E. M. E. (wife of F. E.) £147: 15s. 1d. and .160769 of balance of costs; and the Plt C. J. W. £106: 3s. 1d. and .115504 of balance of costs; And Let the funds in Court and so to be lodged be dealt with as directed in the said Lodgment and Payment Schedule, the sum of £657: 17s. 6d. therein mentioned being the total of the said sums of £59: 6s. 1d., £107: 15s. 7d., £35: 18s. 6d., £35: 18s. 6d., £38: 0s. 10d., £258: 14s. 0d., and £122: 4s. 0d.; And in default of any of the lodgments hereinbefore directed being made, any of the persons interested are to be at liberty to apply to have any sum as to which such default shall have been made, together with the costs of such application, and of the mortgage or charge hereinafter mentioned raised by a mortgage of or charge upon the share under the testator's will of the person or persons making such default; And any of the parties are to be at liberty to apply generally as they may be advised.

THE ORDER SCHEDULE.

1	2	3
Names of Persons to make Payments.	Property in respect of which Payment to be made.	Amount of Cash and Proportions of Costs (when Taxed) to be Paid.
The Defts C. E., T. R. E., and E. G. E.	[Description of Property.]	£59 : 6s. 1d. and ·064527 of balance of costs to be certified.
The Deft C. E.	[Do.]	£64 : 11s. 1d. and ·070239 of balance of costs to be certified.
The Plt W. W. W. .	[Do.]	3-5ths of £179 : 12s. 7d. and ·195451 of balance of costs to be certified.
The Deft K. W. (wife of F. W.)	[Do.]	1-5th of £179 : 12s. 7d. and of ·195451 of balance of costs to be certified.
The Deft F. E. E. . .	[Do.]	Remaining 1-5th of £179 : 12s. 7d. and of ·195451 of balance of costs to be certified.
The Deft W. E.	[Do.]	£38 : 0s. 10d. and ·041394 of balance of costs to be certified.
The Deft W. E.	[Do.]	£223 : 11s. 11d. and ·243292 of balance of costs to be certified.
The Defts C. E. and T. R. E. as trustees of the testator's will, in trust for the Deft G. E.	[Do.]	£100 : 0s. 3d. and ·108824 of balance of costs to be certified.
The Plt M. A. D. and the Defts M. L. D. and E. M. E. (wife of F. E.)	[Do.]	£147 : 15s. 1d. and ·160769 of balance of costs to be certified.
The Plt C. J. W. and her children.	[Do.]	£106 : 3s. 1d. and ·115504 of balance of costs to be certified.

LODGMET AND PAYMENT SCHEDULES.

In the High Court of Justice,

Chancery Division.

Date of Order, 18th May, 1900.

Re E., W. v. E. 1898. E. 373.

Ledger Credit. As above.

I.—Lodgment.

Particulars of Funds to be lodged.	Person to make the Lodgment.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Cash	The Deft C. E.	64 11 1	
·070239 of balance of costs to be taxed under this order.	The same.		
3-5ths of ·195451 of ditto.	The Plt W. W. W.		
1-5th of ·195451 of ditto.	The Deft K. W.		
1-5th of ·195451 of ditto.	The Deft F. E. E.		
·243292 of ditto, less £35 : 2s. 1d.	The Deft W. E.		
·108824 of ditto, less £22 : 3s. 9d.	The Defts C. E. and T. R. E. as trustees of the testator's will in trust for the Deft G. E.		
The amount (if any) by which £258 : 14s. 0d. shall exceed 259 of the 1311 parts mentioned in the Payment Schedule.	The Deft W. E.		
The amount (if any) by which £122 : 4s. 0d. shall exceed 122 of such parts.	The Defts C. E. and T. R. E. as such trustees as aforesaid.		
The sums (if any) lodged by the Deft W. E. and by the Defts C. E. and T. R. E. under the two contingent directions last hereinbefore contained are for the purpose of identification referred to in the Payment Schedule as contingent lodgments.			
Cash	The Plt M. A. D. and the Defts M. L. D. and E. M. E. (wife of T. E.)	147 15 1	
·160769 of said balance of costs	The same.		
Cash	The Plt C. J. W. ..	106 3 1	
·115504 of said balance of costs	The same.		

II.—*Payment.*

Funds to be dealt { £377: 10s. 2d. Consols } In Court at date of
with..... { £ 10: 0s. 8d. Cash .. } order.

And Funds to be lodged as above.

Particulars of Payments, Transfers, or other operations ordered.	Payees, Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
Sell New Consols	£ s. d. ..	£ s. d. 377 10 2
Pay balance of costs to be certified under this order.			
Add to residue of funds and in- terest, exclusive of the contingent lodgments, for purpose of compu- tation, £657: 17s. 6d. cash and the sum of cash that equals 105921 of balance of costs as above.			
Divide the aggregate into 1311 equal parts.			
Out of residue of funds and interest, including contingent lodgments—			
Invest in New Consols 413 such parts, less £59: 6s. 1d. and the sum of cash that equals 084527 of the balance of costs.	The account of the Deft C. E. with re- mainder to his chil- dren.		
Pay dividends during life of payee or until further order.	The Deft C. E.		
Pay 3-5ths of 252 such parts, less £107: 15s. 7d.	The Plt W. W. W.		
Pay 1-5th of 252 such parts, less £35: 18s. 6d.	The Deft K. W. (wife of F. W.) on her separate receipt.		
Pay 1-5th of 252 such parts, less £35: 18s. 6d.	The Deft F. E. E. (spinster).		
Invest in New Consols 265 such parts, less £38: 0s. 10d. and the sum of cash that equals 041394 of balance of costs.	The account of the Deft W. E. and his children (if any).		
Pay dividends during life of payee or until further order.	The Deft W. E.		
Pay the amount (if any) by which 259 such parts shall exceed £258: 14s.	The Deft W. E.		
Pay the amount (if any) by which 122 such parts shall exceed £122: 4s.	The Defts C. E. and T. R. E. as such trustees as afore- said.		

—See *Re Eldridge, E. v. E.*, and *Re Eldridge, Woolnough v. E.*,
Kekewich, J., 18 May, 1900, A. 1567.

NOTES.

PAYMENT INTO COURT.

Where an order for general admon has been made, the exor, although not shown to be insolvent or to have abused his trust, may be ordered to lodge in Court funds admitted to be in his hands: *Strange v. Harris*, 3 Bro. C. C. 365; or the hands of his firm: *Johnson v. Aston*, 1 S. & S. 73; or to be due to the estate from him: *Rothwell v. R.*, 2 S. & S., 217; or from his firm: *White v. Barton*, 18 Beav. 192; though there are actions pending against the exor: *Yare v. Harrison*, 2 Cox, 377 (where the sum recovered in the action was paid out to the Plt in it); and debts to be paid: *Mortlock v. Leathes*, 2 Mer. 491; but see *Blake v. B.*, 2 Sch. & L. 26, *contra*, and *Betagh v. Concannon*, 2 Moll. 559; or he may be ordered only to pay in the balance after making necessary payments: *Roy v. Gibbon*, 4 Ha. 65.

An affidavit by the Plt charging the Deft with having a portion of the estate in his hands, and non-appearance on the motion, is sufficient admission that the money is in his hands on which to found an order for payment into Court: *Freeman v. Coz*, 8 Ch. D. 148; and *sup.* Chap. XLI., "TRUSTEES," p. 1129.

Where an exor admits the receipt of a stated sum, but says he has made payments, he must verify the payments and pay in the balance: *Anon.*, 4 Sim. 359.

On the application of some only of the beneficiaries, their shares only will, in general, be ordered into Court: *Hamond v. Walker*, 3 Jur. N. S. 686.

In a suit for admon, the Deft, who was *curator bonis* and *factor loco tutoris* of Scotch infants, as well as admor in England, was not bound to pay the residue of the estate in his hands into Court, the fund being admitted to be safe: *Mackie v. Darling*, 12 Eq. 319.

Where two trustees had allowed the third to misapply the funds, they were ordered to pay them into Court: *Ingle v. Partridge*, 32 Beav. 661; and upon an originating summons trustees have been ordered to pay into Court moneys which have been received and misapplied by them: *Re Chapman*, 54 L. T. 13.

Insurance money received by the devisee in respect of a house charged by the will with an annuity was ordered into Court, on motion by the annuitant: *Parry v. Ashley*, 3 Sim. 97.

A reasonable expectation of Plt's succeeding, drawn from the trustee's answer, justifies ordering the trust fund into Court, on motion: *Whitmore v. Turquand*, 1 J. & H. 296; but there must be a clear admission of the trust: *Hagell v. Currie*, 2 Ch. 449; not a mere contest on affidavits: *Hollis v. Burton*, (1892) 3 Ch. C. A. 226; and see *Bank of Turkey v. Ottoman Bank*, 2 Eq. 366; *et sup.* p. 1128; Vol. I. p. 211.

And funds were ordered into Court, at the instance of a party having only a contingent interest, though all with vested interests opposed the application: *Bartlett v. B.*, 4 Ha. 631; *Gov. Benevolent Inst. v. Rusbridger*, 18 Beav. 467; but in *Ross v. R.*, 12 Beav. 89, it was refused, no danger being alleged, and a *distringas* being sufficient protection.

Where a legacy was given to be invested by trustees to be nominated by a legatee for life, and after her death to fall into the residue, the residuary legatee had no right to have the fund brought into Court in the absence of a reasonable ground for the application, such as danger to the fund: *Re Braithwaite, B. v. Wallis*, 21 Ch. D. 121.

Payment in will not be ordered on the motion of the Plt in a single creditor's suit: *Reeve v. Goodwin*, 10 Jur. 1050; nor of next of kin disputing the will, the exors denying a charge of insolvency: *Edwards v. E.*, 10 Ha. lxiii; and where the bill did not pray it, notice was required to be given to *cs. g. t.*: *Levellin v. Cobbold*, 1 Sm. & G. 572; and see *Proudfoot v. Hume*, 4 Beav. 476.

After judgment, payment in was not ordered on admissions by answer, but only on examination or certificate: *Wright v. Lukes*, 13 Beav. 107.

Where after order on further consideration the solrs paid half the profit costs to a Deft trustee of the estate, there was no jurisdiction on summons to order the Deft to pay the amount into Court: *Re Thorpe, Vipont v. Radcliffe*, (1891) 2 Ch. 360.

Notice of assignments, &c. of the funds is good, though given to the trustees after lodgment in Court: *Thompson v. Tomkins*, 2 Dr. & S. 8.

For the forms of orders and general rules as to lodgment in Court and the mode of doing so, and as to the carrying over of funds to separate accounts, and the S. C. F. R. applicable thereto, see Chap. XVI., "LODGMET AND PAYMENT OF FUNDS."

As to ordering into Court sums improperly in the hands of trustees, *v. sup.* p. 1150.

PAYMENT OUT OF COURT.

The Court has required an affidavit of no settlement before payment out of a married woman's legacy to her: *Hough v. Ryley*, 2 Cox, 157; or to her husband: *Minet v. Hyde*, 2 Bro. C. C. 663; or to a widow: *Elrington v. E.*, 4 Drew. 545; or to a person to whom she or her husband has assigned her fund: *Clarke v. Woodward*, 25 Beav. 455.

And as to transfer and payment to married women, see Chap. XXXVII., "MARRIED WOMEN," pp. 927 *et seq.*

Where there is a foreign settlement, the fund will not be paid out without the opinion of an advocate of the country that the fund is not thereby affected: *Re Todd*, 19 Beav. 582.

And see further as to affidavits of no settlement, *sup.* pp. 937, 938; D. C. F. 932, 933; Dan. 153.

Unless the fund is standing to a separate account the exor is always a necessary party to any application respecting it: *Salmon v. Anderson*, 9 Beav. 445, 449; *Parsons v. Groome*, 12 Beav. 180; but if the exor dies, the fund may be paid out on his exor appearing on a petition, though not made a party: *S. C.*

Funds have, under special circumstances, been ordered to be paid to two exors, "or one of them": *Bradford v. Nettleship*, 10 W. R. 264; and in the case of income this course is commonly adopted; but this is not usual as to the corpus, and the Court refused to pay out to a sole trustee and exor, but carried it to a separate account, with liberty to apply at Chambers: *Gouldsmith v. Luntley*, 32 L. T. 535; see Payment Schedule, Forms 1, 2.

They may be paid to a temporary admor during the incapacity of the exor: *Exp. Evelyn*, 2 My. & K. 3.

A prospective order was made for payment to a person who would attain twenty-one during the long vacation: *Re Pern*, 21 W. R. 865; 42 L. J. Ch. 880.

Where a payee (not being a trustee, &c.) named in an order dies, any sums remaining unpaid may be paid to his represves without a fresh order or proof of death: S. C. F. R. r. 62, *sup.* Vol. I. p. 234. The similar rule of 1872 was held to apply, on the death of A., to dividends ordered to be paid to A. during the life of B.: *Chapman v. C.*, 17 Eq. 350.

A fund paid in was paid out again to a trustee, he undertaking to remit it to the legatees in America: *Ibberson v. Warth*, 1 Jur. N. S. 440; 3 W. R. 230.

The assignor must be served on the application for payment out of the assigned fund, except where the precise fund has been absolutely assigned: *Briant v. Dennett*, 4 Drew. 550.

A fund limited to widow for life, then as she should appoint by deed or will, was paid to her without appointment: *Cambridge v. Rous*, 25 Beav. 574; but money representing land limited in tail will not be paid out to the tenant in tail until he has executed a disentailing deed: *Re Broadwood*, 1 Ch. D. 438; *Re Reynolds*, 3 Ch. D. 61, C. A.

A wife having a protection order, under the Matrimonial Causes Act, 1857 (20 & 21 V. c. 85), s. 21, was entitled, on her sole petition without a next friend, to payment out of a fund given to her: *Re Kingsley*, 26 Beav. 84; *Re Rainsdon*, 5 Jur. N. S. 55; 4 Drew. 446; or transferred into the joint names of her husband and herself: *Nicholson v. Drury Buildings Co.*, 7 Ch. D. 48; although given to her separate use, without power of anticipation: *Cooke v. Fuller*, 26 Beav. 99.

But a wife who has obtained a judicial separation is not so entitled under 20 & 21 V. c. 85, s. 25, except as to property coming to or devolving on her after the decree: *Waite v. Morland*, 38 Ch. D. 135, C. A.

And as to payment out of funds in which married women are interested, see Chap. XXXVII., "MARRIED WOMEN," pp. 927 *et seq.*

By O. L. 9, if the Court is satisfied that the realty or personality is more than enough to satisfy all claims, it may allow the parties interested the whole or part of the income of the realty, or a part of the personality, or the whole or part of the income thereof, up to such time as may be directed. This rule only applies where assets are admitted, or the debts are all shown to have been paid: *Knight v. K.*, 16 Beav. 358; *Chubb v. Carter*, W. N. (67) 179; and good reason must be shown: *Rowley v. Burgess*, 2 W. R. 652.

Where it was clear a surplus would remain after discharging debts and liabilities, though the amount could not be fixed for some time, proportional payments, so far as safe for creditors, were made to pecuniary legatees: *Thomas v. Montgomery*, 1 Russ. & M. 729, 734; such payments are to be applied, first to pay interest and then in reduction of the principal: *Ib.* and *S. C.*, 2 Sim. 348; but the Court would not direct appropriations from the fund for the legacies subject to the creditors' eventual claims: *S. C.*, 1 Russ. & M. 737, 738; and in *Coster v. C.*, 1 Ke. 199, the report being delayed, reference went on petition as to the proper allowance to the residuary legatee; and in *Shewell v. S.*, 3 Ha. 154, exors admitting assets for all purposes, the dividends of the fund in Court were paid to them to distribute before the accounts were taken; and an exor admitting that the debts and funeral expenses had been paid, was ordered to pay to the residuary legatee the income of balances paid in by him: *Dando v. D.*, 1 Sim. 510; but not unless the exor took the responsibility of such payment: *Abby v. Gilford*, 11 Beav. 28; and, the estate being large, a jointure, and annuity, and legacy duty were paid on affidavit and answer on motion, before decree, but not pecuniary legacies: *Digby v. Boycott*, 4 Ha. 445.

The Court will not, on interlocutory application, decide the question of title so far as to direct the dividends of a litigated fund in Court to be paid to one claimant: *Neddy v. N.*, 4 My. & C. 367.

In simple cases small sums were paid out to the parties entitled on application in Chambers: *Petty v. P.*, 12 Beav. 170; or larger sums under liberty to apply in Chambers: *Winkworth v. W.*, 32 Beav. 233.

As to payment out under the Trustee Act, 1893, s. 42, *v. sup.* p. 1194.

And as to liability and refunding, *v. inf.* Sect. VIII. p. 1525; Sect. XXVIII., p. 1657.

As to payment out being affected by domicile, *v. inf.* p. 1584.

As to payment out of unclaimed stock, or of funds in Court, under the Lands Clauses Acts, &c., see Chap. LIII., "LANDS CLAUSES CONSOLIDATION ACT."

INTEREST ON LEGACIES.

By O. LV, 64, "where a judgment or order is made directing an account of legacies, interest shall be computed on such legacies after the rate of 4 p. c. per ann. from the end of one year after the testator's death, unless otherwise ordered, or unless any other time of payment is directed by the will, and in that case according to the will."

Specific legacies bear interest from the testator's death; demonstrative and general legacies only from a year after the death: *Sleech v. Thorington*, 2 Vez. 560, 563; *Mullins v. Smith*, 1 Dr. & S. 204.

Interest on legacies is given only for delay in payment, and therefore only from the time when they are payable, which is in general one year from the death: *Sitwell v. Bernard*, 6 Ves. 520; *Wood v. Penoyre*, 13 Ves. 325; *Turner v. Buck*, 18 Eq. 301; *Fisher v. Brierley*, 32 Beav. 602; *Donovan v. Needham*, 9 Beav. 164; and see *Hertford v. Lowther*, *Ib.* 266; *Gibson v. Bott*, 7 Ves. 95; *Bignold v. B.*, 45 Ch. D. 496; and there is no exception in favour of a widow: *Re Whittaker*, W. v. W., 21 Ch. D. 657; but legacies payable on the happening of an event only bear interest from then: *Lord v. L.*, 2 Ch. 782; *Hearle v. Greenbank*, 3 Atk. 716; and a legacy given to an infant as exor does not carry interest until he attains twenty-one, and agrees to act: *Re Gardner*, Long v. G., 41 W. R. 203.

Legacies directed to be paid within four years from the death, remaining unpaid, without necessity of convenient admon, carried interest from the end

of the year: *Olive v. Westerman*, 53 L. J. Ch. 525; 50 L. T. 355; distinguishing *Thomas v. A. G.*, 2 Y. & C. 525.

And *semble*, as a general rule, when there is a trust for sale of real estate after the death of a tenant for life, and payment of a legacy out of the proceeds, the legacy carries interest from the death of the tenant for life, and not from a year later: *Re Waters, W. v. Boxer*, 42 Ch. D. 517, distinguishing *Turner v. Buck*, 18 Eq. 301; and see *Wms. Exors.* 1285.

Where a reversionary interest was retained unsold for many years for the benefit of the estate, the legatees, when the reversion fell in, were entitled to interest from the end of the year: *Re Blackford, B. v. Worsley*, 27 Ch. D. 676.

The general rule applies to legacies by a married woman by way of appointment: *Tatham v. Drummond*, 2 H. & M. 262; and see *Re Marten, Shaw v. M.*, (1901) 1 Ch. 370.

Interest may be charged on advancements in order to effect an equal division: *Andrewes v. George*, 3 Sim. 393; *Hilton v. H.*, 14 Eq. 468; *Ackroyd v. A.*, 18 Eq. 313.

Interest is payable from the death if the legacy is given in trust to apply the principal or interest for the maintenance of the testator's child: *Hearle v. Greenbank*, 3 Atk. 716; *Donovan v. Needham*, 9 Beav. 164; although the will contains a provision for the maintenance of the child out of the income of the legacy, or out of the income of a share of residue given to him equally with the other children of the testator: *Re Moody, Woodroffe v. M.*, (1895) 1 Ch. 101; or to an infant, though not his child, if an intention can be inferred: *Beckford v. Tobin*, 1 Vez. 308; *Chidgey v. Whitby*, 41 L. J. Ch. 699; or if the testator puts himself *in loco parentis*: *Wilson v. Maddison*, 2 Y. & C. C. 372; *Rogers v. Soutten*, 2 Keen, 598; or if he shows such intention: *Re Richards*, 8 Eq. 119; or if the legacy is in lieu of a debt: *Clark v. Sewell*, 3 Atk. 96, 99; but a bequest of money to exors to be laid out in the purchase of an annuity for a child of the testator does not carry interest until after the year from the death: *Re Friend, F. v. Young*, 78 L. T. 222.

Pecuniary legacies payable out of land simply bear interest from the death: *Spurway v. Glynn*, 9 Ves. 483; but not when payable out of personality, though yielding immediate income: *Pearson v. P.*, 1 Sc. & L. 10; nor when payable out of the proceeds of the sale of realty: *Turner v. Buck*, 18 Eq. 301.

The interim income of a contingent deferred legacy passes as residue, unless the legacy has been severed from the general estate for some reason necessitated by the legacy itself, and not merely by the convenience or exigency of admon: *Re Judkin's Trusts*, 25 Ch. D. 743; *Re Inman, I. v. Rolfe*, (1893) 3 Ch. 518; *e.g.*, where, upon the construction of the whole will, an intention that the legacy should be permanently set apart from the residue of the estate can be inferred: *Re Medlock, Ruffle v. M.*, 54 L. T. 828; 55 L. J. Ch. 738; *Re Clements, C. v. Pearsall*, (1894) 1 Ch. 665; correcting and explaining dictum of Jessel, M. R., in *Long v. Ounden*, 16 Ch. D. 694; *Re Snaithe, S. v. S.*, W. N. (94) 115; and in such case the intermediate income will be applicable by way of maintenance under sect. 43 of the Conveyancing Act, 1881 (*v. sup.* p. 1026): *Re Clements, C. v. Pearsall*, (1894) 1 Ch. 665; *Re Woodin, W. v. Glass*, (1895) 2 Ch. 309, C. A.; and as to income going with the corpus to an appointee upon a contingency, see *Long v. Ounden*, 16 Ch. D. 691.

The interim income of a fund set apart to provide for a conditional annuity, by a rule of convenience, treated as income of residue: *Re Whitehead, Peacock v. Lucas*, (1894) 1 Ch. 678.

By the Real Property Limitation Act, 1833 (3 & 4 W. IV. c. 27), s. 42, interest is recoverable only for six years after it is due, or after acknowledgment in writing; but that section does not apply to interest on a legacy directed to be raised by sale of realty: *Gough v. Bult*, 16 Sim. 323.

For cases on this section, *v. sup.* pp. 1436, 1437; *Wms. Exors.* 1285; *Re Walker*, 7 Ch. 120; a legacy recovered after many years only carried interest for six years, though there was an express trust: *Thomson v. Eastwood*, 2 App. Ca. 215.

BRINGING ADVANCES INTO HOTCHPOT.

In the absence of special direction, advances to children which have to be brought into hotchpot bear no interest up to the testator's death, but carry

interest from his death at 3 p. c. (formerly 4 p. c.): *Stewart v. S.*, 15 Ch. D. 539; *Hilton v. H.*, 14 Eq. 468; *Field v. Seward*, 5 Ch. D. 538; *Re Lambert, Middleton v. Moore*, (1897) 2 Ch. 169; and see *Re Barclay*, (1899) 1 Ch. 674; or other time fixed for distribution: *Re Rees, R. v. George*, 17 Ch. D. 701; *Re Dallmeyer, D. v. D.*, (1896) 1 Ch. 372, C. A.

But as the doctrine applies only to children, a hotchpot clause in the will was not extended to a widow so as to increase a share given to her by a codicil: *Stewart v. S.*, 15 Ch. D. 539; *Meinertzen v. Walters*, 7 Ch. 670; but in *Limpus v. Arnold*, 15 Q. B. D. 300, C. A., the widow, tenant for life, was held entitled to interest on 2,000*l.* advanced to a son; and children may be bound by a statement in the will as to the amounts of the advances made to them: *Re Wood, Ward v. W.*, 32 Ch. D. 517; *Re Aird's Estate, A. v. Quick*, 12 Ch. D. 291 (notwithstanding, *Re Taylor's Estate, Tomlin v. Underhay*, 22 Ch. D. 495); and see *Re Jolly*, (1900) 1 Ch. 292, reversed on appeal, (1900) 2 Ch. 616, C. A.

Life interests must be brought into hotchpot, and valued, not by reference to the duration of the interests, but by an actuarial valuation of them at the time when they first take effect: *Re Heathcote, Trench v. H.*, W. N. (91) 10; *inf.* Form 6, p. 1733.

Deduction may be made for estate duty payable by reason of the death of the testator within one year after the gift (*v. sup.* pp. 1402, 1405): *Re Beddington, Micholls v. Samuel*, (1900) 1 Ch. 771.

A hotchpot clause, framed by reference to a book which was destroyed by the testator, and not admitted to probate, was held ineffectual: *Coyte v. C.*, 56 L. T. 510.

In *Ackroyd v. A.*, 18 Eq. 313, the testator gave specific gifts to some of his children, A. and B., and the residue of his personalty amongst them all, to be divided so that they should share equally, A. and B. accounting for the value of the specific gifts to them. The exor absconded, and only part of the personalty was recovered some years afterwards. The sums recovered were apportioned between capital and income, and the former only brought into account as against the specific gifts to A. and B.; and see *Cox v. C.*, 8 Eq. 343, *et inf.* p. 1692.

As to bringing into hotchpot payments rightly made before a loss, by which appointed trust funds are rendered insufficient, see *Re Bacon's Settlement, Hutton v. Anderson*, 42 Ch. D. 559.

COSTS OF ACTION—ASSETS DEFICIENT.

Exors and admors will, in general, be allowed their costs, as between solr and client, in priority to those of all other parties, whether Plts or Defts, creditors or legatees: *Tanner v. Dancy*, 9 Beav. 339; *Jackson v. Woolley*, 12 Sim. 12; *Gaunt v. Taylor*, 2 Ha. 413; *Wetenhall v. Dennis*, 33 Beav. 285; and in priority over the costs of litigating the probate: *Major v. M.*, 2 Drew. 281; and although by confessing judgment they had made the assets deficient for paying debts: *Sanderson v. Stoddart*, 32 Beav. 155.

And in the admon of an insolvent estate, costs of cross-examination of the Plt creditor after judgment were allowed the exor, where the circumstances justified the course with a view to the protection of the other creditors: *Re Barber, Burgess v. Vinnicome*, 31 Ch. D. 665; *Lenton v. Brudenell*, 12 W. R. 1127.

But the exor was not entitled to costs of a probate action out of a fund representing proceeds of real estate only in priority to the Plt's costs: *Re Pearse, M'Lean v. Smith*, 56 L. T. 228; 35 W. R. 358; W. N. (87) 51.

Where in a probate action establishing a will against the heir, his costs were ordered to be paid "out of the estate"—the personal estate being insufficient—none of such costs were payable out of the real estate, whether specifically devised or undisposed of: *In re Shaw, Bridges v. Shaw*, (1894) 3 Ch. 615. In a Chancery admon action, costs "out of the estate" meant out of the personal estate only: *S. C.*

In an action for general admon, where the assets are insufficient even to pay the costs, the rule is, that the legal pers. represve first gets his costs as between solr and client; next are paid the Plt's costs in and about sales and getting in the estate, and the costs and expenses of the heir in executing

deeds. The residue is then apportioned among the other parties according to the amount of their costs between party and party: *Wetenhall v. Dennis*, 33 Beav. 285; and see *Dodds v. Tuke*, 25 Ch. D. 617.

In *Wroughton v. Colquhoun*, 1 D. & S. 357, the assets being deficient to pay the legacies and expenses, Plt, residuary legatee, was only allowed costs, as between solr and client, so far as the estate was increased by the proceedings: and see *Re Jarman*, 1 Eq. 71, as to costs of pecuniary legatees.

The costs are payable out of the shares of such of the residuary legatees as insist on taking the accounts after they have been properly shown and vouched, if they turn out to be correct: *Mackenzie v. Taylor*, 7 Beav. 467; *Thompson v. Clive*, 11 Beav. 475; but not if they are substantially incorrect: *Hilliard v. Fulford*, Form 3, *inf.* p. 1659; 4 Ch. D. 389; *Smith v. Cremer*, 24 W. R. 51; or were unsettled: *Mackenzie v. Taylor*, 7 Beav. 467; and see *A. G. v. Gibbs*, 1 D. & S. 156; but see *Sharples v. S.*, M'Clel. 506; 13 Fri. 745, *et inf.* p. 1515. And assigns of bankrupt exor and legatee refusing to concur in a sale, or take the accounts out of Court, had to pay the costs of suit: *Pattison v. Graham*, 2 S. & G. 207.

In *Re Tann, Gravatt v. T.*, 7 Eq. 436, the exors had rendered accounts which turned out substantially correct, had deducted from each legacy a contribution towards an indemnity fund, which was invested, had paid the adult legatees the balance due to them, and invested the infants' shares. The costs of admon at the instance of infants were ordered to be paid out of the undivided funds, but adult legatees and exors were to have no costs without bringing into account what they had received, and contributing to the costs.

The Plt in a legatee's action is allowed his costs, as between solr and client, if the fund is deficient to pay legacies: *Re Wilkins, W. v. Rotherham*, 27 Ch. D. 703; *Re Harvey, Wright v. Woods*, 26 Ch. D. 179; *Cross v. Kennington*, 11 Beav. 89; *Burkitt v. Ransom*, 2 Col. 536; *Waldron v. Frances*, 10 Ha. x; *Thomas v. Jones*, 6 Jur. N. S. 391; 1 Dr. & Sm. 134; and see *Re New Zealand Midland Ry.*; *Smith v. Lubbock*, (1901) 2 Ch. 357, C. A.; although there is a contest between him and another legatee as to the proper mode of distribution: *Re Wilkins, W. v. Rotherham, sup.*

But not where the fund is insufficient to pay debts: *Re Harvey, Wright v. Woods, sup.*; *Weston v. Clowes*, 15 Sim. 610; *Newman v. Hatch, V.-C. K.*, 17 March, 1855, Regr. Min. 284, where, however, Plt was allowed his expenses of sale of real estate, and in *Re Burrell, B. v. Smith*, 9 Eq. 443, 447, he was allowed solr and client costs of a suit by summons.

In *Lewis v. L.*, 13 Beav. 82, exors ordered to pay costs and retain them out of the assets, which were not then sufficient, were not allowed interest.

Where the whole realty is applied to pay debts, the heir-at-law is entitled to full costs, like a trustee: *Tardrew v. Howell*, 2 Giff. 530.

COSTS—GENERAL PERSONALTY.

There is no residue of personal estate until after payment of debts, funeral and testamentary expenses, and all costs of admon: *Shuttleworth v. Howarth*, C. & Ph. 228; *Trethewy v. Helyar*, 4 Ch. D. 53; *Elborne v. Goode*, 14 Sim. 165.

The general personalty is, therefore, the primary fund for payment of all costs of an action for admon or for carrying into effect the trusts of a will: *Howse v. Chapman*, 4 Ves. 550; *Hare v. Rose*, 2 Vez. 558; *Trethewy v. Helyar*, 4 Ch. D. 53; or of an action merely for construing a devise: *Maddison v. Chapman*, 1 J. & H. 470; and even of separate actions as to realty and personalty: *Pickford v. Brown*, 2 K. & J. 426; or occasioned by testator's mistake, or necessary for the construction of his will, and though relating to realty only: *Ripley v. Moysey*, 1 Keen, 578; and see *Re Grooin, Booty v. G.*, (1897) 2 Ch. 407, *inf.* p. 1514; but not of an action occasioned not by the obscurity of the will, but from the misunderstanding of the law: *Philpott v. St. George's Hosp.*, 6 H. L. C. 338; 3 Jur. N. S. 1277; and though the personalty was expressly exempted from debts, and they and "the costs and charges of proving my will" were charged on realty, and the suit was to effect a sale by the Court, and the questions related only to realty: *Stringer v. Harper*, 26 Beav. 585. And where, subject to payment of his debts and legacies, the testator devised "all his real estate," and bequeathed "all the residue of his personal estate" to trustees in trust for A. (who pre-deceased

him), the personal estate was the primary fund for payment of debts and legacies: *Watson v. Row*, 48 L. J. Ch. 476. It is now settled that a charge of "testamentary expenses" includes the cost of an admon action: *Miles v. Harrison*, 22 W. R. 441; 9 Ch. 316; *Harloe v. H.*, 20 Eq. 471; *Penny v. P.*, 11 Ch. D. 440; *Re Chapman, Exp. Clark*, 71 L. T. 778; *et v. sup.* p. 1423; *Wms. on Exors.*, 9th ed. p. 851; *Brown v. Burdett*, 31 W. R. 854 (and see the same case on appeal from *Kay, J.*, 37 Ch. D. 207); but not the Plt's costs of an unsuccessful action impeaching the validity of a will, though ordered in P. D. to be paid out of the estate: *Re Prince, Godwin v. P.*, (1898) 2 Ch. 225; and as to disallowance of costs of improper litigation, see *Brown v. Burdett*, 40 Ch. D. 244.

The general personalty is first liable for the costs of getting in specific legacies: *Perry v. Meddewcroft*, 4 Beav. 204; followed in *Re Asbury, A. v. A.*, *Stirling, J.*, 13 Nov. 1889; *Re Ormston, Goldring v. Lancaster*, 56 L. T. 76; 59 L. T. 594; 36 W. R. 216; but see *Warren v. Postlethwaite*, 2 Col. 123; *Moore v. Dixon*, 15 Ch. D. 566; or establishing classes, not the members of a class: *Shuttleworth v. Howarth, C. and Ph.* 228; *Greedy v. Lavender*, 11 Beav. 418; or of inquiries as to incumbrances by legatees: *Gee v. Muhood*, 23 W. R. 71; *Re Reeve*, 4 Ch. D. 841, *et v. inf.* p. 1519; or deciding between pecuniary legatees: *Wilson v. Squire*, 13 Sim. 212; but see *Young v. Martin*, 2 Y. & C. C. 594.

By O. LXV, 14B (Dec. 1885), "the costs of inquiries to ascertain the person entitled to any legacy, money, or share, or otherwise incurred in relation thereto, shall be paid out of such legacy, money, or share, unless the judge shall otherwise order."

As to the effect of this rule, see *Dan.* 1004.

Where an action was rendered necessary by a mistake of the testator as to the number of the children entitled to share in a legacy, the Court directed the costs to be paid out of the residue, and held that, if the rule applied, a special direction to that effect ought to be given: *Re Groom, Booty v. G.*, (1897) 2 Ch. 407.

A fund for bearing debts, &c., and the expenses of the execution of the trusts of the will had not to bear the costs of executing the trusts of the various real estates: *Lord Brougham v. Poulett*, 19 Beav. 119; nor of a suit by a devisee to exonerate the devised land from a mortgage as to costs incurred after notice that the personalty was sufficient, and would be applied: *Wilding v. Landor*, W. N. (66) 327.

And where an action for execution of the trusts of a settlement at the hearing proved to be wholly unnecessary, the Plt., though entitled to maintain it, was ordered to pay the costs up to and including the trial: *Fane v. F.*, 13 Ch. D. 228.

A beneficiary who has been overpaid will not be paid his separate costs, although the deficiency has arisen from wasting of the estate subsequently to the payment to him: *Re Winslow, Frere v. W.*, 45 Ch. D. 249.

Costs of sale of several real estates were borne by them rateably *inter se*: *Barnwell v. Iremonger*, 1 Dr. & S. 255; 9 W. R. 88.

In general, costs of admon, so far as they have been increased by admon of the real estate, are to be borne by the real estate: *Re Middleton, Thompson v. Harris*, 19 Ch. D. 552, C. A.; *Patching v. Barnett*, 51 L. J. Ch. 74; *Re Roper, Taylor v. Bland*, 45 Ch. D. 128, C. A.; and see *Re Copland, Mitchell v. Bain*, 44 W. R. 94 (where it was said that the proper order would be that the costs should be paid out of personal estate except so far as they had been increased by administering the real estate; and see *sup.* p. 254; and it has been found convenient that the Judge should himself apportion the costs: *Patching v. Barnett, sup.*

The residue must bear all the costs of severing and appropriating a legacy: *Handley v. Davies*, 5 Jur. N. S. 190; but not of investing it in land: *Gwyther v. Allen*, 1 Ha. 505; nor any costs relating to it after severance: *Martineau v. Rogers*, 8 D. M. & G. 328, 335; *Wilson v. Squire*, 13 Sim. 212; *Eyre v. Marsden*, 4 My. and O. 231; and see *Fraser v. Murdoch*, 6 App. Ca. 855. *Secus*, as to the legacy of an imbecile: *Pothecary v. P.*, 2 D. & S. 738; or where the question decided is one between the general estate and the appropriated legacy: *A. G. v. Lawes*, 8 Ha. 32; and see *Wollaston v. W.*, 26 W. R. 76.

For the provision of O. LXV, 14C, obviating delay in distribution by

reason of difficulties in ascertaining persons entitled to shares, *v. inf.* p. 1517.

But costs of an action to determine whether specific property passed under one or other of two separate gifts ought not to be charged on residue: *Wollaston v. W.*, 47 L. J. Ch. 717; 37 L. T. 631; 26 W. R. 77.

As between successive appointees of a fund by deed and will the costs of administering the fund must be borne rateably: *Re Shaw, Tucket v. S.*, (1895) 1 Ch. 343.

As to extra costs occasioned by some shares having been assigned or incumbered, *v. inf.* p. 1518.

The costs of litigating probate were postponed to costs of admon in the Court of Chancery: *Major v. M.*, 2 Drew. 281; although there could have been no admon here without the probate suit: *Re Mayhew, Rowles v. M.*, 5 Ch. D. 596; *Re Prince, Godwin v. P.*, (1898) 2 Ch. 225; and see *Re Pearce, McLean v. Smith*, 35 W. R. 358; W. N. (87) 51; 56 L. T. 228.

The general residue of personalty is first liable, and not a lapsed share of it: *Trethewy v. Helyar*, 4 Ch. D. 53; *Fenton v. Wills, Blann v. Bell*, 7 Ch. D. 382; *Re Giles*, 55 L. J. Ch. 695; but see *Gowan v. Broughton*, 19 Eq. 77, and *Scott v. Cumberland*, 18 Eq. 578.

Where a share of the residue lapsed, the costs of an inquiry as to next of kin were borne by that share: *Chatteris v. Young, Beam. Costs*, 390; *Skrymsher v. Northcote*, 1 Sw. 566; but see *contra, Re Giles*, 55 L. J. Ch. 695; and there being no assets, except a fund covered by a lien, Plts had to pay the costs of suit, except of inquiries as to the lien, which were paid by the parties entitled to it: *Bluett v. Jessop*, Jac. 240; and in general, where in the result it appears that there were no assets at the time of action brought, creditor-Plt must indemnify exor-Def't: *Hibernian Bank v. Lauder* (1898), 1 I. R. 262. In *Re Ham*, 2 Sim. N. S. 106, costs of petition as to sixteen shares of legacy were paid out of five which lapsed.

The "costs and charges of executing" a will do not include fines payable by devisees of copyhold: *Cole v. Jealous*, 5 Ha. 51.

Where an admor had settled with three out of four residuary legatees, only one-fourth of the admor's costs of a suit by the fourth was chargeable against his share: *Holgate v. Haworth*, 17 Beav. 259.

COSTS—MIXED RESIDUE.

Where there is a trust of mixed residue of realty and personalty charged with debts, &c., the costs are apportioned between both estates, and the costs do not fall first on a share which fails: *Bagot v. Legge*, 13 W. R. 1; *Christian v. Foster, Bunnett v. F.*, 2 Ph. 161; 7 Beav. 540; *Eyre v. Marsden*, 4 My. & C. 231; 2 Ke. 564; *Johnston v. Todd*, 8 Beav. 489 (though Plts failed to make out their title); *Hopkinson v. Ellis*, 10 Beav. 169; *Craddock v. Owen*, 2 Sm. & G. 241; and see *Green v. Busby*, W. N. (66) 344; *Re Price, Williams v. Jenkins*, 31 Ch. D. 485; and where realty and personalty are given together as a mixed fund, and the disposition fails as to part, the costs are borne rateably by the whole: *Luckraft v. Pridham*, 48 L. J. Ch. 636, not approving *Row v. R.*, 7 Eq. 414.

This rule holds good where part of the residue becomes undisposed of by lapse: *Roberts v. Walker*, 1 Russ. & M. 752, 767; *Ackroyd v. Smithson*, 1 Bro. C. C. 503; 4 My. & C. 245;

Or by reason of the Statutes of Mortmain: *A. G. v. Winchelsea*, 3 Bro. C. C. 373, *et sup.* pp. 1331, 1350; *A. G. v. Hurst*, 2 Cox, 364; *Curtis v. Hutton*, 14 Ves. 537;

Or the Thellusson Act: *Eyre v. Marsden*, 4 My. & C. 231; *Elborne v. Goode*, 14 Sim. 165.

But the costs of ascertaining the persons entitled to a share undisposed of by revocation were borne by it: *Skrymsher v. Northcote*, 1 Sw. 566; *Chatteris v. Young, Beam. App.* 27; but see *Cresswell v. Cheslyn*, 2 Ed. 123; 1 Sw. 571, n., *contra*; and *Re Giles, sup.*

The expression "blended fund," being only a technical mode of description used in argument, ought not to be used in the declaration made by the Court: *Singleton v. Tomlinson*, 3 App. Ca. 404, H. L.

COSTS WHERE CLAIM FAILS.

By O. LXV, 14A (Dec. 1885), "the costs occasioned by any unsuccessful claim or unsuccessful resistance to any claim to any property shall not be paid out of the estate unless the Judge shall otherwise direct." See Dan. 843.

The A. G. appearing in support of a bill for a legacy, which was dismissed, was not allowed costs: *Corp. Gloucester v. Wood*, 3 Ha. 149; *E. Kilmorey v. A. G.*, 29 L. R. Ir. 320. Where there was a fund in Court, a legatee Plt was allowed costs, though the account given to him before suit brought, that there were no assets to meet his legacy, was verified by the event: *Sharples v. S.*, 13 Pri. 745; *McClell. 506*; and see *Mackenzie v. Taylor*, 7 Beav. 467. Though Plt's and Def't's claims as next of kin were displaced on inquiry, they were allowed their costs from the fund: *Johnston v. Todd*, 8 Beav. 489; and Plt will have his costs where he has enabled the Court to construe the will or distribute a fund: *Merlin v. Blagrave*, 25 Beav. 125; *Wedgwood v. Adams*, 8 Beav. 103; and see *Wisden v. W.*, 5 Jur. N. S. 86, 455.

Plt in an admon suit, with a contingent interest which wholly failed pending the suit, and after decree, was not allowed costs, and the suit was stayed: *Hay v. Bowen*, 5 Beav. 610; *secus*, where on a doubtful will Plt turns out to have no interest: *Thomason v. Moses*, 5 Beav. 77; and Plt will not lose his costs where, though he himself has failed, the Court, through his exertions, has been enabled to distribute the fund: *Wedgwood v. Adams*, 8 Beav. 103.

But where a tenant for life who had received the income instituted a suit for admon, and the accounts, when taken, showed he had been overpaid, he was allowed no costs of action: *Croggan v. Allen*, 22 Ch. D. 101; 31 Ch. D. 319, C. A.

Bill against exors for a legacy was dismissed on paying it and the costs into Court, except as to one of them, who had a lien on it derived from the Plt: *Sawyer v. Mills*, 1 Mac. & G. 390.

And for cases where Plt has been allowed costs from the estate, though the bill was dismissed, or his claim failed, see *Westcott v. Culliford*, 3 Ha. 274; *Cooper v. Pitcher*, 4 Ha. 485; *Boreham v. Bignall*, 8 Ha. 131; *Turner v. Frampton*, 2 Col. 331; *Lee v. Delane*, 4 D. & S. 1; *Douglas v. Cooper*, 3 My. & K. 378; but the Plt is not necessarily entitled, in priority to a Def't, to costs out of a deficient fund: *Re Middleton, Thompson v. Harris*, 19 Ch. D. 552, C. A.

An admor who instituted a suit when his right was in dispute and whose grant had been revoked was not allowed his costs: *Houseman v. H.*, 1 Ch. D. 536.

COSTS GENERALLY.

"Costs out of the estate ought only to be given for those proceedings that are in their origin directed with some show of reason and a proper foundation for the benefit of the estate, or which have in their result conduced to the benefit thereof": *Bartlett v. Wood*, 9 W. R. 817, 818, per Lord Westbury; 30 L. J. Ch. 614; 4 L. T. 672; *Croggan v. Allen*, 22 Ch. D. 101.

Thus, where the accounts showed that the Plt, tenant for life, had in fact been slightly overpaid, he had no costs of the action, and was ordered to pay the costs of taking the income account: *Croggan v. Allen*, 22 Ch. D. 101.

The heir was entitled to costs as between solr and client in charity cases, and where he was a trustee: *James v. J.*, 11 Beav. 397; but in a charity case, if he failed, he only got party costs: *Whicker v. Hume*, 14 Beav. 528; *S. C.*, 1 D. M. & G. 506; 7 H. L. C. 124; and the heir, being a necessary party, was allowed, in House of Lords, his costs both below and on the appeal: *Singleton v. Tomlinson*, 3 App. Ca. 404.

Tenant for life may have an immediate sale to raise costs to which he is entitled out of the trust estate: *Burkett v. Spray*, 1 Russ. & M. 113.

Where the exors had increased the costs of an admon suit by refusing information and an account, and in other ways, they had to pay the costs to the hearing; and as to the rest, each party to pay his own: *Talbot v. Marshfield*, 3 Ch. 622; 4 Eq. 661; followed in *Re Mason, M. v. Cattley*, 22 Ch. D.

609; and exors must pay costs occasioned by their misconduct: *Heugh v. Scard*, 24 W. R. 51; 33 L. T. 658; but delay, or even refusal to account, is not always enough without misconduct: *S. C.*; *Heighington v. Grant*, 1 Ph. 600; *White v. Jackson*, 15 Beav. 191; and see Wms. Exors. 1936, 1937; and *sup.* p. 1174.

Exors have been refused costs for retaining large balances: *Birks v. Micklethwait*, 34 L. J. Ch. 362; 13 L. T. 31 (reversing 33 Beav. 409); and, up to the hearing, for neglecting to produce accounts: *Gresham v. Price*, 35 Beav. 47; and see *Simpson v. Bathurst*, 5 Ch. 193.

Exors have been ordered to pay costs for misstating and refusing the accounts: *Eglin v. Sanderson*, 3 Giff. 434; *Re Radcliffe, Pearce v. R.*, 50 L. J. Ch. 317; 29 W. R. 420; disputing the Plt's right to arrears of annuity: *Roch v. Callen*, 6 Ha. 531; and for retaining large balances, selling stock unnecessarily, and making false pretences of outstanding demands: *Crackett v. Bethune*, 1 Jac. & W. 586.

Where items in exors' account were objected to, and the chief clerk disallowed them all, the exors were ordered to pay the costs of the action: *Re Radcliffe, Pearce v. R.*, 50 L. J. Ch. 317.

Where exors, one of whom was a debtor to the estate and became bankrupt, were represented by the same solr, the costs prior to the bankruptcy were distinguished, and the solvent exor was allowed only his own proportion out of the fund, the defaulter's proportion being set off against the debt due from him, but the costs incurred by both subsequently to the bankruptcy were allowed in full: *Smith v. Dale*, 18 Ch. D. 516; dissenting from *Watson v. Row*, 18 Eq. 680.

The administratrix had to pay the costs of employing an accountant required through her conduct: *Toner v. Thompson*, 7 Sim. 145.

After further consideration, reserving liberty to apply, but not second further consideration, trustees were entitled to costs of sale and other exercise of their powers, though they had not obtained leave of the Court: *Re Mansel, Rhodes v. Jenkins*, 52 L. T. 806.

A trustee is entitled to costs as between solr and client in an admon action, unless he has been guilty of some misconduct. The mere fact that one set of costs as between solr and client has been given in the action to a co-trustee is not sufficient to deprive him of such costs: *Re Love, Hill v. Spurgeon*, 29 Ch. D. 348, C. A.; and see *Lee v. Barna*, 62 L. T. 922.

Where infant Plts were entitled in reversion, party and party costs only were allowed out of the fund in the first instance, the next friend having liberty to apply for the other costs when the fund came into possession: *Damant v. Hennell*, 31 Ch. D. 225.

A secured creditor of a deficient estate cannot, without valuing his security, claim priority over the Plt's costs; the time when the creditor's rights are fixed by election is when he sends in his proof: *Re Clogherly*, 21 L. R. Ir. 388.

An order on petition in an admon action by a person absolutely entitled to a share for an interim division of residue in anticipation of the hearing on further consideration is in the discretion of the Court, and the costs may be ordered to be paid by the Petr instead of being costs in the action: *Re Benett, Dyer v. Rickards*, W. N. (87) 167.

By O. LXV, 140: "Where some of the persons entitled to a distributive share of a fund are ascertained, and difficulty or delay has occurred or is likely to occur in ascertaining the persons entitled to the other shares, the Court or a Judge may order or allow immediate payment of their shares to the persons ascertained, without reserving any part of those shares to answer the subsequent costs of ascertaining the persons entitled to the other shares; and in all such cases such order may be made for ascertaining and payment of the costs incurred down to and including such payment as the Court or Judge shall think reasonable."

Mere liberty to attend proceedings under an admon judgment does not as of course entitle the parties to costs of attendance in Chambers; the order should expressly provide for such costs: *Day v. Batty*, 21 Ch. D. 830.

An action in which the sole question was whether certain sums were raisable out of the specifically devised real estates for the benefit of the personal estate was held to be an admon action, so that such real estates must defray the costs, which the personal estate was insufficient to pay, rateably

according to their respective values: *Re Price, Williams v. Jenkins*, 31 Ch. D. 485.

The costs of a suit to administer the trusts of a married woman's will, and also her general estate, which did not pass by the will, were borne by the two estates equally: *Mayd v. Field*, 24 W. R. 660; 3 Ch. D. 587; though of unequal value: *Dean v. Morris*, 5 W. R. 345.

In *Irby v. I.*, 24 Beav. 525, the costs of an admon suit, so far as increased by executing the trusts of a settlement, were borne by the settlement fund; and costs of an action to administer the trusts of a settlement were borne rateably out of appointed and unappointed shares: *Moore v. Dixon*, 15 Ch. D. 566.

In *Brandon v. B.*, W. N. (66) 253, where the property was divisible in seventy-two shares, orders were from time to time made for meetings of the trustees, with liberty to all parties to attend, and the annual taxation and payment of costs out of the rents were provided for.

An order on further consideration directing payment of costs, for convenience of admon in a particular way, may be readjusted on the ultimate distribution: *Re Roper, Taylor v. Bland*, 45 Ch. D. 126, C. A.

In *Nelson v. Duncombe*, 9 Beav. 211, the exor was allowed the costs of a cross cause against *ca. q. t.*; and in *Jackson v. Woolley*, 12 Sim. 12, of original and supplemental suits in priority to residuary legatees.

Letters written "without prejudice" cannot be read in order to deprive a successful Plt of costs: *Walker v. Wilsner*, 23 Q. B. D. 335, C. A.; and see *Williams v. Thomas*, 2 Dr. & S. 29; *Hoghton v. H.*, 15 Beav. 278, 321; *Paddock v. Forrester*, 3 Man. and G. 903; but the rule which excludes such documents applies only where there is a dispute or negotiation and terms offered, and not then if the document is one which from its character may prejudice the recipient whether or not he accepts the terms; and the Judge is entitled to look into the document in order to ascertain its character: *Re Daintrey, Exp. Holt*, (1893) 2 Q. B. 116.

As to the mode of taxation, where directed as to particular portions of the suit, see *Heighington v. Grant*, 1 Beav. 228; *A. G. v. Carrington*, 6 Beav. 458; *Hardy v. Hull*, 17 Beav. 355; and see Forms 15—22, *sup.* pp. 248—250, and notes, p. 264. The Court is not inclined to apportion costs minutely: *Knott v. Cottee*, 16 Beav. 81; *Coates v. C.*, 3 N. R. 355.

And as to costs of suits by legatees, see *Morg. & Davey*, 111, 135; and as to costs of trustees, *sup.* pp. 1168 *et seq.*

For forms as to taxation of costs and payment out of funds in Court, and as to costs generally, *v. Chap. XVII.*, "Costs"; as to the higher and lower scale, as to review of taxation and what items are allowed, as to costs in creditors' suit for admon, *v. sup.* p. 1459; as to disallowance of costs to solr on account of delay or misconduct, see O. LXV, 11; and *sup.* Vol. I., p. 262.

COSTS OF INCUMBERED SHARES—SEVERING.

The costs of inquiries as to incumbrances on shares of residue are payable out of the general estate: *Gee v. Mahood*, 23 W. R. 71; and see *Re Reeve*, 4 Ch. D. 841.

But where extra costs have been occasioned by assignments of or incumbrances on shares of residue, only one set of costs is allowed to each share out of the general estate, and that is paid to the assignees or incumbrancers, who take the deficit of their costs from their assignors; or if the one set allowed is more than sufficient to pay an assignee or incumbrancer the surplus of course is applied towards paying the costs of subsequent incumbrancers, and the assignor or mortgagor: *Basevi v. Serra*, 3 Mer. 676; 14 Ves. 313; *Greeedy v. Lavender*, 11 Beav. 417; and see Form 6, *sup.* p. 1497; *Hancock v. H.*, L.J.J., 5 Aug. 1852, B. 1516; *Coates v. C.*, 3 N. R. 355; *Re Jarman*, 1 Eq. 71.

One set of costs given to the parties entitled to a share merely includes all they would have incurred had they employed one solr. In simple cases it would suffice to direct such costs only to be allowed, as to each incumbered share, as the parties interested in such share would have been entitled to if they had not incumbered. If the incumbrancers and their priorities are ascertained, the order should provide for payment, as in Form 7, pp. 1498,

1499; if not, the costs to be allowed, and the amounts of such shares, should be carried to the respective accounts of the persons entitled, with liberty to apply.

In some cases all parties have had solr and client costs, but as to the incumbrancers only by consent. In *Lee v. Howlett*, 2 K. & J. 531, *et sup.* Form 7, pp. 1498, 1499, the costs were only as between party and party, except as to the exor. Where the residue is to be divided amongst the parties, costs are often allowed as between solr and client, but all parties must concur. An incumbrancer is not entitled to solr and client costs, even against his assignor, unless by the terms of his charge, or where the share, being insufficient to pay him, becomes his own. The estate sufficing to pay creditors, not legatees, Plt in legatee's suit had solr and client costs: *Thomas v. Jones*, 6 Jur. N. S. 391; 1 Dr. & Sm. 134, *et sup.* p. 1513.

Parties in the same interest ought to join in their defence: *Greedy v. Lavender*, 11 Beav. 419, 420; but see *Remnant v. Hood*, 27 Beav. 613; 2 D. F. & J. 396, 414, 415; or as co-Plts: *England v. Downs*, 6 Beav. 279; or will not be allowed costs; and the rule holds good as to a husband and wife, or a bankrupt and his trustee: *Mildmay v. Quicke*, 46 L. J. Ch. 667; 6 Ch. D. 553; *Garey v. Whittingham*, 5 Beav. 268; and as to costs of trustees severing in their defence, *v. sup.* p. 1170; and as to the costs of classes of persons, *inf.* p. 1576.

A Deft who represented different interests, and appeared by different solrs, was allowed two sets of costs: *Woolley v. Colman*, W. N. (86) 6, 36.

By O. LV, 40, in prosecuting the judgment or order, the Judge may order each class of persons to be represented by one solr. For order, see p. 1074.

Defts A. and B., in the same interest with Plt, will not be allowed separate costs unless Plt and the accounting Deft act by the same solr, in which case A. and B. will be allowed one set of costs between them: *Re Taylor*, *Daubney v. Leuke*, 1 Eq. 495; followed in *Hubbard v. Latham*, 14 W. R. 553; 35 L. J. Ch. 102; 14 L. T. 612; *Wragg v. Morley*, 14 W. R. 949; *Armstrong v. A.*, 12 Eq. 614; *Joseph v. Goode*, 23 W. R. 225.

Assignees of a defaulting bankrupt exor are not entitled to costs of an action from testator's estate, but might be to costs of a charge of having received parts of his estate, which failed: *Massey v. Moss*, 1 Ha. 319.

SECTION VI.—SPECIAL JUDGMENTS AGAINST REPRESENTATIVES.

1. *Against Executors of Sole Executor.*

AN account of the personal estate, not specifically bequeathed, of the testator A., come to the hands of B., deceased, the sole exor of his will, and of the Defts C. and D. [*or C., D., and E.*], the exors of the will of the said B., since his decease, or either [*or any*] of them, or of any other person or persons, by the order or for the use of the said B., or of the said Defts, or either [*or any*] of them; And Let what, on taking the said account, shall appear to be due from the Defts C. and D. [*or C., D., and E.*] be answered by them personally, and what shall appear to be due from the estate of the said B., deceased, be answered by the Defts C. and D. [*or C., D., and E.*] as such exors, they having admitted assets of the said B. for that purpose [*Or if assets not admitted*, out of his assets in a course of admon; And in case the said Defts shall not admit assets of the said B. for that purpose, then Let

an account be taken of the personal estate of the said B., come to the hands of the Defts C. and D. [*or* C., D., and E.], or either [*or any*] of them, or of any other person or persons, by the order or for the use of the said Defts, or either [*or any*] of them].

If against more than two exors, insert "any" instead of "either."

The words "come to the hands of," "received by," "possessed by," and, in the latter part of the direction, the same words, and "coming on the said account," or "due from," and "due from the estate of," are all used, but "come to the hands of," "due from," and "due from the estate of," are the better expressions.

For order against the exors of an exor, who had committed breaches of trust with special directions as to costs, see *Palmer v. Jones*, 43 L. J. Ch. 349, *et sup.* p. 1168.

For form of affidavit by exor of deceased exor as to personal estate, see D. C. F. 609.

2. Against Surviving Executor, and Executors of Deceased Executor.

AN account of &c., come to the hands of the Deft B. and of C., deceased, the exors of his will, or either of them, or of any other &c.; And Let what, on taking the said account, shall appear to be due from the Deft B. be answered by him personally; And what shall appear to be due from the estate of the said C., deceased, be answered by the Defts D. and E., the exors of his will, they having admitted &c. [Form 1] [*Or, if assets not admitted*, out of his assets in a course of admon; And in case the Defts D. and E. shall not admit assets &c., Form 1, *sup.*]

3. Against Executors of both Executors.

AN account of the personal estate of the testator A. come to the hands of B. and C., the exors of his will, and of the Defts D. and E., the exors of the will of the said B., who survived the said C., since the death of the said B., or any of them, or to the hands of any other &c.; And Let what on taking the said account shall appear to be due from the Defts D. and E. be answered by them personally, and what shall appear to be due from the estate of the said B. be answered by the Defts D. and E., the exors of his will, they having admitted assets &c. [Form 1, p. 1519] [*If assets not admitted*, out of his assets in a course of admon; And in case the Defts D. and E. shall not admit assets of the said B. for that purpose, then let an account be taken of the personal estate of the said B. come to the hands of the Defts D. and E., or either of them, or to the hands of any other &c.]; And Let what, on taking the said account of the personal estate of the testator A., shall appear to be due from the estate of the said C. be answered by the Defts F. and G., they having admitted assets &c. [Form 1, p. 1519] [*If assets not admitted*, out of his assets in a course of admon; And in case the Defts F. and G. shall not admit assets &c., Form 1, p. 1519].

4. *Against Executor of Executor of acting Executor.*

ACCOUNT of the testator's personal estate come to the hands of A., deceased, the acting exor of his will, or to the hands of B., also deceased, who was the sole exor of the will of the said A., or to the hands of the Deft C., the exor of the will of the said B.

And Let what, on taking the said account, shall appear to be due from the Deft C. be answered by him personally; And Let what shall appear to be due from the estates of the said A. and B. respectively be answered by the Deft C. out of the assets of the said A. and B. respectively in a due course of admon; And in case the Deft C. shall not admit assets of the said B., and of the said A., come to the hands of the said B., or to the hands of the Deft C., for that purpose, then Let an account be taken of the personal estate of the said B. come to the hands of the said Deft C., and of the personal estate of the said A. come to the hands of the said B. in his lifetime, or to the hands of the Deft C. since his decease, or of any other person &c.

5. *Executors indebted to Estate.*

AND in taking the account of the testator's personal estate, Let an inquiry be made whether the said Defts, the exors, or any of them, were, or was, at the time of the testator's decease, indebted to him, on any and what security or securities; And if it shall appear that they or any of them were or was so indebted, Let an account be taken of what is due from such of them as shall appear to have been so indebted; And Let them be charged therewith in the account of the testator's personal estate.

For direction where exor has paid debts or legacies, for him to stand in creditor's or legatee's place, *v. inf.* Sect. XXX., "RECOUPING," pp. 1675 *et seq.*

6. *Where Plaintiff does not seek to charge Deceased Executor's Estate.*

AN account of the personal estate &c. come to the hands of the Deft C., the surviving exor of the will of the testator, either alone, or jointly with W., deceased, the other exor of the said will, or to the hands of any other person or persons by the order or to the use of the Deft C. alone or jointly with the said W., the Plt by his statement of claim not seeking for any account against the estate of the said W., deceased.—See *Pease v. Cheesbrough*, M. R., 17 March, 1858, B. 791; *Re Lindo*, L. v. L., V.-C. H., 16 Dec. 1876, B. 2057.

For like decree, Plt declining account against the estate of a co-exor who died insolvent, see *Symes v. Glynn*, M. R., 14 Feb. 1771, B. 541.

For order for admon against the surviving exor, the represves of the deceased exor and trustee not being parties, see *Whittington v. Gooding*, 1851, B. 1020; 10 Ha. xxix.

For order where Plt exor submitted to account, and did not ask any

accounts against Deft, his co-exor and trustee, who by the bill was stated to have accounted to Plt, for accounts of testator's estate received by Plt alone or jointly with Deft, see *Lambert v. Buchanan*, V.-C. S., 22 Dec. 1858, B. 447.

For order on further consideration, there being no evidence to show whether C., one of the exors, had or had not received any rents and profits of the testator's realty, and all parties interested, other than the infants, by their counsel admitting that C. had not received any rents and profits not accounted for by him, declaring that it was for the benefit of the infants to do so, and waiving any inquiry with respect to the rents and profits received by C., see *Tinkler v. Compton*, V.-C. M., 9 Aug. 1875, B. 3323.

NOTES.

ACCOUNTS WHERE SOME OF THE EXECUTORS HAVE DIED.

All the living exors must be parties to an admon action: *Latch v. L.*, 10 Ch. 464; *Hamp v. Robinson*, 3 D. J. & S. 97; but it is not necessary to join the represves of one who has died, when it is not sought to charge his estate with any sums received by him.

But an allegation that he or his exors duly accounted to the surviving exor is sufficient: *Adams v. Barry*, 2 Y. & C. C. 167; or a waiver of the account against his estate: *Masters v. Barnes*, Ib. 616, where the deceased exor had become bankrupt before his death; and see *Pease v. Cheesbrough*, Form 6, *sup.* p. 1521; *Whittington v. Gooding*, 10 Ha. xxix., *et sup.* p. 1521; or the judgment may be made restricted to the account against the survivors, though there is no such allegation or waiver: *Wilson v. Todd*, 1 My. & C. 42; *q. v.* as to bringing in the deceased's exor by supplemental proceedings: and see *Simes v. Eyre*, 6 Ha. 137; *Holland v. Prior*, 1 My. & K. 237; O. xvi, 4, 5, *et sup.* pp. 1139, 1416.

Where a testator dies subsequently to the Land Transfer Act, 1897 (60 & 61 V. c. 65), having appointed exors, his real estate vests in all the exors, and not only in those who prove the will or act in the admon of the estate: *In re Pawley and London and Provincial Bank*, (1900) 1 Ch. 58. As to the devolution of the legal estate in the realty before grant of probate or letters of admon, see *Brickdale*, 238, 239.

PAYMENTS.

Extravagant funeral expenses were not allowed in full: *Bissett v. Antrobus*, 4 Sim. 512; *Bridge v. Brown*, 2 Y. & C. C. 181; Wms. Exors. 9th ed. 838.

As to the illegality of cremation, see *Williams v. W.*, 20 Ch. D. 659.

Exors have been allowed a salary to agent to get in debts: *Hopkinson v. Roe*, 1 Beav. 180; and broker's percentage for identifying exor on transfer to legatee: *Jones v. Powell*, 6 Beav. 488; *Davenport v. Powell*, 14 Sim. 275; but not for intermediate transfer to exor, and only one guinea on transfer into Court: *Hopkinson v. Roe*, *sup.*

Payments to the rightful exor made by exor *de son tort*, after action brought against him, will not be allowed: Wms. Exors. 219; and in *Layfield v. L.*, 7 Sim. 172, payments by exors *de son tort*, to admor appointed after suit brought, and then made co-Deft, were not allowed; but acts of deceased exor who had not proved were confirmed by subsequent probate: *Brazier v. Hudson*, 8 Sim. 67.

An auctioneer who sells the assets is liable for the debts as an exor *de son tort* unless he can show that he acted under an exor who has proved the will: *Nulty v. Fagan*, 22 L. R. Ir. 604.

And as to the order of payment of debts, *v. sup.* pp. 1419 *et seq.*

An exor in India is entitled to 5 p. c. on all assets obtained or retained by him there: *Cockerell v. Barber*, 1 Sim. 23; *Campbell v. C.*, 13 Sim. 168, 169; 2 Y. & C. C. 607; *Matthews v. Bageshaw*, 14 Beav. 123, 126, n.; Wms. Exors. 1857; 8th ed., 1865.

For the corresponding rule as to the West Indies, see *Denton v. Davy*, 1 Moo. P. C. 15.

And as to exors' allowances, see Wms. Exors. 1860 *et seq.*

As to what will be allowed under the term "executorship expenses," see *Sharp v. Lush*, 10 Ch. D. 468; and as to the meaning of the expression "testamentary expenses," *v. sup.* p. 1423.

Payments to police for protecting and preserving property left derelict were held to be salvage expenses payable out of the assets: *Re Pike, Burke v. B.*, 23 L. R. Ir. 9.

ACCOUNTS AND DISCHARGE.

An *exor de son tort* is subject to all the liabilities without any of the privileges of an *exor*: *Carmichael v. C.*, 2 Ph. 101; and, it has been said, is liable to account to the beneficiaries, though he has settled with the rightful *exor*, or with a person who has taken out *admon* pending an action for an account of the intestate's estate: *S. C.*; *Layfield v. L.*, 7 Sim. 172; but see *Hill v. Curtis*, 1 Eq. 90, *contra*; *Wms. Exors.* 9th ed. 219 (k); and *sup.* p. 1416.

An agent employed by and accounting to a person not the rightful *exor* may be made accountable as *exor de son tort*: *Sharland v. Mildon*, 5 Ha. 469; *A. G. v. New York Breweries Co.*, (1898) 1 Q. B. 205, C. A.; and persons acting as trustees or *exors* are liable as such: *Rackham v. Siddall*, 1 Mac. & G. 607; *Pearce v. P.*, 22 Beav. 248, *et sup.* p. 1131; but a creditor who obtains payment of a debt from an *exor de son tort* does not thereby become an *exor de son tort*: *Hursell v. Bird*, 65 L. T. 709.

As to *exor's* liability for cutting timber by mistake on a supposed trust, see *Ferrand v. Wilson*, 4 Ha. 383.

It seems an *exor* cannot defend an action *in formā pauperis*, even if he swear there are no assets: *Oldfield v. Cobbett*, 1 Ph. 613; and see *S. C.*, 1 Col. 169; unless he is also beneficially entitled: *Thompson v. T.*, cited *Id.* 170; *Everson v. Matthew*, 3 W. R. 159; and a husband entitled to property as *admor* of his wife may sue *in formā pauperis*: *S. C.*; *Rogers v. Hooper*, 21 L. T. 278; 1 W. R. 474.

As to the liability of an *exor* who has distributed the estate, *v. sup.* p. 1434, *et inf.* p. 1527, and Sect. XXVIII., "REFUNDING," pp. 1657 *et seq.*

A trustee on settling accounts and handing over the property is entitled to an acknowledgment from his *c. q. t.*, but not in general to a release under seal: *Chadwick v. Heatley*, 2 Col. 137; *Re Wright*, 3 K. & J. 419; *King v. Mullins*, 1 Drew. 308; *Lewin*, 402; and cases *inf.* pp. 1527, 1528.

SECTION VII.—CONDUCT OF ACTION.

Prosecution of Judgment or Order given to Creditor.

LET M. and B., *exors* of the will of M. deceased, who claim to be creditors upon the estate of the testatrix D., have the carriage and execution of the order made in this action for the *admon* of the personal estate of the said D., dated &c.—*Duffield v. O'Brien*, V.-C. W. in Chambers, 10 June, 1853, A. 949.

For order for delivery of papers, see *L. Alvanley v. Kinnaird*, 1841, B. 1133; *S. C.*, 8 Jur. 114; and in *Beale v. Symons*, L. C., affirming V.-C. E., 1849, A. 281, 337, the conduct of the cause, though not a creditors' suit, was given to a creditor.

For various orders as to the conduct of *admon* suits, see *Smith v. Guy*, 2 C. P. Coop. 289, and cases there collected.

For order giving the conduct of an admon order taken on summons to a residuary legatee on payment of Plt's debt and costs, see *Re Molyneux, Pimbley v. M.*, W. N. (67) 250; and see *L. Alvanley v. Kinnaird*, 2 M. & G. 1; 8 Jur. 114; *Earle v. Sidebottom*, W. N. (68) 121; 37 L. J. Ch. 503.

For order giving a creditor leave to attend proceedings under admon decree at the expense of the estate, see *Bush v. B.*, V.-C. M., 23 May, 1871. But in general he can only attend at his own expense; and see *Hare v. Rose*, 2 Vez. 558, *et sup.* p. 1432.

For form of summons, see D. C. F. 538.

NOTES.

CONDUCT OF PROCEEDINGS.

The question which of two creditors or beneficiaries shall have the conduct of admon proceedings is a matter for the Judge's discretion in Chambers: *Harvey v. Coxwell*, 32 L. T. 52; and will not be interfered with on appeal: *Dowbiggin v. Trotter*, 20 W. R. 1024; 27 L. T. 731.

An order giving the conduct to a creditor who is not a party, and has not proved his debt, would be irregular: *Smith v. Guy*, 2 C. P. Coop. 297, 298; but a Plt whose debt the Master had disallowed was not deprived of the conduct, pending exceptions to the report: *Jeudwine v. Agate*, 5 Russ. 283.

The conduct was, after a creditor's admon order, given to a residuary legatee on payment of Plt's debt and costs: *Re Molyneux, Pimbley v. M.*, W. N. (67) 250. And see *L. Alvanley v. Kinnaird*, 2 M. & G. 1; 8 Jur. 114. See, however, *Re Ainsworth, Cockcroft v. Sanderson*, W. N. (95) 153, to the effect that the proper course in such a case is for the legatees or next of kin to commence a fresh action for administration, the proceedings in the creditor's action being stayed.

A residuary legatee may be preferred to a creditor: *Penny v. Francis*, 7 Jur. N. S. 248; or to an exor: *Kelk v. Archer*, 16 Jur. 605; and an exor to a creditor whose writ was issued first: *Re Smith, McMurray v. Mathew*, 33 L. T. 804; 30 L. J. Ch. 185; 9 W. R. 8.

The Court will not take the conduct of the action from Plt for irregularity in the judgment or order, though collusion is suggested: *Smith v. Guy*, 2 Ph. 159; and judgments being made in two suits, Plt in one was allowed to attend in the other: *S. C.*

The prosecution of a judgment or order in Chambers may be taken from Plt for want of diligence and committed to another, in which case Plt's solr will be ordered to allow inspection and copies of all documents in his possession: *Bennett v. Baxter*, 10 Sim. 417; see O. xxxiii, 9.

Delay by Plt was ground for giving the conduct to a creditor: *Cook v. Bolton*, 5 Russ. 282; but Plt must be indemnified against future costs: *Anon.*, 2 Moll. 467.

A mortgagee of interests under the will who had got liberty to attend in the admon suit, and afterwards foreclosed, could not sustain a suit to have the conduct of the admon suit given to him: *Beckwith v. Booth*, W. N. (66) 379.

After decree here the Plt in a suit for admon in Ireland was restrained from proceeding: *Eustace v. Lloyd*, 25 W. R. 211; 35 L. T. 900.

See, as to consolidation of actions and stay of proceedings, *sup.* Vol. I. pp. 835 *et seq.*; and see *Furze v. Hennet*, 2 D. & J. 125; *Scaffold v. Hampton*, 22 W. R. 182; 43 L. J. Ch. 137; 29 L. T. 575; *et sup.* Vol. I. p. 393.

COSTS.

A Plt who has been deprived of the conduct of an admon action is not entitled to the costs of attending the taking of the accounts in Chambers: *Armstrong v. A.*, 12 Eq. 614; *Joseph v. Goode*, 23 W. R. 225; but will be allowed the costs of appearing on further consideration to ask for costs up to his removal: *S. C.*; and see *Hubbard v. Latham*, 14 W. R. 553.

A creditor proceeding after notice of a sufficient judgment or order loses subsequent costs: *Biddulph v. Fitzgerald, Moffet v. Smith*, 2 Moll. 351, 359.

SECTION VIII.—LIABILITY OF THE ESTATE AND INDEMNITY.

1. *Executor or Administrator to defend Action and be indemnified.*

LET the Plt, as admor of the effects of S., deceased &c., be at liberty to defend the action instituted against him, as such admor, together with other persons, wherein C. &c. are Plts, and J. &c. are Defts, as he may be advised; And the Plt is to be indemnified against all costs, charges, and expenses which have been, or hereafter may be, properly incurred by him, as such admor, relating to the said action out of the testator's estate.—*Norris v. Sadleir*, M. R., at Chambers, 17 March, 1858, B. 635.

2. *Inquiries as to Testator's Liability as Surety or Partner.*

AN inquiry whether the estate of the testator is liable for any and what debt of — due and owing to Messrs. B., and whether it will be proper and for the benefit of the testator's estate that any and what proceedings should be taken against the said —, or otherwise, and by whom, for the purpose of discharging the testator's estate from such liability.—*Bicknell v. B.*, M. R., 11 Jan. 1853, A. 436.

AN inquiry whether the testator at his death was surety for the Deft W. in any and what sum or sums of money, and whether such sum or sums, or any and what parts thereof, has or have been paid or secured; And at what time or times respectively the same were so respectively paid or secured; And whether any, and which, of such sum or sums of money, or any and what parts thereof, has or have not been paid or secured, and under what circumstances; And whether anything, and what, remains due to or from the testator's estate in respect of the same, and under what circumstances.—*Fordham v. Wallis*, V.-C. T., 8 Jan. 1853, A. 403; 10 Ha. 217.

For special inquiries as to liability of testator's estate under lease and partnership, and as to getting rid of liabilities, and as to misconduct in waiver of right to become partner, see *Fletcher v. Stevenson*, 3 Ha. 364.

For order for surviving partner to execute an indemnity to the testator's estate against debts and liabilities, see *May v. M.*, V.-C. M., 21 July, 1874.

3. *Inquiry as to Testator's Liability as Trustee and his Receipts.*

AN inquiry whether the testator, either alone or jointly with any other persons or person, became, and was at the time of his decease, trustee under or by virtue of the indenture dated &c., or under or by virtue of any other, and what, deed or instrument; And whether by any act or acts, either alone or jointly with such other persons or person, or by the omission of any acts or act which he, either alone or jointly with them or him, was bound to do or perform, under or by virtue of the said indenture, or deed or instrument, any liability or obligation

has arisen by which his estate has or may become bound or chargeable to any, and what, extent.—*Proper v. Rowlands*, V.-C. W., 11 Jan. 1850, B. 639.

For inquiries as to any person, other than parties to the suit, having claims on the estate, see *Adams v. Barry*, 2 Col. 294.

4. Inquiry as to Liability under Contracts.

AN inquiry whether the testator was at the time of his death engaged in any and what contracts, and whether or not in partnership with any and what persons, and whether the estate of the testator is under any and what liabilities or liability in respect of such contracts or contract, or any or either and which of them; And whether such partnerships, or any or either of them, are or is still subsisting, and whether the partnership accounts have been wound up and settled; And whether any and what proceedings will be requisite in relation to such contracts and accounts, or any or either of them, and by and against whom; And whether any proceedings are now pending, and whether such proceedings should be compromised; and if so, upon what terms.—*Trott v. Jones*, V.-C. M., 14 March, 1874, B. 779.

5. Inquiry as to Building Contract by Testator affecting Property bequeathed by Will.

AN inquiry whether the testator had entered into any and what building contracts affecting the property devised to the said E. L. S. D. for life or for any shorter period, with remainder over, and whether any and which of such contracts remained uncompleted at his death in respect of which the estate of the testator was under any and what liability, and whether any and what compensation is payable by the testator's estate to the said E. L. S. D. in respect thereof.—See *Re Day, Day v. Sprake*, North, J., 11 August, 1898, A. 3986; (1898) 2 Ch. 510.

6. Inquiry whether proper to insure Lives.

AN inquiry whether it will be proper for the Deft B. to insure or renew (and keep on foot) the insurances of any of the lives whereon any annuities are held for the benefit of the testator's personal estate; And if so, then Let such insurances be made or renewed (and kept on foot) accordingly, with the approbation of the Judge, out of the testator's personal estate.

7. *Decree in Action by Residuary Legatees against Specific Legatee of Bank Shares, and her Husband, and the Trustees of her Settlement, to indemnify Plaintiffs and the Testator's Executor against Calls.*

DECLARE that the Plts (*residuary legatees*) are entitled to have the sum of £576, paid by the Plts in respect of the call in the pleadings mentioned, and the costs of the action of the C. Bank of India v. T., together with interest on the said sum of £576 from the time the same was paid by or on behalf of the Plts, at the rate of 4 p. c. per ann., raised and paid to them out of the trust funds hereinafter mentioned : And Declare that the Plts are entitled to be indemnified against the call of £180 in the pleadings mentioned, and all other calls hereafter to be made in the winding-up of the said co. in respect of the forty-five shares in the pleadings mentioned out of the funds now subject to the trusts of the said indenture of settlement &c. ; And Let the Defts S. and J. (*the trustees*), out of the funds subject to the trusts of the said indenture of settlement, raise the said sum of £576 and interest as aforesaid, and the sum payable in respect of the said call of £180, and out of the amount so to be raised pay the said sum of £576 and interest as aforesaid to the Plts G. and H., and thereout pay to the Deft T. (*the exor*) what he shall have paid in respect of the said call of £180.—Tax costs of Plts and of Defts T. and S. and J., those of S. and J. as between solr and client.—Plts to pay T.'s costs and add them to their own.—Defts S. and J. to pay the total amount and raise the same and their own costs out of trust funds.—*Gribble v. Tucker*, V.-C. M., 16 Feb. 1875, A. 293.

NOTES.

By the Law of Property Amendment Act, 1859 (22 & 23 V. c. 35), s. 27, an exor or admor liable as such under any lease or agreement for a lease granted or assigned to the deceased, after providing for any "future claim that may be made in respect of any fixed or ascertained sum covenanted or agreed by the lessee to be laid out on the property," and assigning the lease to a purchaser, may distribute the assets without appropriating any fund for liability under the lease or agreement, and shall not be liable ; but the lessor's right to follow the assets is not to be affected.

The section applies to exors of a person who died before it came into operation (Aug. 13, 1859), assigning a lease afterwards: *Re Green*, 2 D. F. & J. 121 ; *Smith v. S.*, 1 Dr. & S. 384 ; *Dodson v. Sammel*, *Ib.* 575 ; 9 W. R. 887 ; *Reilly v. R.*, 34 Beav. 406 ; *Bennett v. Lytton*, 2 J. & H. 155, 158.

The section only applies to admon out of Court, for exors acting fairly under a judgment or order for admon are fully indemnified without more: *Smith v. S.*, 1 Dr. & S. 384, 386 ; *Dean v. Allen*, 20 Beav. 1, 4 ; *Waller v. Barrett*, 24 Beav. 413 ; *Williams v. Headland*, 12 W. R. 367, *et inf.* p. 1661.

And for the principles on which the Court acts as to giving an indemnity against covenants in leases, or debts which may arise, see *Waller v. Barrett*, 24 Beav. 414, 416—420 ; *Dean v. Allen*, 20 Beav. 1, 4.

Though an exor is entitled to an indemnity as to liability in respect of leaseholds, he will, when his misconduct has caused delay or embarrassment, only be allowed such costs as would have been incurred in obtaining the

judgment on an admon summons: *Re Bosworth, Howard v. Easton*, 29 W. R. 885; 45 L. T. 136.

He is not bound to accept an indemnity, but may require the repairs, &c., necessary to keep the property from risk of forfeiture, to be carried out out of the rents and profits, and on his application the Court will appoint a receiver: *Re Fowler, F. v. Odell*, 16 Ch. D. 723; and see *Re Courtier, Coles v. Courtier*, 34 Ch. D. 136, C. A.; and the tenant for life of leaseholds specifically bequeathed is bound during the continuance of his interest, as between himself and the testator's estate, to pay the rent reserved by the lease and perform the covenants and conditions contained in it: *Re Betty, B. v. A. G.*, (1899) 1 Ch. 221; *Re Giers, Cooper v. G.*, (1899) 2 Ch. 54; not following *Re Tomlinson*, (1896) 1 Ch. 232; and see earlier cases considered in Lewin on Trusts, 255.

An exor loses the protection of the section if he assigns the leaseholds to the legatees, or to trustees for them, for they are not purchasers: *Smith v. S., Dodson v. Sammell*, 1 Dr. & S. 384, 575.

Funds set apart before the Act to meet the landlord's claims as to assigned leaseholds may be paid out without notice to him: *Sowdon v. Marriott*, 21 W. R. 808; 28 L. T. 867; *Dodson v. Sammell*, 1 Dr. & S. 575; but see *Bunting v. Marriott*, 7 Jur. N. S. 565; 9 W. R. 264; and a claim by the lessor to administer the lessee's estate, and to impound assets, to meet future possible breaches, was dismissed: *King v. Malcott*, 9 Ha. 692.

The liabilities of leasehold given for life were in the case borne by the corpus: *Allen v. Embleton*, 4 Drew. 226.

A purchaser of a lease without a legal assignment was not liable to lessor's suit for rents and breaches of covenant during his possession: *Cox v. Bishop*, 3 Jur. N. S. 499.

For cases before the Act, see *Fletcher v. Stevenson*, 3 Ha. 360, 364; *Dobson v. Carpenter*, 12 Beav. 370, 376; *Brewer v. Pocock*, 23 Beav. 310.

An exor was entitled to an indemnity, though he had never been in possession: *Cochrane v. Robinson*, 11 Sim. 378; 5 Jur. 4; and to an indemnity out of the general estate against leaseholds specifically bequeathed: *Garratt v. Lancefield*, 2 Jur. N. S. 177; *secus*, where he has unconditionally assented to the bequest: *Shadbolt v. Woodfall*, 2 Col. 30; and no indemnity was necessary where the testator was only assignee and the lease had been assigned: *Garratt v. Lancefield, sup.*

Sums paid to a landlord for dilapidations to a leasehold specifically bequeathed, and for rents since the testator's death, are not debts of the testator: *Hawkins v. H.*, 13 Ch. D. 470, C. A.

As to the liability of a shareholder's estate for debts contracted by the company after his decease, *v. inf.* p. 1661, and Chap. XLIX., "PARTNERSHIP."

As to the right of the pers. represve of a deceased shareholder to have an allotment of shares which the deceased would have been entitled to have offered to him, see *James v. Buena Ventura Nitrate Grounds Syndicate, Ltd.*, (1896) 1 Ch. 456, C. A.

What was due in respect of shares repudiated by the legatees of them, also a devisee, fell on testator's estate: *Muffett v. Bates*, 3 Sm. & G. 468; and fines on renewals of leases which the testator had covenanted to pay were paid out of the general estate: *Trail v. Jackson*, 25 W. R. 802; and as to specific legatees of shares or land being liable for calls or rent, or entitled to payment out of the general estate, *v. inf.* p. 1621.

Where, in an admon action, proceedings taken with the leave of the Court for the benefit of the estate are unsuccessful, and the persons so taking them are ordered to pay the Deft's costs, he becomes entitled to the benefit of their right of indemnity, and, as between them and him, his right is the higher, so that if the estate is insufficient his costs will be paid first: *Re Blundell, B. v. B.*, 44 Ch. D. 1, C. A.

RIGHT TO RELEASE.

A trustee, on settling accounts and handing over the property, is entitled to an acknowledgment from his c. g. t., though not to a release under seal: *Chadwick v. Heatley*, 2 Col. 137; he may be entitled to a release under seal,

if the trusts were created by deed: *Re Wright*, 3 K. & J. 419; or where there is no writing to indicate them, or the amount of the fund, or if he is asked to depart from the exact trusts: *King v. Mullins*, 1 Drew. 308.

Trustees receiving a fund from other trustees need only give a receipt: *Re Cater*, 25 Bea. 366.

And see Lewin, 402.

SECTION IX.—RETAINER OF HIS OWN DEBT BY EXECUTOR.

Declaration that Administrator entitled to retain Debt.

DECLARE that the debt, W. B., as the admor *de bonis non* of the personal estate of the above-named intestate, J. P., deceased, has a right to retain the sum of £—, the balance of the principal due in respect of a debt of £—, by the master's certificate, dated &c. certified to be due to the said W. B., and owing to him by the said intestate out of a sum of (two hundred and seventy-five pounds twelve shillings and sevenpence), moneys come to his hands as legal pers. repesve of the said intestate.—See *Davies v. Parry*, Romer, J., 4 Feb. 1899, A. 192, (1899) 1 Ch. 602. See note, *inf.* p. 1532.

NOTES.

RIGHT OF RETAINER.

An exor or admor has a legal right to retain his own debts out of the testator's legal assets in priority to all other creditors of equal degree: Wms. Exors. 1039; 8th ed. 1043 *et seq.*; 9th ed. 884 *et seq.*; *Re Jones, Calver v. Laxton*, 31 Ch. D. 440; *Wilson v. Coxwell*, 23 Ch. D. 764; and before the costs of all parties, including Plt: *Chissum v. Dewes*, 5 Russ. 29; *Richmond v. White*, 12 Ch. D. 361, C. A.; although a mortgagee: *Tipping v. Power*, 1 Ha. 411; but see *Ferguson v. Gibson*, 14 Eq. 379; and, according to *Loomes v. Stotherd*, 1 S. & S. 458, retainer will only have priority over such costs as are incurred after the exor has given notice that his right of retainer will exceed the assets; and retainer is of course subject to specific charges: *Tipping v. Power*, 1 Ha. 405.

And the right to retainer for a simple contract debt will not be enlarged because, for convenience of admor, specialty creditors have been paid in the first instance out of proceeds of real estate: *Walters v. W.*, 18 Ch. D. 182; nor, on the other hand, will it be diminished because, for convenience of admor, creditors in a higher degree have been paid out of outstanding personal estate: *Re Lance, Sharp v. Rebbeck*, W. N. (00) 29.

The right of retainer exists only in the case of legal assets: Wms. Exors. 888; *Bain v. Sadler*, 12 Eq. 570 (explaining *Hall v. Macdonald*, 14 Sim. 1); and therefore not as against real estate, which by the Admon of Estates Act, 1833 (3 & 4 W. IV. c. 104), is made assets only in equity: *Walters v. W.*, 18 Ch. D. 182; but debts recoverable only in equity could be retained: *Re Morris, M. v. M.*, 10 Ch. 68.

And the right attaches only to a fund of which the repesve has actual or constructive possession, not, *e.g.*, to a fund transferred from another action on his application: *Pulman v. Meadows*, (1901) 1 Ch. 233.

When the debt due to the exor exceeds the value of the assets, the exor is entitled to retain the assets in specie: *In re Gilbert, Exp. Gilbert*, (1898) 1 Q. B. 282, discussing *Woodward v. Darcy*, 1 Plow. 184, and *Chapman v. Turner*, 9 Mod. 268; *S. C.*, Vin. Abr. Exor. D. 2, p. 72.

Although the rule of equity was against retainer, it followed the law as to legal assets; so that it seems that there was no "conflict or variance" between the rules of common law and equity (see Jud. Act, 1873, s. 25 (11)) on this point, and that consequently the distinction between legal and equitable assets in this respect will still prevail.

As to legal and equitable assets, *v. sup.* p. 1423; and as to retainer by exor *de son tort*, *Wms. Exors.* 200.

RIGHT—HOW AFFECTED BY JUDGMENT OR ORDER.

The right to retain is not affected by the judgment or order for admon: *Nunn v. Barlow*, 1 S. & S. 588; *Re Barrett, Whittaker v. B.*, 43 Ch. D. 70; *Re Orme, Evans v. Maxwell*, 50 L. T. 51; nor a balance order obtained against the exor for payment of a call out of the assets in a due course of admon: *Re Hubback, Int. Mar. Hydropathic Co. v. Haues*, 29 Ch. D. 934, C. A.; nor by payment into Court: *Langton v. Higgs*, 5 Sim. 228; *Tipping v. Power*, 1 Ha. 411; *Chissum v. Dewes*, 5 Russ. 29; though under an order made in his presence in Chambers, and not expressed to be without prejudice to his right of retainer: *Richmond v. White*, 12 Ch. D. 361, C. A.; *Re Langley, Johnson v. L.*, W. N. (99) 23; *Re Lance, Sharp v. Rebbeck*, W. N. (00) 29; nor by its not having been exercised against the first available assets received: *Binns v. Nichols*, 2 Eq. 256; nor by the fact that he is himself the Plt in a creditor's action, and has submitted to account in the ordinary form: *Exp. Campbell, C. v. C.*, 16 Ch. D. 198; nor by mere delay, *e.g.*, not claiming until after the certificate, nor by his having paid the assets into Court or to a receiver if the delay can be satisfactorily explained and there are assets against which he can exercise his right: *Re Giles, Jones v. Pennefather*, (1896) 1 Ch. 956; nor, where an admon order has been made under sect. 125, subsect. 12, of the Bankruptcy Act, 1883, by his paying over the assets by mistake to the official receiver, or even by proving in bankruptcy for his debt, if on discovering his error he withdraws his proof: *Re Rhoades, Exp. Rhoades*, (1899) 2 Q. B. 347, C. A.; (1899) 1 Q. B. 905; and, *semble*, may be asserted at any time before the final distribution: *Stahle Schmidt v. Lett*, 1 Sm. & G. 415; and need not be asserted before occasion arises, as on an attempt to take assets out of his possession (the debt as against creditors in equal degree being regarded as extinguished upon the receipt of assets by him): *Re Rhoades, Exp. Rhoades, sup.*; and an exor will not be ordered to pay in money which he is entitled to retain for a debt: *Middleton v. Poole*, 2 Col. 246.

And after an order in an admon action, under O. xv, 1, merely for an account, and reserving further consideration, an executrix who was appointed trustee of a settlement, and so became entitled to a debt due from her testator's estate, could apply the balance of the testator's estate in part satisfaction of the debt: *Re Barrett, Whittaker v. B.*, 43 Ch. D. 70.

After the appointment of a receiver an exor cannot assert a right of retainer as against any assets got in by the receiver: *Re Jones, Calver v. Laxton*, 31 Ch. D. 440; *Richmond v. White*, 12 Ch. D. 361, C. A.; *Re Birt*, 22 Ch. D. 604; but an existing right of retainer is not lost by the exor paying over assets to the receiver; *secus*, as to a debt which arises after such payment, *e.g.*, when payment is made by the exor as a surety for the testator: *Re Harrison, Latimer v. H.*, 32 Ch. D. 395; and the Court will not order a fund to be paid out to an exor or admor solely to enable him to retain a debt statute-barred: *Trevor v. Hutchins*, (1896) 1 Ch. 844.

The Court will not interfere with an exor's right of retainer by appointing a receiver, at the instance of the Plt, in a creditor's action for admon merely because the exor will probably exercise his right to the prejudice of the general body of creditors, nor unless it is shown that the assets are being wasted: *Re Wells, Molony v. Brooke*, 45 Ch. D. 569.

WHAT DEBTS MAY BE RETAINED.

One of several exors or admors may retain his own debt, and may retain it out of a debt due to the estate from himself and his co-exor: *Kent v. Pickering*, 2 Keen, 1; but the right would be lost by his death before his co-exor: *Hupton v. Dryden*, Prec. Ch. 179; except as to so much of the assets as came into his possession or control, or was paid into Court during his life-

time: *Re Compton, Norton v. 'C.*, 30 Ch. D. 15, C. A. (overruling to this extent *Wilson v. Cozwell*, 23 Ch. D. 764); *Richmond v. White*, 12 Ch. D. 361, C. A.; and he may retain a mortgage debt due from the testator to a body of trustees of whom the exor is one: *Re Hubback, Int. Mar. Hydropathic Co. v. Hawes*, 29 Ch. D. 934, C. A. If shares in a limited co. are put in the names of exors individually, although they have a right of indemnity against the estate, they are liable personally, and not merely to the extent of the assets: *Re Cheshire Banking Co., Duff's Exors' Case*, 32 Ch. D. 301, C. A.

The exor of a surviving exor may retain a debt due to his testator: *Thomson v. Grant*, 1 Russ. 540, n.

As between the exors or admors, they must retain their debts rateably: *Chapman v. Turner*, 11 Vin. Ab. 72; 9 Mod. 268; 2 Keen, 8.

An exor or admor may retain a sum due to him as represve of another estate: *Thompson v. Cooper*, 1 Coll. 85; or as trustee in virtue of his character of represve, e.g., where the testator or intestate was indebted to an estate of which he was sole trustee: *Sander v. Heathfield*, 19 Eq. 21; *Crowder v. Stewart*, 16 Ch. D. 368; *Re Faithfull, Re Sutton, Hardwick v. S.*, 57 L. T. 14; *Re Dunning, Hatherley v. D.*, 54 L. J. Ch. 900; 33 W. R. 760; 53 L. T. 413; or as assignee of a debt before judgment: *Hepworth v. Heslop*, 6 Ha. 561; or as one of several trustees: *Plumer v. Marchant*, 3 Burr. 1380; *Re Hubback, sup.*; or a sum due to a firm of which he is a member: *Burge v. Bruton*, 2 Ha. 376; *Re Morris, M. v. M.*, 10 Ch. 68; or a debt due from him as surety, notwithstanding that he has not paid until after judgment: *Re Orme, Evans v. Maxwell*, 50 L. T. 51. And a trustee or admor is bound to exercise any right of retainer he may have as represve of another estate: *Fox v. Garrett* (No. 1), 28 Beav. 16; 6 Jur. N. S. 208; *Sander v. Heathfield, sup.*; *Re Owen, Poe v. Shortt*, 23 L. R. Ir. 328; and see *Ingle v. Richards, Ib.* 1178; 28 Beav. 366.

But an exor cannot retain for a debt bequeathed to him by a creditor who has died after proving against the estate: *Jones v. Evans*, 2 Ch. D. 420; or a debt which has accrued due to him after he has paid over the assets to a receiver: *Re Harrison, Latimer v. H.*, 32 Ch. D. 395; or a debt which is due to a trustee for him: *Re Hayward, Tweedie v. H.*, (1901) 1 Ch. 221; *Re Dunning, Hatherley v. D., sup.* (overruling *Loomes v. Stothard*, 1 S. & S. 461); nor an admor, because he is the creditors' nominee and manager: *Re Richards*, (1901) 2 Ch. 399; and where A., the exor or admor of B. has died, his represves cannot have a right of retainer as against B.'s creditors, unless they either represent B.'s estate (*Hopton v. Dryden*, Prec. Ch. 179), or show that such a right actually attached to assets received during the lifetime of A.: *Re Compton, Norton v. C.*, 30 Ch. D. 15, C. A.; *Burge v. Bruton*, 2 Ha. 373. Nor has a member of a firm of solrs concerned for the Plt in a creditor's action for admon, though himself the admor, a right to retain his own debt out of money paid to the firm: *Re Birt, B. v. Burt*, 22 Ch. D. 604; and see *Batten v. Dartmouth Harbour Commrs*, 38 W. R. 603; 45 Ch. D. 612.

A married woman advancing money to her husband for the purposes of his business is, on becoming his admix, entitled to retain her debt out of his personal estate: *Re May, Crawford v. M.*, 45 Ch. D. 499.

A statute-barred debt may be retained: *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Hill v. Walker*, 4 K. & J. 166; *Lewis v. Rumney*, 4 Eq. 451; and letters of admon may be granted to a creditor whose debt is barred, but in that case he is required to give a bond to distribute the assets rateably and without any preference of his own debt: *Re Coombs*, L. R. 1 P. & M. 193, 288; as to such bond, in the case of an ordinary creditor being appointed admor, see *Wms. Exors.* 378.

But there can be no retainer of a debt which is not enforceable by reason of non-compliance with the Statute of Frauds, as to pay such a debt would be a devastavit: *Re Rowson, Field v. White*, 29 Ch. D. 358, C. A.

It has been held that sect. 10 of the Jud. Act, 1875 (as to which *v. sup.* p. 1460), does not affect the common law right of an exor or admor to retain a debt due to himself (the right of retainer not making him a secured creditor within the section): *Lee v. Nuttall*, 12 Ch. D. 61, C. A.; *Re May, Crawford v. M.*, 45 Ch. D. 499; and see *Re Leng*, (1895) 1 Ch. 652, C. A.; and as invasion of this common law right would tend to augment the assets, these decisions may be unaffected by *Re Whitaker, W. v. Palmer*, (1901) 1 Ch. 9, C. A.; (1900) 2 Ch. 676, *v. sup.* p. 1460.

By the Admon of Estates Act, 1869 (32 & 33 V. c. 46), in the admon of

estates of persons dying on or after 1st Jan. 1870, specialty and simple contract debts are to be treated as standing in equal degree.

But the Act does not interfere with or enlarge the exor's right of retainer as against creditors in equal degree with himself, except in so far as it increases the fund available for payment of simple contract creditors: *Re Jones, Calver v. Laxton*, 31 Ch. D. 440; *Wilson v. Coxwell*, 23 Ch. D. 764; *Crowder v. Stewart*, 16 Ch. D. 368; *Re Williams' Estate*, 15 Eq. 270; *Hanley v. M'Dermott*, Ir. R. 9 Eq. 33; and where there was a simple contract debt due to the Crown the assets were first apportioned rateably between the specialty and simple contract creditors, and then the Crown debt had its priority out of the amount apportioned to the simple contract debts: *Re Bentinck, B. v. B.*, (1897) 1 Ch. 673 (distinguishing *Re Williams' Estate*, 15 Eq. 270).

An admon who held an unregistered judgment of his own against the intestate was held to be a judgment creditor for the purpose of retainer: *Horne v. Shepherd*, 3 Jur. N. S. 806; 26 L. J. Ch. 817, *et v. sup.* p. 1422.

An admix, entitled to an annuity under a covenant by the intestate, may retain all arrears falling due during admon, but must prove for the value *in futuro*: *Re Beeman, Fowler v. James*, (1896) 1 Ch. 48.

Under the old form of admon bond to a creditor requiring him to proceed in a due course of admon "rateably and proportionably, and according to the priority required by law," and not "unduly preferring his own debt," or the debts of any other of the creditors of the deceased by reason of being admon, the pers. represve was entitled to retain his own debt: *Davies v. Parry*, (1899) 1 Ch. 602; *Form, sup.* p. 1529 (examining and following *Nunn v. Barlow*, 1 S. & S. 588, and distinguishing *Jones v. Evans*, 2 Ch. D. 420); *Re Belham*, (1901) 2 Ch. 52, C. A.; but the form of admon bond has now been changed by omitting the word "unduly": see W. N. (99), Practice Note, p. 262.

A liability of unascertained amount may be retained for: *Morris v. M.*, 10 Ch. 68; *Loane v. Casey*, 2 W. Bl. 965; *e.g.*, a claim for damages for breach of a pecuniary contract, for which there is a certain standard or measure: *Loane v. Casey*, 2 W. Bl. 965; *Re Morris, M v. M.*, 10 Ch. 68; or for breach of covenant to assign a policy and replace furniture, if sold, by other furniture: *Re Compton, Norton v. C.*, 30 Ch. D. 15, C. A.; or a debt for which the exor was his testator's surety, if he has paid it: *Boyd v. Brooks*, 34 Beav. 7; *Wildes v. Dudlow*, 19 Eq. 198; or continues liable to pay: *Re Giles, Jones v. Pennefather*, (1896) 1 Ch. 956 (considering *Re Harrison*, 32 Ch. D. 395); *Re Allen, Adcock v. Evans*, (1896) 2 Ch. 345; but a surety's right to indemnity, the debt not having been paid, so that the surety could only be treated as a simple contract creditor, gave no right of retainer as against specialty creditors: *Ferguson v. Gibson*, 14 Eq. 379; *Re Illidge, Davidson v. I.*, 27 Ch. D. 478, C. A.; *secus*, where the deceased had entered into an express covenant with the surety to make the payment, and had broken the covenant: *Re Allen, Adcock v. Evans*, (1896) 2 Ch. 345.

Wherever the exor might have sued on the one hand and have been sued on the other, if he had not been exor, he may retain (*Plumer v. Marchant*, 3 Burr. 1384), and is entitled to retain in full all money he advanced for the estate (*Spackman v. Holbrook*, 2 Giff. 198, 200; *Hepworth v. Heslop*, 6 Ha. 561), with interest: *Small v. Wing*, 5 Bro. P. C. 72; but see *Lewis v. L.*, 13 Beav. 82.

As to waiver of right of retainer by form of pleading, see *Player v. Foxhall*, 1 Russ. 538; *Ferguson v. Gibson*, 14 Eq. 379, 384. The question of waiver cannot be gone into in Chambers under the ordinary judgment: *Spicer v. James*, 2 My. & K. 387; and see *Thompson v. Cooper*, 1 Coll. 85.

An exor has no right to retain his legacy in preference to other legatees: *Wms. Exors.* 1211; though given for his trouble: *Duncan v. Watts*, 16 Beav. 204.

TRANSFER OF ADMINISTRATION TO BANKRUPTCY.

The existence of the right of retainer is not a ground for directing a transfer of proceedings for admon of an insolvent estate to the Court in bankruptcy, under the Bankruptcy Acts, 1883, s. 125, and 1890, s. 21: *Re Baker, Nichols v. B.*, 44 Ch. D. 262, C. A.; but has not been per-

mitted to stand in the way of such a transfer: *Re York, Atkinson v. Powell*, 36 Ch. D. 233; but as to this case, and whether the right of retainer will be affected by the transfer, see *Re Baker, sup.* and *sup.* p. 1465.

RETAINER BY HEIR OR DEVISEE.

The heir or devisee of real estate which is not made equitable assets by the testator, being a creditor by specialty in which the heirs are bound, and liable to be sued at law by other creditors in like degree, has a right of retainer out of the proceeds of such real estate: *Re Illidge, Davidson v. I.*, 27 Ch. D. 478, C. A.; and this right, it seems, is not affected by the Admon of Estates Act, 1869 (32 & 33 V. c. 46): *S. C.*; it extends to a debt of the trustee for the heir or devisee, or the debt of a deceased creditor whose exor he is: *Loomes v. Stotherd*, 1 S. & S. 458; and see *Player v. Foxhall*, 1 Russ. 538; *Solley v. Gower*, 2 Vern. 61; but not to simple contract debts: *Re Illidge, sup.*; and the devisee of land charged with or devised to him for payment of debts has no right of retainer: *Bain v. Sadler*, 12 Eq. 570. *Hull v. Macdonald*, 14 Sim. 1, is useless as an authority: per Lindley, L. J., *Re Illidge, sup.*

SECTION X.—MORTGAGES AND CHARGES.

1. *Inquiry as to Incumbrances, and if paid off.*

AN inquiry what incumbrances, if any, affect the testator's real estate; and whether the testator's real estate was at his death subject to any and what incumbrances, which have since been paid or satisfied; and if so, when, and by whom, and under what circumstances.—*Re Bayne, Parnell v. P.*, V.-C. H., 17 March, 1877, A. 521.

And for special inquiry as to incumbrances, see *Langton v. L.*, 7 D. M. & G. 34.

2. *Inquiry as to Charges subsisting at and created since Testator's Death.*

AN inquiry what incumbrances there were, if any, affecting the testator's real estate, or any and what parts thereof, at the time of his death, and whether any and what incumbrances have since been created thereon; and whether any and which of the incumbrances, if any, affecting the said estates at the death of the testator or since created, are now subsisting.—*Earle v. Wells*, V.-C. W., 24 March, 1860, A. 765.

3. *Inquiry as to Charges, and by whom, and if paid off, how.*

AN inquiry what mortgages &c. [incumbrances] created upon any part of the testator's real estate in his lifetime were subsisting at the

time of his death, and what, if any, mortgages &c. have been made by the Defts [*trustees*] in pursuance of or by virtue of his will, and whether the same have been properly made, and whether any and what sums are now due and owing in respect of any such mortgages &c. respectively, and in whom the same are now vested respectively, and what mortgages &c. on the testator's real estate have been wholly or in part paid off by the said Defts, out of the rents and profits of the said estates, or out of any and what other fund.—See *Jenkinson v. Makin*, V.-C. S., 15 March, 1856, A. 821.

For inquiry what incumbrances were subsisting at the testator's death, and if any had been created since, and whether the trustees joined in creating them, see *Stronge v. Hawkes*, V.-C. K. B., 17 Jan. 1849, B. 468, Form 6, p. 1550.

4. Inquiry as to Agreement for Mortgage.

1. AN inquiry when, and for what purposes, and under what circumstances, the deposit of the deeds and documents of title in the pleadings mentioned was made, and with whom, and by whom, and if the same was made under any and what agreement or agreements, whether any such agreement or agreements was or were fulfilled; and if not, in what respect, and under what circumstances, such agreement or agreements was or were not fulfilled; 2. An inquiry whether any and which of the terms of such agreement or agreements, and the breach or breaches of such agreement or agreements, if any, was or were ever, and if ever, when, waived, and by whom; 3. An inquiry who now claims or claim under and by virtue of such deposit, and by what means.—See *Douglas v. D.*, V.-C. K. B., 11 Dec. 1844, A. 953.

5. Directions to apportion Purchase-money—Part of the Estates being subject to distinct Mortgages.

AND in case the estates comprised in different mortgages, the mortgagees having consented to the sale, shall be sold in one lot, Let the purchase-money be apportioned between the several estates according to their respective values.—*Gibson v. Styles*, L. C., 18 July, 1741, A. 549; and see *Birkhead v. Manaton*, L. C., 25 Jan. 1748, A. 308; 2 Vez. 571; *Lodge v. Pritchard*, L. JJ., 20 March, 1860, B. 964.

6. Inquiry as to Mortgages subject to Agreement not to be paid off.

“AN inquiry what mortgages and incumbrances affect the testator's real estate, or any and what parts thereof, and whether any and which of such mortgages and incumbrances are subject to any and what agreements or conditions which prevent the mortgaged estates, or any and which of them, from being redeemed before the expiration of any and

what period without the consent of the mortgagees or incumbrancers respectively, and if so, whether such mortgagees or incumbrancers are willing to concur in the sale of the said estates, or any and which of them and upon any and what terms, and if not, whether it will be expedient that the equity of redemption of the testator in the mortgaged hereditaments, or any of them, or any other mortgaged hereditaments of the testator, should be sold."—*Frinnsby v. Latchford*, M. R., 8 May, 1875, A. 808.

7. Inquiry whether Intestate's Estate liable for Stipend of a Clergyman, and what Provision should be made.

AN inquiry whether the estate of the intestate is liable to pay any and what stipend, or other payment, to the clergyman of the chapelry at G —; or whether it is fit and proper that any and what stipend, or other payment, should be made to C. in respect of the services rendered by him in performing the ministerial duties of the chapelry since he was appointed thereto, and whether any and what arrangement ought to be made with C., or with any other person, to continue to perform the ministerial duties of the said chapelry, and by whom, and out of what fund, any stipend or other payment in respect thereof ought to be borne and paid.—*Langton v. Burton*, V.-C. K. B., 17 Feb. 1851, B. 482.

8. Declaration that Realty only is liable.

AND it appearing by the will of the testator that the sum of £400 was not the proper debt of the testator, Declare that the same and all interest due thereon were exclusively payable out of the testator's freehold estate, and have been properly paid thereout.—*Williams v. Kershaw*, 1 Ke. 274, n.

For inquiry if annuities given by the will of testator's father, or of his brother, subsisting, and if so, to be paid, see *Gibson v. L. Mountford*, L. C., 25 June, 1750, A. 583; 1 Vez. 485; Ambl. 93.

SECTION XI.—PERSONAL ESTATE EXONERATED.

1. Judgment to execute Trusts of Will exonerating Personalty.

Testator devised his estates to Plt D., wife of Plt L., for life, with remainder to the infant Deft in tail, subject to a term of 500 years, which he charged with debts and legacies, in exoneration of his personalty.

(DIRECTION to establish will, heir admitting it)—Account of testator's debts, funeral expenses, and legacies.—“And Let the specific legacies

given by the testator's will be delivered by the Deft M., the executrix according to the will; And the said Deft by her counsel admitting the testator's personal estate to be sufficient to answer the further purposes in the will, viz., to pay the funeral expenses and the charges of the probate of the will, Declare, that the residue of the testator's personal estate belongs to the said Deft, freed from the payment of the testator's debts and legacies; And Let the following &c.; An account of the rents and profits of the testator's real estates, devised by his will, and comprised in the term of 500 years accrued since the testator's death, received by the Plt, or by any other &c., and thereout the Plt is to keep down the interest of the testator's debts and legacies."—Directions to raise principal of debts and legacies and costs of suit by mortgage of testator's real estate, or a sufficient part thereof—Plt, devisee for life, to keep down the interest during her life; and in case of her default the infant tenant in tail to be at liberty to apply.—[Form 18, *sup.* p. 1456.]—*Lord v. Calton*, L. C., 10 Nov. 1747, B. 107.

For decree declaring widow entitled to the personalty, as a specific bequest, exempt from payment of debts and funeral expenses, and real estate or a sufficient part, to be sold, see *O'Donnell v. Crop*, M. B., 3 March, 1759, B. 438.

In *Tucker v. Loveridge*, V.-C. S., 8 Feb. 1858, B. 460, the question of exoneration was reserved, though not expressly, until further consideration, and the accounts of the personalty and inquiries as to realty were in the usual form, with an inquiry as to timber cut; but the directions for the application of the personalty and for sale of the realty were omitted.

2. Direction to distinguish Specific Effects first liable under the Will, and for Sale by the Executors.

IN taking which account, Let such parts of the testator's personal estate as consisted of &c., at the time of his death, be distinguished from his other personal estate; And Let an inquiry be made what are the particulars and value of the said &c., and whether the same, or any part thereof, have or hath been sold and disposed of, and by whom, and whether the same, or any and what part thereof, now remain or remains undisposed of; And Let such parts thereof as are unsold be sold by the Defts, the exors of the testator; And Let the said Defts account for the money already arisen and which shall arise by or from the said specific effects; And Let the money to arise by sale of the said specific effects be applied in the first place in payment of the testator's debts and funeral expenses in a due course of admon; And Let the testator's personal estate, exclusive of the money arisen or to arise by such sale, be applied in payment of his debts remaining due, in case the money arisen or to arise by such sale shall not be sufficient to pay the whole, and in payment of his legacies in a course of admon.

For notes as to what is required to exonerate the personal estate from its primary liability to discharge all the testator's debts, see notes to Sect. XI. *inf.* p. 1539.

3. *Debt declared payable out of Residue in exoneration of Property specifically given.*

THE application by originating summons of A. B., adjourned &c.—Declare that the debt due by the testator at his death to his bankers, the London and South Western Bank, Limited, and secured by three indentures, dated respectively &c., and by the deposit of deeds and documents therein referred to, and the interest thereon, is, as between the various parties beneficially interested under the testator's will, primarily payable out of the residuary real and personal estate, in exoneration of the property specifically devised and bequeathed to E. F.—*Re Nevill, Robinson v. N., Kay, J.*, 3 June, 1890, B. 762; *S. C.*, 59 L. J. Ch. 511.

4. *Debts and Legacies apportioned between Pure and Impure Personality.*

UPON motion by way of appeal &c.—Declare that the debts and funeral and testamentary expenses of the testatrix X., and the legacies bequeathed by her will and the duties thereon, and the costs herein-after directed to be taxed and paid, ought to be apportioned between the pure and impure personalty of the said testatrix; and that for the purpose of such apportionment the proceeds of sale of the testatrix's leasehold property, in the will called ground rents, ought to be treated as impure personalty, and that, first, the proceeds of sale of the testatrix's dwelling house in Chertsey, and, secondly, the proceeds of sale of the testatrix's said leasehold property, ought to be applied, so far as the same will extend, in payment of the amount of the said debts, expenses, duties and costs which shall be apportioned in respect of the testatrix's pure personalty, and that the residue of the amount so apportioned in respect of the pure personalty, and also the legacy duty payable in respect of the residue of the pure personalty, ought to be borne by such pure personalty, and that the amount apportioned in respect of the testatrix's impure personalty ought to be borne by such impure personalty.—*Kilford v. Blaney, C. A.*, 23 Nov. 1885, A. 1694; *S. C.*, 31 Ch. D. 56, *C. A., inf.* p. 1539.

NOTES.

INCUMBRANCES CREATED BEFORE THE TESTATOR'S DECEASE.

The personal estate being the primary fund for payment of debts, the heir or devisee of a deceased mortgagor was formerly entitled to have the mortgage debt (unless it was one not created, nor subsequently adopted, by the ancestor or testator as his own proper debt: see *Wms. Exors.* 1582) satisfied out of the personalty, unless it was exonerated by express words (as in *Morrow v. Bush*, 1 Cox, 185), or by implication (*Webb v. Jones*, 2 Bro. C. C. 60; 1 Cox, 245; *Bateman v. Earl Roden*, 1 J. & Lat. 356), showing a plain intention to exonerate it (*Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454, 462,

463; 1 L. Ca. Eq. 630, 640); and the intention could not be proved by parol evidence: *Stephenson v. Heathcote*, 1 Ed. 38.

But in order to discharge the personal estate from this primary liability a mere charge or trust, "however anxious" for payment of the general debts out of the realty, has been held not to be sufficient: *Tait v. Lord Northwick*, 4 Ves. 816; *Stephenson v. Heathcote*, *sup.*; though (*semble*) contained in a deed anterior to the will, and referred to in the will: *Trott v. Buchanan*, 28 Ch. D. 446; an intention to discharge the personalty, as well as to charge the realty being required: *Bootle v. Blundell*, 1 Mer. 193, 220; *Kilford v. Blaney*, 31 Ch. D. 61, C. A. (*secus*, where particular debts were charged: *Hancox v. Abbey*, 11 Ves. 179, 184; *Bateman v. Earl Roden*, *sup.*); nor a charge on the personalty of certain specified debts: *Watson v. Brickwood*, 9 Ves. 447; but see 2 Spence, 342; or some of the legacies: *Brydges v. Phillips*, 6 Ves. 567; nor the creation of a term of years for raising them out of the realty: *Tower v. Lord Rous*, 18 Ves. 132; nor the devise of the mortgaged property, "subject to" the mortgage: *Johnson v. Child*, 4 Ha. 94; *Wythe v. Henniker*, 2 My. & K. 635, 644; nor a direction that the mortgage on one house out of several mortgaged houses should be paid off: *Re Bull, Catty v. B.*, 49 L. T. 592; 31 W. R. 852.

For the law as to what exonerates the personalty, see 2 Jarm. W. 1461 *et seq.*; *Forrest v. Prescott*, 10 Eq. 545; *Powell v. Riley*, 12 Eq. 175; *Allan v. Gott*, 7 Ch. 439; and as to what constitutes a charge on corpus, see *Re Green, Baldock v. G.*, 40 Ch. D. 610, adopting *Tewart v. Lawson*, 18 Eq. 490.

In a similar manner, the personalty was the first fund for paying off a vendor's lien for unpaid purchase-money: *Emuss v. Smith*, 2 D. & S. 722; or an annuity charged on the land purchased, with a covenant for payment: *Yonge v. Furze*, 20 Beav. 380.

The primary liability of the personalty to pay mortgages was subject to this, that if the personalty was insufficient to pay the specific or pecuniary legatees, they could go against the mortgaged estate, whether devised or descended, to the extent to which the mortgage had been paid out of the personal estate: *Wythe v. Henniker*, 2 My. & K. 635, 644; *Johnson v. Child*, 4 Ha. 94; *Forrester v. Lord Leigh*, Amb. 171; *Re Smith, S. v. S.*, (1899) 1 Ch. 365; referring to *Lutkins v. Leigh*, Cas. t. Tal. 53, and following *Porcher v. Wilson*, 14 W. R. 1011; and see *O'Neal v. Mead, Tipping v. T.*, 1 P. Wms. 693, 729; *Davis v. Gardiner, Rider v. Wager*, 2 P. Wms. 190, 335; but see *Davies v. Bush*, 4 Bli. N. S. 305; and this general rule in favour of pecuniary legatees will not be excluded by a provision in the will negating the application of the Real Estate Charges Acts (*v. inf.* p. 1539) by directing that devisees are to take "freed and discharged from any mortgages": *Re Smith, S. v. S.*, (1899) 1 Ch. 365.

This right of the legatees applied to lien for unpaid purchase-money of land descended: *Trimmer v. Bayne*, 9 Ves. 209; 4 Russ. 339, n.; *Sproule v. Prior*, 8 Sim. 189; but not where it was devised: *Wythe v. Henniker*, 2 My. & K. 635, 645, 646; Wms. Exors. 1563, 1564; but see *contra*, *Lord Lilford v. Powys Keck*, 1 Eq. 347.

It also applied to lien on land for trust money misapplied: *Birds v. Askey*, 24 Beav. 618.

If both devised and mortgaged estates were charged with the payment of debts, each was to contribute to the mortgage: *Carter v. Barnadiston*, 1 P. Wms. 505; *Irvin v. Ironmonger*, and cases *infra*.

Where mortgages were not to be paid out of the personalty, but to remain charged on the estates till discharged by the devisees for life, the rents and profits were applied to pay capital and interest, in exoneration of descended estates, and of personalty, even in favour of next of kin: *Milnes v. Slater*, 8 Ves. 295. And see *Smith v. Moreton*, 37 L. J. Ch. 6, that, independently of the statute (*v. inf.* p. 1539) the personal estate may be exonerated by an antecedent grant of an estate in Scotland to the devisee burdened with payment of a mortgage debt on the devised property (in England).

Semble, in an admon suit, a mortgage for years, of which the equity of redemption is statute-barred, is deemed leasehold of the mortgagee: *Hearn v. Wells*, 1 Col. 323; and so a building lease bought up by the owner of the fee and assigned to a trustee for him and his exors: *Gunter v. G.*, 23 Beav. 571.

A creditor having proved his debt, and having leave to amend to show an

alleged charge, and not having done so, his exor could not set up a claim to the charge nine years afterwards: *Cattell v. Simons*, 8 Beav. 243.

To create a charge by covenant, it must refer to particular property, or property must be acquired with the intent to perform the covenant: *Cs. Mornington v. Keane*, 2 D. & J. 292, 318; but in *Montagu v. Sandwich*, 32 Ch. D. 525, C. A., a covenant specially framed was held to constitute a charge upon all the real estate of which the covenantor died seised; and as to a covenant to purchase land, see *Barham v. E. Clarendon*, 1 Y. & C. C. 688; 10 Ha. 126.

An equal investment in the purchase of an estate, without more, makes a joint tenancy: *Rigden v. Vallier*, 3 Atk. 731, 735; *secus*, as to a mortgage: *Robinson v. Preston*, 4 K. & J. 505, 510, 515; although the deed contains a joint account clause: *Re Jackson, Smith v. Sibthorpe*, 34 Ch. D. 732; or where the contributions are unequal: *Luke v. Gibson*, 1 Eq. Ca. Ab. 290, 291; *Rigden v. Vallier, sup.*

An estate settled, subject to a mortgage by the settlor, was held the primary fund to pay it: *Ly-Langdale v. Briggs*, 8 D. M. & G. 391; 2 Jur. N. S. 982; 3 Sm. & G. 255.

Where freeholds and leaseholds are separately mortgaged to secure the same debt, the mortgage of the leaseholds being expressed to be "collateral" (not secondary) to the other, the debt must be borne rateably by the heir-at-law and next of kin of the intestate mortgagor: *Re Athill, A. v. A.*, 16 Ch. D. 211, C. A.

An heir paying movable debts from ancestor's realty in Scotland, being entitled, *lege loci*, to be recouped from the personalty, can enforce the right here: *E. Winchelsea v. Garety*, 2 Ke. 293; *Harrison v. H.*, 8 Ch. 342; but an heir buying up charges on descended estates is not entitled, as against creditors, to more than he paid: *Lancaster v. Evors*, 10 Beav. 154, 165; and as to the right of the wife's estate to be recouped sums raised by mortgage of her property for the benefit of the husband, see *E. Huntingdon v. Cs. H.*, 2 L. C. Eq. 1010; 6th ed. 1147.

And as to proof by mortgagees, as creditors, for such part of the mortgage money as is not realized by their securities, *v. sup.* pp. 1462 *et seq.*

A direction to pay "all my just debts" out of the residue included a debt subsequently incurred on the security of land in Scotland, which passed under a Scotch will, and was therefore entitled to be exonerated: *Maxwell v. M.*, L. R. 4 H. L. 506.

An express exemption of the personal estate from payment of debts, and a charge of debts, "and the costs and charges of proving my will," on realty did not exempt the personalty from costs of admon suit: *Stringer v. Harper*, 26 Beav. 585; but see *Miles v. Harrison*, and other cases, *sup.* pp. 1350, 1423.

A direction to exonerate general personal estate out of a specific fund of personalty will not enure for the benefit of persons who take by reason of lapse: *Kilford v. Blaney*, 31 Ch. D. 56, C. A.; not following *Browne v. Groombridge*, 4 Mad. 495.

Where a gift of land to A., on condition that he released a debt owing to him, failed by reason of lapse, the land in the hands of the heir was nevertheless liable to discharge the debt: *Re Kirk, K. v. K.*, 21 Ch. D. 431, C. A.

The rule that a charge of debts on real estate does not of itself exonerate personal estate applies where a testator by deed creates a charge for payment of debts after his death; but no such rule applies where specific personal estate is by the deed similarly charged, but in such a case the specific personal estate will be the primary fund: *Trott v. Buchanan*, 28 Ch. D. 446; explaining *French v. Chichester*, 2 Vern. 568; 3 Bro. P. C. 16, 2nd ed.

EXONERATION OF PERSONAL ESTATE FROM PRIMARY LIABILITY TO PAY MORTGAGE DEBTS—REAL ESTATE CHARGES ACTS, 17 & 18 V. c. 113, AND SUBSEQUENT ACTS.

The law in this respect as to mortgage debts was altered by the Real Estate Charges Act, 1854 (17 & 18 V. c. 113), commonly known as Locke King's Act, which provides that when any person shall, after the 31st Dec. 1854, "die seised of or entitled to any estate or interest in any land or other hereditaments" at the time of his death charged with any mortgage, and "shall not by his will, deed, or other document have signified any contrary or other

intention," the heir or devisee "shall not be entitled to have the mortgage debt discharged out of the personal estate or any other real estate of such person; but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof," with a proviso that the rights of any person claiming under or by virtue of any will, deed, or other document already made, or to be made before the 1st Jan. 1855, are not to be affected.

The Act applies to an intestacy happening since 1855, though the mortgage was made before: *Piper v. P.*, 1 J. & H. 91; or happening by lapse under a will made before: *Nelson v. Page*, 7 Eq. 25; but not to a will made before the Act came into operation, though the testator republished it after: *Rolfe v. Perry*, 3 D. J. & S. 481.

The Act applies to copyholds: *Piper v. P.*, 1 J. & H. 91; and to an equitable mortgage by deposit of title deeds: *Pembroke v. Friend*, 1 J. & H. 132; *Coleby v. C.*, 2 Eq. 803; but did not to leaseholds for years: *Solomon v. S.*, 12 W. R. 540; 33 L. J. Ch. 473; 10 Jur. N. S. 331; 10 L. T. 54; *Re Wormsley, Hill v. W.*, 4 Ch. D. 665; *Gall v. Fenwick*, 43 L. J. Ch. 178.

Nor, *semble*, to land given on trust for conversion: *Lewis v. L.*, 13 Eq. 218; nor to a share to which the testator was entitled under a settlement of land on trusts for conversion: *S. C.* And only to specified charges on specified property, not to a general charge of debts on the realty by the will: *Hepworth v. Hill*, 30 Beav. 476.

Now, however, by the Real Estate Charges Act, 1877 (40 & 41 V. c. 34, *g. v. inf.*), the Act has been extended to "any land or hereditaments of whatever tenure."

The Act does not apply to the case of a charge created by one partner on his separate real estate to secure a debt of the partnership, when at the time of his death the partnership assets are sufficient to answer all the debts of the partnership: *Re Ritson, R. v. R.*, (1899) 1 Ch. 128, C. A.; (1898) 1 Ch. 667.

Where real and personal estate are comprised in the same mortgage, the debt must be borne rateably, and the real estate is not primarily liable under Locke King's Act: *Trestrail v. Mason*, 7 Ch. D. 655; and see *Leonino v. L.*, 10 Ch. D. 460; not following *Lipscomb v. L.*, 7 Eq. 501; or *De Rochefort v. Dawes*, 12 Eq. 540; so as to real and leasehold properties mortgaged to secure the same debt: *Re Athill, A. v. A.*, 16 Ch. D. 211, C. A.; but there was no question of contribution where the subsidiary security consisted of a right to prevent the transfer of shares until payment, but without giving the creditor a lien on the shares: *Re Dunlop, D. v. D.*, 21 Ch. D. 583, C. A.

The Act was held not to apply to a vendor's lien for unpaid purchase-money: *Hood v. H.*, 3 Jur. N. S. 684; 5 W. R. 747; 26 L. J. Ch. 616; *Barnwell v. Iremonger*, 1 Dr. & S. 255, 260; *Day v. D.*, 14 W. R. 261; 13 L. T. 625; but does so now under the Real Estate Charges Act, 1867 (30 & 31 V. c. 69), s. 2, extending it, in the case of persons dying after 31 Dec. 1867, to "any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator." So that if the vendor dies before completion, the land will be subject to the repayment to the executor of the purchase-money paid by him: *Re Cockcroft, Broadbent v. Groves*, 24 Ch. D. 94; and see *Re Kidd, Brooman v. Withall*, (1894) 3 Ch. 558.

This did not apply to intestates' estates: *Harding v. H.*, 13 Eq. 493; *Hudson v. Cook*, 13 Eq. 417. But has now been extended to them by the Real Estate Charges Act, 1877 (40 & 41 V. c. 34, *inf.*)

General directions for payment of the debts (*Pembroke v. Friend*, 1 J. & H. 132), or for their payment by the exors (*Woolstencroft v. W.*, 2 D. F. & J. 347), or "out of my estate" (*Brownson v. Lawrance*, 6 Eq. 1), were held not to show any contrary intention; and see *Greated v. G.*, 26 Beav. 621; *Rowson v. Harrison*, 31 Beav. 207; *Lewis v. L.*, 13 Eq. 218, on the same side. The opposite decisions are *Eno v. Tatham*, 4 Giff. 181; 3 D. J. & S. 443; *Moore v. M.*, 1 D. J. & S. 602; *Mellish v. Vallins*, 2 J. & H. 194; *Stone v. Parker*, 1 Dr. & S. 212; and see *Maxwell v. Hyslop*, 4 Eq. 407; 4 H. L. 506, *et inf.*; *Allen v. A.*, 30 Beav. 395.

By the 30 & 31 V. c. 69, s. 1, it was enacted that, in construing the will of

any person dying after 31 Dec. 1867, "a general direction that the debts or all the debts of the testator shall be paid out of his personal estate shall not be deemed a declaration" of a contrary intention within Locke King's Act of 1854. As to the effect and operation of this Act, see *Gall v. Fenwick*, 43 L. J. Ch. 178; 29 L. T. 822; 22 W. R. 211; *Re Newmarch, N. v. Storr*, 9 Ch. D. 12; *Elliott v. Dearsley*, 16 Ch. D. 322, C. A.; *Re Hooper, Ashford v. Brooke*, W. N. (92) 151, where a direction that a specified fund should be applied in payment of "all and every liability which the testator might have incurred during life, or that might remain unpaid at his death," was held not to indicate a contrary intention.

In *Newman v. Wilson* (No. 1), 31 Beav. 33, the provision of a mixed residue of real and personal estate for payment of debts was held sufficient to exonerate a specifically devised estate. And in *Re Fleck, Colston v. Roberts*, 37 Ch. D. 677, a direction for payment of trade and private debts out of different parts of the testator's personal estate was held sufficient to exonerate devised realty from an equitable mortgage to bankers effected subsequently to the will; and see *Re Nevill, Robinson v. N.*, 59 L. J. Ch. 511; 62 L. T. 864; W. N. (90) 125.

The owner of two estates, A. and B., subject to one mortgage, does not by specifically devising A., and leaving B. to pass in the residue, signify any "contrary or other intention" within Locke King's Act of 1854, so as to make B. primarily liable for the mortgage: *Re Smith, Hannington v. True*, 33 Ch. D. 195; *Gibbins v. Eyden*, 7 Eq. 371; *Sackville v. Smyth*, 17 Eq. 153 (not following *Brownson v. Laurance*, 6 Eq. 1). And a direction to the testator's exors to pay all his just debts, funeral and testamentary expenses, out of his personal estate, in exoneration of his real estate, was not sufficient: *Re Rossiter, R. v. R.*, 13 Ch. D. 355.

The "contrary intention," so as to exclude the Act, must be signified, not guessed at, by the Court: *Cooté v. Lowndes*, 10 Eq. 376; and must be collected from the whole will: *Rolfe v. Perry*, 3 D. J. & S. 481, 486; and for a case in which there was held to be sufficient evidence of a "contrary intention" upon the will and subsequent deeds, see *Re Campbell, C. v. C.*, (1893) 2 Ch. 206.

And now by 40 & 41 V. c. 34, after extending the two prior Acts to "any testator or intestate dying after 31 Dec. 1877, seised or possessed of or entitled to any land or hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage or any other equitable charge, including any lien for unpaid purchase-money," it is enacted that "the devisee or legatee or heir, shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall, within the meaning of the said Acts, have signified a contrary intention, and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate, or residuary real estate." And the effect of this enactment is to extend 17 & 18 V. c. 113 to leaseholds: *Re Kershaw, Drake v. K.*, 37 Ch. D. 674.

Where the land has been delivered in execution, a judgment debt has been held to be a charge within the Act: *Re Anthony, A. v. A.*, (1892) 1 Ch. 450; and see *Nesbitt v. Lawder*, 17 L. R. Ir. 53. But where the deceased judgment debtor was a tenant in tail in possession, and his will contained no direction exonerating the personalty, the Real Estate Charges Acts not being applicable, the judgment debt was not chargeable on the land in exoneration of the personalty: *Re Anthony, A. v. A.*, (1893) 3 Ch. 498, distinguishing *Jenkinson v. Harcourt, Kay*, 688.

INCUMBRANCES CREATED BY THE EXECUTOR OR DEVISEE.

An exor or admor may, for the purposes of paying off the liabilities of the estate, effect a sale of any part of the testator's chattels real or personal: *Farhall v. F.*, 7 Ch. 123; or a pledge: *Berry v. Gibbons*, 8 Ch. 747; or a mortgage with power of sale to a building society: *Cruikshank v. Duffin*, 13 Eq. 555; and such a mortgage, though made to secure, not only money advanced and interest thereon, but also moneys becoming due from the exor

as a shareholder, may be good as against the beneficiaries to the extent of the *bonâ fide* advance: *Thorne v. T.*, (1893) 3 Ch. 196; *Russell v. Plaice*, 18 Beav. 21; and the purchaser is not bound to see to the application of the purchase-money: *Wms. Exors.* 803; *Gray v. Johnston*, L. R. 3 H. L. 1; *Saxby v. Thomas*, 64 L. T. 65; 63 *Ib.* 695; but an admor cannot mortgage leaseholds for repairs unless the testator was under covenant to repair: *Ricketts v. Lewis*, 20 Ch. D. 745.

An exor who has mortgaged his testator's estate is not entitled, by commencing an admon action, to an order staying proceedings by the mortgagee for recovery of the land: *Crowle v. Russell*, 4 C. P. D. 186.

The sale or mortgage of a chattel, though specifically bequeathed, cannot be impeached: *Ewer v. Corbet*, 2 P. Wms. 148; *M'Leod v. Drummond*, 17 Ves. 152, 169;

Unless the purchaser knew that all the debts were or could be paid without touching the property dealt with: *Ewer v. Corbet*, 2 P. Wms. 148; *M'Leod v. Drummond*, 17 Ves. 152, 170;

Or, by collusion with the exor, bought at an undervalue: *Scott v. Tyler*, 2 Dick. 724, 725; 2 Bro. C. C. 431, 438; 17 Ves. 166, 167;

Or was a party to an intended *devastavit*: *Crane v. Drake*, 2 Vern. 616, where part of the consideration was a debt due from the exor personally; and an exor cannot now dispose of his testator's property as "security for or in payment or satisfaction of his own debts": *Sug. V. & P.* 668.

And a judgment or order for admon, without any injunction or appointment of a receiver, does not take away the power of the exor to deal with the assets: *Berry v. Gibbons*, 8 Ch. 747.

The exor may in a similar manner deal with realty devised to him for or subject to the payment of debts: see *Corser v. Cartwright*, L. R. 7 H. L. 731; or given subject to the payment of debts by him: see *Farhall v. F.*, 7 Eq. 286; 7 Ch. 123; but this power does not extend to an admor: *Re Clay and Tetley*, 16 Ch. D. 3, C. A.

The purchaser or mortgagee is not bound to see to the application of the money, unless he has notice that the exor intends to misapply it: *Corser v. Cartwright*, L. R. 7 H. L. 731; *Elliot v. Merriman*, 1 L. C. Eq. 59.

As where he knows that all the debts and legacies are paid: *Ewer v. Corbet*, 2 P. Wms. 148, *et sup.*; *Carlyon v. Truscott*, 23 W. R. 302;

—or must, from the lapse of time since the death, be presumed to know it: *Stroughill v. Anstey*, 1 D. M. & G. 635; *Burt v. Trueman*, 6 Jur. N. S. 721; 29 L. J. Ch. 902; and, as a general rule, by analogy to the period of limitation for specialty debts, a lapse of twenty years will, as to real estate, be sufficient to put the purchaser on inquiry: *Re Tanqueray-Willauve and Landau*, 20 Ch. D. 465, C. A.; *Re Molyneux and White*, 13 L. R. Ir. 382; *Re Ryan and Cavanagh*, 17 L. R. Ir. 42 (modifying the earlier cases: see *Forbes v. Peacock*, 1 Ph. 717; *Sabin v. Heape*, 27 Beav. 553; *Greetham v. Colton*, 34 Beav. 615; *Charlton v. E. Durham*, 4 Ch. 433; *Lewin*, 523); but this rule does not apply to the case of an exor selling the leaseholds of his testator: *Re Whistler*, 35 Ch. D. 561; *Re Venn and Furze's Contract*, (1894) 2 Ch. 101 (explaining *Re Molyneux and White, sup.*; and as to the real estate of a testator dying on or after January 1, 1898, see the Land Transfer Act, 1897, *sup.* p. 1397; *Brickdale*, 246, 271);

—or knows of the intended application for unauthorized purposes: *Eland v. E.*, 4 My. & C. 427; *Collinson v. Lister*, 7 D. M. & G. 634 (where the money was raised that it might be advanced on the security of a ship); *Watkins v. Cheek*, 2 S. & S. 199 (where the purpose appeared in the mortgage deed); *Walker v. Taylor*, 4 L. T. 845; 8 Jur. N. S. 681, H. L.; or for the exor's own benefit: *Watkins v. Cheek, sup.*

But the onus is on the person impeaching the sale or mortgage to prove notice: *Corser v. Cartwright*, L. R. 7 H. L. 731; the purchaser or mortgagee need make no inquiries: *Ib.* 737; *Watkins v. Cheek*, 2 S. & S. 199, 205; and refusal to answer such inquiries will not affect the title: *Forbes v. Peacock*, 1 Ph. 717.

It is not enough that nothing was stated as to the purpose of the loan: *Culyer v. Finch*, 5 H. L. C. 923; *Corser v. Cartwright, sup.*; nor that the exor gave an indemnity against the debts and legacies, or against the legacies only: *Johnson v. Kennett*, 3 My. & K. 624; nor that the mortgage was made to secure previous advances to the exor, not shown to have been for his personal

benefit: *Miles v. Durnford*, 2 D. M. & G. 641; 2 Sim. N. S. 234; and see *M'Leod v. Drummond*, 17 Ves. 152, 170; nor that he mortgaged property of his own by the same deed: *Barrow v. Griffith*, 13 W. R. 41; 11 Jur. N. S. 6.

A mortgagee with such notice stands as a creditor so far as the money was duly applied: *Collinson v. Lister*, 7 D. M. & G. 634; 20 Beav. 356, n.; *Devaynes v. Robinson*, 24 Beav. 86, 97; but see *Farhall v. F.*, 7 Ch. 123; *Walker v. Taylor*, 4 L. T. 845; 8 Jur. N. S. 681.

The rule in favour of mortgagees does not apply as to land which is to be sold to pay certain specified debts: *Elliot v. Merriman*, 2 Atk. 41; Barn. Ch. 78; 1 L. Ca. Eq. 66; 6th ed. 72; nor where legacies alone are charged (but see *Dowling v. Hudson*, 17 Beav. 248); but it does apply where the debts, though charged, have all been paid at the date of the mortgage: *Johnson v. Kennett*, 3 My. & K. 624, 630; *Eland v. E.*, 4 My. & C. 420; *Horn v. H.*, 2 S. & S. 448; and where there were no debts at the time of the death: *Stroughill v. Anstey*, 1 D. M. & G. 635, 652; and after conveyance by the trustee to a devisee reciting debts and legacies paid: *Storrey v. Walsh*, 18 Beav. 559.

The rule applies to land which has become subject to the trusts of the will in substitution for other land sold under a power: *Ball v. Harris*, 4 My. & C. 264.

The proceeds of land mortgaged, subject to the legacies charged thereon, are, of course, applicable to them before the mortgage debt, and the amount of them is general assets: *Eland v. E.*, 4 My. & C. 420, 428, 430, n.; and see *Bank of Ireland v. McCarthy*, (1898) A. C. 181, H. L.

Where lands are devised in fee beneficially to one of two exors, subject to a particular legacy given in trust to such exors, the devisee alone cannot make a good title to a purchaser of the lands: *Re Rebbeck, R. v. R.*, 63 L. J. Ch. 596.

Where lands are devised to trustees for sale with powers to postpone sale and make outlay for interim repairs and management, the trustees have an implied power to raise money for repairs by mortgage of the lands: *Re Bellinger, Durell v. B.*, (1898) 2 Ch. 534.

If trustees, or a tenant for life, not having funds, pay or borrow premiums or calls, they are a lien on the policies or shares; *secus*, if paid by mere strangers: *Clack v. Holland*, 19 Beav. 262; *Burridge v. Row*, 1 Y. & C. 6. 183, 192; *Todd v. Moorhouse*, 19 Eq. 69; or by the owner of the equity of redemption, though upon the supposition that he has bought the mortgagee's interest: *Fulcke v. Scottish Imperial Ins. Co.*, 34 Ch. D. 234, C. A.; and see *Re Power's Policies* (1899), 1 I. R. 6, C. A.; or if the payments are such as the trustees might have made out of income: *Re Waugh*, 25 W. R. 555; and see *Gill v. Downing*, 17 Eq. 316; *Re Leslie, L. v. French*, 23 Ch. D. 552; *Re Wilson, Pennington v. Payne*, 34 W. R. 512; 54 L. T. 600.

Advances by exors bear interest at 4 p. c.: *Finch v. Prescott*, 17 Eq. 554; or 5 p. c.: *Re Sargood*, 15 Eq. 43; *Stewart v. S.*, 15 Ch. D. 539; but *quære*, whether more than 3 p. c. would now be allowed except in special circumstances, *v. sup.* p. 1512.

SALE OF REAL ESTATE BY EXECUTOR OR DEVISEE.

Where there was a devise of realty, subject to payment of debts and legacies, to one of several exors, he could make a good title to it: *Colyer v. Finch*, 5 H. L. C. 906; and see the will more fully stated, 18 Jur. 935; but see now the provisions of the Land Transfer Act, 1897, *sup.* p. 1397, vesting the real estate of a testator dying on or after Jan. 1, 1898, in the pers. represve or represves with the powers, rights, duties, and liabilities of pers. represves in respect of personal estate, subject to the exception that it is not to be lawful "for some or one only of several joint pers. represves, without the authority of the Court, to sell or transfer real estate."

Previously to the Land Transfer Act, 1897, where there was a general direction to pay debts and legacies (which are thereby charged on the realty, *v. sup.* p. 1424), and then a devise of a specific portion of the real estate to one of the exors, subject to the payment of debts, &c., he was the person to sell: *Corser v. Cartwright*, L. R. 7 H. L. 731; 8 Ch. 971; 21 W. R. 938; Sug. V. & P., 14th ed. 662, n.; but see *Robinson v. Lowater*, 5 D. M. & G. 272, *inf.*; *Wrigley v. Sykes*, 21 Beav. 337; *secus*, in the case of admor, as he

is not appointed by the testator: *Re Clay and Tetley*, 16 Ch. D. 3, C. A.; but see now Land Transfer Act, 1897, *sup.* p. 1397.

Where a testator had charged his realty with a sum of money, he was to be taken to have given an implied power of sale to some person, the donee being ascertained in each case from the whole will: *Eidsforth v. Armstead*, 2 K. & J. 333.

A power to the exors to sell the land of which they were devisees, and give receipts, was implied by a general charge of debts, &c.: *Ball v. Harris*, 4 My. & C. 264; *Greetham v. Cotton*, 34 Beav. 615, and cases there cited; *Bolton v. Stannard*, 4 Jur. N. S. 576; *Shaw v. Borrer*, 1 Keen, 559; and see *Cook v. Dawson*, 3 D. F. & J. 127, *et sup.* p. 1424; and where there was a devise of land, charged with debts, in strict settlement, and no express power of sale, the exors had an implied power to sell and give receipts: *Robinson v. Lowater*, 5 D. M. & G. 272; but see *Corser v. Cartwright*, *sup.*; and see now Law of Property Amendment Act, 1859 (22 & 23 V. c. 35), s. 16, *inf.*

But an exor's implied power was overridden by an express power given to others, so that under a devise, after a charge of debts, to trustees, on trusts, and on their cesser to sell and give receipts and apply the proceeds in trust, after satisfying all incumbrances, the trustees could make a good title, without the exors: *Hodkinson v. Quinn*, 1 J. & H. 303; and see *Eidsforth v. Armstead*, 2 K. & J. 333.

Where there was a general charge of debts, and no legal estate given, the exors might have an implied power enabling them to pass the legal estate: *Colyer v. Finch*, 5 H. L. C. 922.

It is not clear whether the power implied in the exor by Courts of Equity extended beyond the equitable estate: see *Doe v. Hughes*, 6 Exch. 223; *Walton v. Shalcross*, 21 L. T. 154; *Robinson v. Lowater*, 17 Beav. 601; 5 D. M. & G. 272; *Wms. Exors.* 574, n.; *Lewin*, 527.

STATUTORY POWERS OF SELLING AND MORTGAGING.

As to wills taking effect since August 13, 1859, the powers of trustees and exors to sell the real estate were extended by the Law of Property Amendment Act, 1859 (22 & 23 V. c. 35).

By sect. 14, devisees in trust of realty, charged with the payment of debts or legacies, or other specific money, for raising which no express provision is made, were empowered, though any trusts were declared, to raise it by a sale or mortgage; by sect. 15, such powers survived or devolved as there mentioned (and see *Conv. Act*, 1881, 44 & 45 V. c. 41, s. 30, *sup.* p. 1220); by sect. 16, if the testator's whole estate vested not in some devisee in trust, the exor or exors for the time being were to have the like powers, but any sale or mortgage under the Act was to operate only on the testator's estate and interest; by sect. 17, purchasers or mortgagees were not required to see to the due exercise of the powers by the persons so acting; by sect. 18, sales and mortgages under previous wills were excluded, and devisees in fee, or in tail, for the testator's whole estate, charged with debts and legacies, were not within the Act; but the power of such devisees to sell or mortgage remained unaffected.

An admor with the will annexed had no power, under sect. 16, or the general doctrines of the Court, to sell the testator's real estate for payment of debts: *Re Clay and Tetley*, 16 Ch. D. 3; nor could an admor mortgage the testator's leaseholds for the purpose of raising money for repairs: *Ricketts v. Lewis*, 20 Ch. D. 745; but an admor *dur. min. et.* had the power of an absolute admor to deal with and sell the estate for payment of debts: *Re Cope*, C. v. C., 16 Ch. D. 49.

Sect. 18 was held to apply where the devisee or devisees could themselves mortgage the property, but not where a testator had devised real estate by way of settlement on one for life with remainders over, such a case falling within sect. 16: *Re Wilson*, *Pennington v. Payne*, 54 L. T. 600; 34 W. R. 512.

By sect. 23, payment to, and the receipt of, any person, to whom purchase or mortgage-money was payable, on express or implied trusts, was made a discharge, unless the contrary were expressly declared by the instrument creating the trust or security; and by 23 & 24 V. c. 145, s. 29 (applicable only to instruments executed since 28 Aug. 1860), trustees' receipts are to

be sufficient discharges. And see the Trustee Act, 1893 (56 & 57 V. c. 53), s. 20.

By sect. 25, "lands," "mortgage," "mortgagor," "mortgagee," and "judgment," are defined; and see Law of Property Amendment Act, 1860 (23 & 24 V. c. 38), s. 8.

As to the powers conferred on exors and admors by the Land Transfer Act, 1897 (60 & 61 V. c. 65), *v. sup.* pp. 1397 *et seq.*

SECTION XII.—REDEMPTION IN ADMINISTRATION ACTION BY DEVISEE.

The Defts D., &c., were successive tenants for life under the will.

(ESTABLISH will.)—Account of what due to Defts R. and E., as exors of A. [*the mortgagee*], deceased, for principal and interest, on the mortgage in question, and their costs of action to be taxed, and—Tax costs of Deft F. [*mortgagee's heir*].—Usual judgment for redemption.—[See Vol. III., Chap. XLVII., "MORTGAGES."]"—"But in case the Plt or the Defts D. &c., or any of them, shall redeem as aforesaid, then the equity of redemption of such hereditaments is, in the hands of (to be held by) such of them as redeem as aforesaid, (to be) subject and liable to such trusts and limitations as are declared and limited by the testator's will concerning the same."—Accounts of personalty, debts &c.—Account of rents and profits of testator's real estate devised to his trustee, Deft R., accrued since his death and received by Plt.—"And Let what shall be coming on the said account of rents and profits be applied in payment of so much of the testator's debts &c. as his personal estate will not extend to satisfy."—Direction for marshalling.—After such redemption of the testator's estate, a settlement to be made of the trust estates, with the approbation &c., and on the trusts mentioned in the will.—Costs of action out of the trust estate.—Adjourn &c.—See *Aynsley v. Reed*, L. C., 11 Feb. 1754, A. 565; 1 Dick. 249; followed in *Pawley v. Colyer*, L. JJ., 4 Aug. 1863, B. 2698.

For decree for redemption in suit by a mortgagor's heir against the assignee of a mortgagee in possession, who was also the mortgagor's admor, and for admon, if necessary, of the mortgagor's estate, in respect of any balance or rents paid to or retained by Deft, see *Lloyd v. Wait*, 1 Ph. 70.

NOTES.

A mortgagee cannot be made party to an action by the mortgagor or those claiming under him, except for the purpose of redemption: *Drew v. O'Hara*, 2 Ba. & B. 562, n.; but the mortgagor conveying another estate to trustees to sell and pay off the mortgage, bill lay against the trustees and mortgagee to execute the trusts, without offering to redeem: *Dalton v. Hayter*, 7 Beav. 313; and see *Cholmley v. Cs. Oxford*, 2 Atk. 267; *Marshall v. Shrewsbury*, 10 Ch. 250; on a bill against a mortgagee, a sale could only be directed by

consent: *Troughton v. Binkes*, 6 Ves. 575; and see *Howard v. Harris*, 2 L. C. Eq. 1042; 6th ed. 1178.

And under O. LIV A, 1, a mortgagor may apply by originating summons for the determination of a question of construction arising upon the mortgage without offering to redeem: *Re Nobbs, N. v. Law Reversionary Interest Society*, (1896) 2 Ch. 830.

Bill lay for redemption against incumbrancer, by the Plt in a creditor's suit, after decree for sale: *Christian v. Field*, 2 Ha. 177.

A demurrer was allowed to a bill in Ireland by a trustee under the mortgagor's will, against the mortgagee, to execute the trusts, praying a sale, but not offering to redeem, notwithstanding the practice in Ireland to direct a sale on bill by mortgagee: *M'Donough v. Shewbridge*, 2 Ba. & B. 555.

Where a mortgagee of part of the estate made the suit necessary by his conduct, the whole costs of suit were first paid out of the proceeds of the mortgaged property: *White v. Gudgeon*, 30 Beav. 545.

Where a person seised in fee subject to a mortgage by demise died intestate and without heirs, his admor could not sue to redeem for the purpose of making the property available for the intestate's debts: *Cutley v. Sampson*, 33 Beav. 551.

By the V. & P. Act, 1874 (37 & 38 V. c. 78), s. 4, *sup.* p. 1219, the legal pers. repesve of a mortgagee was empowered, on payment of all sums secured by the mortgage, to convey or surrender the mortgaged estate; but in the case of a death occurring after 31 Dec. 1881, this section was repealed by the Conveyancing Act, 1881 (44 & 45 V. c. 41), s. 30, vesting trust and mortgaged estates in the pers. repesves of a sole trustee or mortgagee; but as to copyholds, *v. sup.* p. 1220; and see the Land Transfer Act, 1897 (60 & 61 V. c. 65), *sup.* p. 1397.

SECTION XIII.—DOWER, AND ELECTION BY WIDOW.

1. *Judgment for General Administration of Intestate's Estate, with Inquiries as to Dower and Freebench, Widow consenting to Sale.*

INQUIRIES for next of kin and account of personalty and realty.—Inquiry as to incumbrancers and their priorities [Form 4, p. 1467].—
 “13. An inquiry whether the Plt, the intestate's widow, is entitled to dower or freebench out of the intestate's real estates, or any and what parts thereof; 14. And if so, an account of what, if anything, is due to her in respect thereof for the time past; 15. And the Plt praying to have a value set upon her dower or freebench out of such part of the intestate's real estate, if any, as shall be sold as hereinafter directed, an inquiry what is the value of such dower or freebench; 16. And Let, in case the intestate's personal estate shall not be sufficient for the payment of his debts and funeral expenses, a sufficient part of the intestate's real estate, to make good the deficiency, or, if necessary, the whole of such real estate, be sold, with the approbation &c., free from the incumbrances &c., and free also from the Plt's right to dower or freebench, if any, thereout; And Let the money to arise by the sale of the intestate's real estate be paid into Court &c.; and if such money or any part thereof shall arise from real estate with the consent of incumbrancers, or from real estate subject to the Plt's right to

dower or freebench, the money so arising is to be applied, in the first place, in payment of what shall appear to be due to such last-mentioned incumbrancers respectively, and to the Plt for the value of her dower or freebench, according to their priorities &c."—Adjourn &c.—See *Blamire v. B.*, V.-C. S., 4 July 1857, B. 1281.

For a case where dower deducted in account of rents, receiver to keep down dower, see Seton, 5th ed., Form 3, p. 1301.

2. *Election between Dower and Legacy—Inquiry.*

AN inquiry whether the Deft (*testator's widow*) is entitled to dower out of any and what part of the testator's estates; and in case it shall appear that she is so entitled, she is to elect whether she will take the legacy of £— given to her by the will of the testator, or such dower; And in case she shall elect to take such dower, Let the estate be sold subject to such dower, But in case she shall elect to take the said legacy, Let the said estate be sold free from such dower.—*Turner v. T.*, M. R., 12 Nov. 1801, B. 402; *Hatton v. H.*, M. R., 12 March, 1830, A. 1380.

3. *Election between Dower and Annuity—Inquiry.*

"AND the testator having by his will charged his estate with an annuity of £500 in favour of his wife, the Deft, for her life, on condition that she should relinquish all right of dower which she might have or be entitled to, out of the real estate which he might be seised of or be entitled to, at the time of his death, Let the Deft make her election whether she will accept the provision made for her by the testator's will in lieu of her right of dower in [out of] his real estate, or whether she will give up the said provision, and insist upon her said right; And in case the Deft shall elect to give up the said provision, and insist upon her said right of dower, Let an inquiry be made whether the Deft is dowable in [out of] any of the said real estate; And if so, and she shall consent to have a value set upon her dower, Let a value be set thereon accordingly; And in that case, or in case she shall elect to accept the said provision in lieu thereof, Let the said estates be sold, with the approbation of the Judge, free from such dower; And in case a value shall be set upon such dower, Let out of the money to arise &c., the same be paid" &c.—*Hibbert v. Rowland*, M. R. 11 Nov. 1805, A. 38.

4. *Widow electing to take by Will, Trustees to keep up Residence.*

"AND A., having, by her counsel, made her election to take under the will of the testator in lieu of her dower, Let A. have the use and enjoyment of the testator's house &c., at &c., during her widowhood;

And Let W. &c., the acting trustees and exors, from time to time keep the said house &c. in proper and sufficient repair during the time the said A. shall reside therein, and be allowed what they shall properly expend on that account in passing their account."—*Thellusson v. Woodford*, L. C., 19 Feb. 1801, B. 937; S. C., 13 Ves. 209; 4 Madd. 420.

5. *Declaration as to Widow's Charge under Intestates' Estates Act, 1890, coming before Dower out of Real Estate.*

Tax the costs of the Plts and Defts secured by the orders dated &c., And Declare that the proportion payable out of the intestate's real estate of the sum of £— to which the Deft E. C., the widow of the intestate, is entitled under the Intestates' Estates Act, 1890, and which has been deducted by her wholly out of the personal estate of the intestate (the amount of such proportion to be ascertained pursuant to the said Act after taxation of the said costs) is a charge together with interest thereon, at the rate of [four] p. c. per ann. from the date of the death of the said intestate upon the whole of the real estate of the intestate in priority to the claim of the widow of the intestate to dower out of the real estate remaining after such charge.—Liberty to apply as to raising the aforesaid charges by sale or mortgage of the intestate's real estate, and as to payment of the said costs when taxed and as to the distribution of the funds in Court after payment of any costs thereout, and generally, see *Re Charriere, Duret v. C.*, North, J., 14 March, 1896, A. 1692; (1896) 1 Ch. 912.

For order directing Government annuity to be purchased in lieu of dower, the widow having consented to the sale of the real estate discharged from her dower, see *Swan v. Webb*, V.-C. W., 25 Feb. 1854, B. 622.

And as to dower and annuity, see p. 955, *sup.*, and Sect. XXIII., "ANNUITIES," pp. 1625 *et seq.* As to election to take under or against the will generally, see Sect. XX., "ELECTION," *inf.* p. 1588.

SECTION XIV.—SALES AND CONTRACTS.

1. *Inquiry as to Sale of Realty, and Proceeds.*

AN inquiry whether any and what parts of the testator's real estates have been sold, and if so, by and to whom (and under what circumstances), and for what sum or sums of money, and by whom the purchase-money has been received, and how the same has been applied or disposed of.

2. *The like—with Account.*

INQUIRY [Form 1].—"And if it shall appear that the purchase-money of such parts, if any, of the testator's real estate as have been

sold has been received by any person or persons who is or are a party or parties to this action [*or by the Deft*], or by any other person or persons by the order or for the use &c. ; An account of the money which has arisen from [*or the proceeds of*] such sale received by such party or parties [*or by the Deft*] or by any other &c."—Inquiry as to incumbrances affecting unsold realty.—See *Dow v. Baker*, V.-C. K., 7 Nov. 1860, A. 2203.

For inquiries as to accounts of proceeds of sale of several freehold and copyhold estates, and as to the investment thereof, and the interest, distinguishing the proceeds of each estate, see *Hitch v. Leworthy*, V.-C. K. B., 5 Dec. 1842, A. 310; 2 Ha. 210.

3. *Inquiry as to Contracts.*

AN inquiry whether the testator at the time of his death had entered into any and what contracts for the sale or purchase of any real or leasehold estate, and whether such contracts, or any and which of them respectively, are binding and ought to be carried into execution, and if so, what is the extent (if any) of the liability of the testator's estate under the same, and what sum or sums of money (if any) ought to be applied out of the testator's personal estate for the complete performance thereof.—*Moss v. Swarder*, V.-C. M., 24 May, 1875, B. 816.

For inquiry as to completing or compromising testator's contracts, see *Lambert v. Buchanan*, V.-C. S., 22 Dec. 1858, B. 447.

4.—*The like Inquiry and as to Title—Completion—Account of Rents.*

AN inquiry whether the testator was at the time of his death under any and what contract for the purchase of any and what estate; and if so, whether the testator paid any and what part of the purchase-money for the same, and whether the testator accepted the title thereto; And in case it shall appear that the testator had not accepted the title to the said estate at the time of his death, an inquiry whether a good title has been, or can be, made to the said estate; And in case the testator had accepted the title to the said estate, or that a good title has been, or can be, made thereto, Let an inquiry be made whether the Defts have completed the said contract, and paid any and what part of the purchase-money for the same; And if it shall appear that the Defts have completed the said contract, Let an account be taken of the rents and profits of the estate comprised in the said contract received by the Defts &c.—*Page v. Clay*, V.-C., 27 Nov. 1822, B. 649.

5. *Inquiry as to Intestate's Building Contracts.*

AN inquiry whether any and what contracts were entered into by the intestate for building or completing the farm-house &c. on the intestate's

estate at —, or for executing any and what other works on the intestate's real estates, or on any and what part thereof; And whether such contracts, or any and which of them respectively, are binding &c.—[Form 3, *sup.*]—*Langton v. Burton*, V.-C. T., 25 Feb. 1852, B. 482.

6. *Inquiry as to Sales and Contracts by Trustee and Executor.*

1. An inquiry whether the Deft (the trustee and exor) has since his death sold any and what part or parts of the testator's real estates devised by his will to be sold, or entered into any and what contract or contracts with any person or persons, and whom, for the sale thereof, or of any and what part or parts thereof, and for what sum or sums of money; And whether any and what proposal or proposals, with a view to any such sale, has or have been made, and when and by and with or to whom. 2. And if it shall appear that any part thereof has been sold, an account of the money arising by such sale, received by &c., and of the application thereof. 3. And if it shall appear that the said Deft has entered into any such contract or contracts, or that any such proposal or proposals has or have been made, which have not been carried into execution, an inquiry whether such contract or contracts, or proposal or proposals, is or are proper and for the benefit of the Plts, the infants, to be carried into execution, and whether or not with any and what modifications; (And whether the said Deft can make a good title to the purchaser or purchasers of the estates comprised in any such contract or contracts).—See *Stronge v. Hawkes*, V.-C. K. B., 17 Jan. 1849; B. 468.

7. *Inquiry as to Option to purchase.*

An inquiry whether the testator was at the time of his death entitled to any right to acquire any and what real estate subject to the payment of any and what sum of money, and whether it would be fit and proper and for the benefit of the testator's estate that any such right should be exercised, and by whom, on behalf of the testator's estate.—*Frinaby v. Latchford*, M. R., 8 May, 1875, A. 808.

8. *Right of Pre-emption declared.*

DECLARE that the right of pre-emption given by the will of H., the testator &c., extended as well to his freehold as to his copyhold estates, and that such right is now vested in the Plt.—*Hunt v. H.*, V.-C. W., 21 Dec. 1872, A. 3272.

9. *Direction to sell if Right of Pre-emption be not exercised.*

An inquiry whether the Plt has elected or does elect to avail himself of the right of pre-emption given him by the will of the testatrix to

any and what extent; And Let a period be fixed within which such election is to be made; And if it shall appear that the Plt has elected or if he shall elect to avail himself of such right of pre-emption, then (the Plt by his counsel consenting) Let a time be fixed within which such purchase is to be completed; And if the Plt shall not avail himself of the said right of pre-emption, or in case the purchase shall not be completed within the time so to be fixed, or within such further time as shall be appointed by the (Judge) (the Plt by his counsel consenting), Let the said estates devised by the said will to the Plt and others, or such parts thereof as the Plt shall not elect to purchase, be sold with the approbation &c.—*Fowler v. F.*, V.-C. E., 17 Nov. 1849, A. 778.

10. *Inquiry as to carrying into effect Agreement for Exchange.*

AN inquiry whether it is fit and proper, and for the benefit of the testator's estate, and the persons entitled thereto, that the agreements for the exchange of the estates in the testator's will and the schedule to the said agreement mentioned, should be carried into execution, and whether with or without any and what variation in the terms thereof, and whether any and what proceedings should be taken in reference thereto.—*Cope v. Evans*, V.-C. K., 7 June, 1858, A. 1783.

11. *Exchange of Estates notwithstanding Judgment for Sale.*

AND this Court being of opinion that the exchange of the unentailed estates at H. &c., for the entailed estates called M. &c., is fit and proper, Let, notwithstanding the judgment, dated &c., for the sale of the said estates at H., the Petr be at liberty to prosecute the proposal in the petition (summons) mentioned, for effecting an exchange of the said estates at H. for the said entailed estates called M., before the Board of Agriculture; And in case the said exchange shall be sanctioned by the said Board, Let the same be carried into effect under the authority of the said Board; And Let the said estates at H., when so exchanged, be vested in the Deft and her heirs, upon the trusts of the will of B., the father of the Petr; And Let the said estates called M., when so exchanged, be sold with the approbation &c.—See *Blake v. B.*, M. R., 7 Nov. 1854, A. 70.

For inquiry as to agreement or proposal by testator for a partition, see *Dodds v. Lewis*, V.-C. S., 10 Dec. 1859, A. 390.

For order declaring heir's right to have purchase by intestate completed out of personalty, see *Hood v. H.*, V.-C. S., 4 July, 1857; *S. C.*, 5 W. R. 747; *Ston*, 4th edit. p. 909.

See Real Estate Charges Acts, *sup.* pp. 1540, 1541.

NOTES.

EQUITABLE CONVERSION BY WILL OR CONTRACT.

The right of an heir or devisee to have the purchase-money of estates which the deceased contracted to purchase paid out of the personal estate is

now limited to the case of testators or intestates dying before 1 Jan. 1868, and intestacies before 31 Dec. 1877: see Real Estate Charges Act, 1867 (30 & 31 V. c. 69), s. 2; *Hudson v. Cook*, *Harding v. H.*, 13 Eq. 417, 493; and Real Estate Charges Act, 1877 (40 & 41 V. c. 34), *et sup.* p. 1540.

Estates which the testator had contracted to sell, the contract having become binding before his death, passed under a devise of trust estates: *Lysaght v. Edwards*, 2 Ch. D. 499; *Wall v. Bright*, 1 J. & W. 494; and see *Re Thomas, T. v. Howell*, 34 Ch. D. 166; and the legal estate passed under a residuary gift to trustees upon trust to sell: *Surrey Commercial Dock v. Kerr*, W. N. (78) 163; but leaseholds which he had agreed to sell subject to questions of title did not pass under a gift of his leaseholds and securities: *Good v. Teague*, 7 W. R. 84; 5 Jur. N. S. 116; but this case was doubted in *Callow v. Callow*, 42 Ch. D. 550, which decides that a bequest of "all securities for money" includes sums due to the testator for which he has a vendor's lien for unpaid purchase-money.

By the Conveyancing Act, 1881 (44 & 45 V. c. 41), s. 4, where at the death of any person there is subsisting a contract enforceable against his heir or devisee for the sale of the fee simple or other freehold interest descendible to his heirs general in any land, his pers. represves shall, by virtue of the Act, have power to convey the land for all the estate and interest vested in him at his death in any manner proper for giving effect to the contract. But a conveyance made under this section is not to affect the beneficial rights of any person claiming under any testamentary disposition, or as heir or next of kin of a testator or intestate, and the section applies only in cases of death after the 31st Dec. 1881.

A direction to convert must be imperative in order to work constructive conversion in the meantime, and personalty will not be converted by a direction to invest in land (r other securities: *Van v. Barnett*, 19 Ves. 102, 109; *Rich v. Whitfield*, 2 Eq. 583; *Atwell v. A.*, 13 Eq. 23; *Re Bird*, *Pitman v. P.*, (1892) 1 Ch. 279; *Goodier v. Edmunds*, (1893) 3 Ch. 455; *Lewin*, 1164; unless the intention is that the other investment is to be interim only: *Earlom v. Saunders*, Amb. 241; nor by a mere power to invest in land: *De Beauvoir v. De B.*, 3 H. L. C. 524; *Re Ibbitson*, 7 Eq. 226; *Goodier v. Edmunds*, (1893) 3 Ch. 455; or permission to convert: *Lucas v. Brandreth*, 28 Beav. 273; with trust for reinvestment in freeholds, copyholds, or leaseholds: *Re Bird*, *sup.*; nor where there is a power to postpone the conversion: *Glover v. Heelis*, 23 W. R. 677; 32 L. T. 534, nor where the effect is to repose a discretion in the trustees whether they will sell or not: *Re Hotchkys*, *Freke v. Calmady*, 32 Ch. D. 408, C. A.; and see *McGwire v. M.* (1900), 1 I. R. 200; nor where the trust for sale is void as offending the rule against perpetuities: *Goodier v. Edmunds*, (1893) 3 Ch. 455; but a direction to trustees to sell so soon as they shall see fit for the benefit of the *cs. q. t.*, or when it shall appear to be for their benefit, amounts to an imperative direction to convert: *Re Raw*, *Morris v. Griffiths*, 26 Ch. D. 601; *Doughty v. Bull*, 2 P. Wms. 320; *Robinson v. R.*, 19 Beav. 494; *Gilbert v. Aviolet*, W. N. (87) 217; 58 L. T. 43; and so an absolute direction to sell on request: *A. G. v. Dodd*, (1894) 2 Q. B. 150; *Lewin*, 1159; and conversion takes place on a trust for sale becoming absolute by subsequent events: *Mitchison v. Buckton*, 23 W. R. 480; 32 L. T. 11.

A mere direction in a will that the residuary real estate shall, for the purpose of transmission, be impressed with the quality of personalty from the time of the testator's death, does not amount to a conversion: *Hyett v. Meekin*, 25 Ch. D. 735; *Goodier v. Edmunds*, (1892) 3 Ch. 455, where, under a devise on trust for sale of land at a period too remote the interests of beneficiaries in the proceeds of sale passed to their real represves; and see *McGwire v. M.* (1900), 1 I. R. 200.

Persons exercising a power of appointment under a settlement of land as realty, with a mere power of sale, may appoint the shares as personalty: *Webb v. Sadler*, 8 Ch. 419.

And a general residuary gift in the will of the donee of a general power will, *prima facie*, carry the proceeds of sale of real estate not impressed with a trust for reconversion: *Blake v. B.*, 15 Ch. D. 481; or stock invested in the name of the testatrix at her request, and representing such proceeds of sale, and impressed with a trust for reconversion only in default of appointment by her: *Chandler v. Pocock*, 16 Ch. D. 648, C. A.; or a share

of proceeds of real estate (sold under a judgment in a partition action) represented by a sum of stock: *Re Harman, Lloyd v. Tardy*, (1894) 3 Ch. 607; and money impressed with a trust to invest in land in England will pass under a general devise of lands, but not under a devise of lands in a particular county of England: *Re Duke of Cleveland's Settled Estates*, (1893) 3 Ch. 244, C. A.

As to what are lands "directed to be sold" within the Stamp Act, 1815 (55 G. III. c. 184), Sched. Part III., for the purposes of legacy duty, see *Hanson*, 19, 20, 208.

For the effect of a direction to convert at the request of a person named, see *Thornton v. Hawley*, 10 Ves. 129; *Re Taylor*, 9 Ha. 596; *A. G. v. Dodd*, (1894) 2 Q. B. 150.

And with a consent: *Lechmere v. Carlisle*, 3 P. Wms. 219, 220; *Davies v. Goodhew*, 6 Sim. 585.

A mortgage does not, until sale, operate as a conversion: *Bourne v. B.*, 2 Ha. 35; though on sale the surplus money is to be paid to the mortgagor's exors or admors: *Wright v. Rose*, 2 S. & S. 323; and see *Re Underwood*, 3 K. & J. 745.

As to conversion of land for partnership purposes, see *Waterer v. W.*, 15 Eq. 402; *Davis v. D.*, (1894) 1 Ch. 393.

A mere notice to treat given by a railway, &c. company does not effect conversion: *Haynes v. H.*, 1 Dr. & S. 426; but the land is converted by any contract, though under compulsion, which is enforceable, as to which see Chap. L., "SPECIFIC PERFORMANCE," Sect. V.

When an absolute order for sale is made by the Court in an admon action, the conversion dates from the order: *Hyett v. Mekin*, 25 Ch. D. 735; and see *Re Beamish's Estate*, 27 L. R. Ir. 326; and in case of a sale by the Court, there is in general no equity between the persons claiming the realty and those claiming the personalty, whether in the case of sale of lands of a lunatic: *Re Mary Smith*, 10 Ch. 79; or an infant: *Steed v. Preece*, 18 Eq. 192; *Arnold v. Dixon*, 19 Eq. 113; although more is sold than necessary: *S. C.*; unless the Act under which the Court sells shows that the proceeds of the sale retain their character of realty: *Foster v. F.*, 1 Ch. D. 588; *Norton v. N.*, (1900) 1 Ch. 101; *Settled Estates Act*, 1877 (40 & 41 V. c. 18), ss. 34—36; *Partition Act*, 1868 (31 & 32 V. c. 40), s. 8; and see *sup.* Chap. XXXVIII., "INFANTS," pp. 1024 *et seq.*

So, where realty is converted by Act of Parliament, it is taken in its actual state: *Frewen v. F.*, 10 Ch. 610 (Irish advowson changed to a right to compensation); and see *Cadman v. C.*, 13 Eq. 470.

Immediate conversion directed by will, though there be a discretion as to the time, is deemed to take effect from the testator's death: *Robinson v. R.*, 19 Beav. 494; but not before: *Beauclerk v. Mead*, 2 Atk. 170.

Immediate conversion, directed by deed, generally takes effect from the execution of the deed: *Griffith v. Ricketts*, 7 Ha. 299. The principle is the same as in the case of a will: *Ib.* 311. If the conversion is to take place on the happening of an event it dates from then: *Ward v. Arch*, 15 Sim. 389.

Conversion under an option of purchase takes place from the time of its being exercised: *Townley v. Bedwell*, 14 Ves. 591; *Lawes v. Bennett*, 1 Cox, 167; *Collingwood v. Row*, 5 W. R. 484; 3 Jur. N. S. 785; 26 L. J. Ch. 649; and see *Drant v. Vause*, 1 Y. & C. C. 580; *Emuss v. Smith*, 2 D. & S. 722; even though the option to purchase is exerciseable only after the death of the grantor who dies intestate: *Re Isaacs, I. v. Reginall*, (1894) 3 Ch. 506; but the rule is not favoured by the Court: *Lewin*, 1165; and where a testator executed a lease containing an option of purchase, and on the same day executed a codicil confirming his will, as he must have had the lease present to his mind when he executed the codicil, the doctrine of *Lawes v. Bennett* was displaced, and the title of the devisee to the purchase money prevailed: *Re Pyle, P. v. P.*, (1895) 1 Ch. 724.

Under sect. 4 of the Intestates' Estates Act, 1884 (47 & 48 V. c. 71), the law of escheat applies to proceeds of sale of real estate ineffectually disposed of by testatrix so that the Crown takes and not the exors: *Re Wood, A. G. v. Anderson*, (1896) 2 Ch. 596.

FAILURE OF PURPOSE OF CONVERSION—RECONVERSION.

If the conversion of realty for the purposes of the will, express or implied, fails, the realty goes to the heir, and if the purposes fail wholly, as realty, if partially, as personalty: *Ackroyd v. Smithson*, 1 L. C. Eq. 7th ed. 372; *Smith v. Claxton*, 4 Madd. 484; *Bugster v. Fackrell*, 26 Beav. 469; *Wilson v. Coles*, 28 Beav. 215; *Ramsay v. Sheldermine*, 1 Eq. 129. The failure is only partial if there are debts or legacies to be paid: *Wright v. W.*, 16 Ves. 188; *A. G. v. Lomas*, L. R. 9 Ex. 29; *Re Richerson*, *Scales v. Heyhoe*, (1892) 1 Ch. 379.

And the right of the heir to real estate descended is not affected by a direction to carry on the testator's business any further or otherwise than is necessary for the purposes of the will: *Re Cameron*, *Nixon v. C.*, 26 Ch. D. 19, C. A.

The lapsed shares of a mixed fund go, so far as constituted of realty and personalty, to the heir and next of kin respectively: *Ackroyd v. Smithson*, 1 Bro. C. C. 503; 1 L. C. Eq. 7th ed. 372; *Roberts v. Walker*, 1 Russ. & M. 752; *Jessopp v. Watson*, 1 My. & K. 665; *Amphlett v. Parke*, 2 Russ. & M. 221; as to which, however, see *Court v. Buckland*, 1 Ch. D. 605.

A mere direction that the proceeds of sale shall be deemed personalty does not prevent the heir-at-law taking: *Amphlett v. Parke*, 2 Russ. & M. 221; *Court v. Buckland*, 1 Ch. D. 605; *Smith v. Harding*, W. N. (74) 101; and see *Hyett v. Mekin*, 25 Ch. D. 735.

On the principle of *Ackroyd v. Smithson*, *sup.*, a chattel interest carved out of realty, and made subject to limitations which fail, results to the heir as a chattel: *Burley v. Evelyn*, 16 Sim. 290, 295.

Where conversion of land directed by deed fails totally, it goes to the settlor's heir: *Ripley v. Waterworth*, 7 Ves. 435; failing partially, to the next of kin: *Clarke v. Franklin*, 4 K. & J. 265; 6 W. R. 836; *Hewitt v. Wright*, 1 Bro. C. C. 86.

Money directed by will to be converted into land for purposes which fail totally or partially goes to the next of kin: *Hereford v. Ravenhill*, 1 Beav. 481; *Cogan v. Stevens*, *Ib.* 482, n.; 5 L. J. N. S. Ch. 17; and belongs to them as realty or personalty, according to its character in equity at the time of such failure: *Curteis v. Wormald*, 10 Ch. D. 172, C. A., overruling *Reynolds v. Godlee*, Joh. 536, 582.

Where money is to be laid out in land to be settled to uses, all of which are exhausted except a legal jointure, the jointress has an equity to compel the investment in land; *secus*, *semble*, in the case of portioners: *Waltrond v. Rosslyn*, 11 Ch. D. 640; *Lewin*, 1155, 1156.

And where rents of an infant tenant in tail were expended in insurance of buildings which were burnt down, the policy moneys being personal estate of the infant, the reversioner, in the absence of any provision in the settlement as to fire insurance, had no equity for reconversion: *Warwicker v. Brednall*, 23 Ch. D. 188.

Where there is a covenant to lay out money in land (*Pulteney v. Darlington*, 1 Bro. C. C. 223), or a trust to raise a sum of money out of land (*Re Newberry*, 5 Ch. D. 746), for purposes which have failed at the death of the obligor, &c., the money or land devolves according to the state in which it was at his death.

As to conversion under covenant to pay money to trustees to be laid out in the purchase of land, on trusts which fail, see *Pulteney v. Darlington*, 1 Bro. C. C. 223; *Lechmere v. L.*, Ca. t. Talb. 80; *Chichester v. Bickerstaff*, 2 Vern. 295.

A contract by a testator for sale of real estate, the title to which was bad, at his death, and is not subsequently accepted by the purchaser, does not effect a conversion: *Re Thomas*, *T. v. Howell*, 34 Ch. D. 166.

As to conversion by adoption by the authorities in lunacy of a contract to purchase real estate entered into by a person who was afterwards found lunatic and died intestate, see *Baldwyn v. Smith*, (1900) 1 Ch. 588.

A devisee was held not to have adopted his testator's parol contract so as to effect a conversion relating back to the testator's lifetime: *Re Harrison*, *Parry v. Spencer*, 34 Ch. D. 214; but where an option to purchase has been given to a lessee, the exercise of it after the lessor's death has been held to effect a retrospective conversion as between his real and pers. represes: *Re*

Adams and The Kensington Vestry, 27 Ch. D. 394, C. A.; *Lawes v. Bennett*, 1 Cox, 167; but not when the option is exercised after the death of the lessee: *S. C.*; *Lewin*, 1164, 1165, and *v. sup.* p. 1553.

And as to failure of trusts for conversion generally, see 1 Jarm. 586 *et seq.*; *Ackroyd v. Smithson*, 1 L. C. Eq. 372; *Wms. Exors.* 585; *Lewin*, 1151 *et seq.*

As to reconversion by election of the person or persons absolutely entitled, see *Mutlow v. Bigg*, 1 Ch. D. 385, C. A., and cases there cited; *Van v. Barnett*, 19 Ves. 109; *Meek v. Devenish*, 6 Ch. D. 566; *Re Lewis, Foxwell v. L.*, 30 Ch. D. 654; *Lewin*, 1166 *et seq.*

Where a lunatic's estate was subject to a mortgage, which it was desired to pay off, an order was made that the mortgage be paid off without prejudice to the question how the mortgage should ultimately be borne, and it was to be kept on foot by transferring it to the committee, to be disposed of as the Court should direct: *Re Melly*, 49 L. T. 429; *Re Leeming*, 3 D. F. & J. 43; *Lewin*, 1179.

SECTION XV.—LEASES AND OCCUPATION—PERMANENT IMPROVEMENTS.

1. *Inquiry as to Leases granted.*

AN inquiry whether the said real estates or any and what part thereof have been let upon lease, and by whom the same were so let, and whether the same were properly let.—*Potter v. Baker*, V.-C., 11 Nov. 1826, B. 2164.

For inquiries as to grant or renewal of leases, and repurchasing or compounding for anns, and investments, and income, see *Longmore v. Elcum*, 2 Y. & C. C. 371.

2. *Inquiry as to Occupation Rent—Account.*

AN inquiry what is the proper occupation rent with which the Plt ought to be charged during such time as the said farm &c. have been in his occupation; An account of what is due from the Plt in respect of such occupation rent.—See *Badham v. Allen*, M. R., 6 Dec. 1860, A. 2443.

3. *Defendant to be charged with Occupation Rent.*

AND the Deft by her counsel admitting that she has been, and now is, in the occupation of the real estates of the intestate, Let an annual value by way of rent be set on the said estates during the time the Deft has been so in possession; And Let the Deft be charged therewith accordingly (in her accounts of rents and profits).—*Lechmere v. Brasier*, V.-C., 2 July, 1816, B. 1833.

For inquiry whether Deft, the trustee, has been in occupation, and if so

an annual value to be charged by way of rent; or if he occupied under any existing lease by the testator, Deft to be charged according to the rent reserved, see *Simmons v. Gutteridge*, M. R., 16 Feb. 1805, B. 270; *Radmore v. Niner*, M. R., 17 July, 1805, B. 841.

For order for Deft to be charged with the annual royalty rent for clay dug by him for the making of bricks, see *A. G. v. Grant*, V.-C., 15 June, 1816, A. 1584.

4. Inquiry as to Occupation by Trustees.

An inquiry whether the Defts W. and S. (*exors and trustees*), or either of them, have or has (since the testator's death) been in the occupation of the said real estate, or any and what parts thereof, and during what periods; and if so, Let an annual value by way of occupation rent be set on the said real estate or such parts thereof as have been so occupied during such occupation; And Let the said Defts or either of them who shall appear to have been in such occupation be charged with such value in the said accounts of rents and profits.—See *Salvin v. Weston*, V.-C. W., 23 April, 1866, B. 1016.

5. Inquiry as to Improvements.

“AN inquiry what permanent improvements of the real estate of the testator have been effected by the Deft (*exor and trustee*), and whether, and to what amount, such improvements have increased the annual value of such estate; or so that the same could be let to a tenant at any or what increased rental; but such inquiry is to be without prejudice to any question between the tenant for life under the testator's will and the Deft.”—*Salvin v. Weston*, V.-C. W., 23 April, 1866, B. 1016.

For like inquiries and accounts in partition actions, see Chap. XLVI., “PARTITION AND SALE,” Sect. I.

6. The like—as to Buildings.

At the request of the Plt by his counsel, but without prejudice to any question, Let an inquiry be made what additions have been made to the buildings standing upon the testator's land in the statement of claim mentioned, and what improvements have been made to the said buildings and land, and what new buildings have been erected, and when, either entirely or partly on the testator's land by the Plt either alone or jointly with others, and whether for the purposes of his or their business or otherwise, and what is the value of such additions, improvements, and new buildings.—See *Hunt v. H.*, V.-C. W., 21 Dec. 1872, A. 3272.

For orders authorizing expenditure by trustees, *v. sup.* pp. 1178—1180, and for notes as to what payments will be allowed to trustees for repairs and improvements, pp. 1184 *et seq.*

As to the measure of the personal liability of an exor of an insolvent estate, who takes beneficial possession of the testator's leaseholds, see *Re Bowes, Earl of Strathmore v. Vane*, 37 Ch. D. 128.

SECTION XVI.—CARRYING ON BUSINESS.

1. *Inquiry as to carrying on Testator's Business for Infants.*

AN inquiry whether it will be proper and for the benefit and advantage of the Plts, the infants, and of the Defts A., and B. his wife [*or* for the benefit of the persons interested in the testator's estate], that the testator's business should be carried on and continued [*If so*, and if so in what manner and upon what terms], and if not what should be done in respect thereof; [*or*, And Let, if it shall appear not to be proper and for their benefit and advantage, the lease of the house in which the said trade is carried on, and also the stock-in-trade, be sold with the approbation of the Judge].

2. *Inquiry as to Testator's Business, and whether to be continued or disposed of.*

10. "AN inquiry whether the testator was engaged in any and what trade or business at his death, and where, and how, and by whom, and in what circumstances, the same was carried on at his death, and has since been carried on, and what gains and profits, if any, have been made thereby since his death; 11. An inquiry whether it will be fit and proper, and for the benefit of the infant Plt and of the other persons interested under the said will, that the testator's trade or business shall be carried on and continued by the Defts, or any of them, personally, or by any person or persons to be employed by them, or in any other manner; or that the mills, machinery, and premises where, or by means whereof, such trade or business is carried on shall be let, and to whom, and on what terms; or that such business shall be wound up and disposed of; And if it shall appear not to be proper and for the benefit and advantage of the infant Plt and other persons interested under the said will that the said trade or business should be carried on and continued, Let the same be let or wound up and sold as may be proper and for their benefit, with the approbation of the Judge."—*Rhodes v. R.*, V.-C. S., 30 May, 1868, B. 1315.

3. *Inquiry as to Business carried on, and Stock and Profits.*

1. AN inquiry in what circumstances the testator's business of hotel-keeper has been carried on from his death until the — day of —,

and what gains and profits have been derived by the Deft in respect of the said business during that period; 2. An inquiry whether the testator's stock-in-trade, furniture, farming-stock and effects, or any and what parts thereof, have been sold; and if so, under what circumstances; 3. An inquiry whether it will be for the benefit of the Plts that the Deft should become or be confirmed as the purchaser of the said stock-in-trade, furniture, farming-stock and effects, at the price of £—, the amount of the valuation thereof, or upon any other and what terms.—*Bicknell v. B.*, M. R., 11 Jan. 1853, A. 436.

4. *Inquiry as to Intestate's Farming Business, and Expenditure thereon since his Death.*

AN inquiry whether the intestate at the time of his death was carrying on any farming business on any and what farm, and under any and what lease or otherwise, and whether such business has been carried on by the Deft C. (*admix*) since the death of the intestate, and whether any and what moneys have been properly expended by her in stocking, cropping, managing, and cultivating such farms, and what ought to be done in respect of such farming business.—*Smith v. Carter*, V.-C. M., 25 Jan. 1873, B. 215; and see *Norman v. Baldry*, V.-C. E., 2 June, 1834, B. 1527; *S. C.*, 6 Sim. 621.

For order directing exors to carry on business, and to leave at Chambers annual balance sheets showing the result of trading, see *Paitson v. P.*, V.-C. M. at Chambers, 14 June, 1871, B. 1543.

5. *Inquiry as to Testator's Interest in Business.*

INQUIRY what was the nature of the testator's right and interest in the business carried on by him at his decease, and the fixtures and stock-in-trade used and employed therein, and the debts owing thereto at the time of his decease.—*Mordaunt v. Smith*, M. R., 17 July, 1858, B. 1531.

6. *Inquiry as to Testator's Trade—Use of Assets—Sale of Effects—And if with Widow's Assent.*

ACCOUNT of dealings and transactions;—Usual accounts of personal estate.—“An inquiry whether any trade or trades in which the testator at his death was engaged, was or were continued after his death, and by whom, and for what time, and under what circumstances, and whether any and what part of his assets was after his death used and employed in and for the purposes of any or what trade or trades, business or businesses, and under what circumstances; And whether after his death any and what part of his effects and property was sold to the — Co., and when, and by whom, and for what price or consideration,

and in what circumstances, and whether the property and effects, if any, so sold, or any and what part thereof, was or were afterwards purchased by the Deft. B. (*trustee*), and for what price or consideration, and in what circumstances; And whether —, the testator's widow, after the testator's death assented to the acts of the Deft. B., and the acts, if any, of the Deft. L. (*co-trustee*), in the admon or management of the testator's estate, and in relation to the trade or trades which had been carried on by the testator, or any or which of such acts, and under what circumstances."—Usual directions.—*Barker v. Birch*, V.-C. K. B., 16 July, 1847, A. 2203; 1 D. & S. 391.

For inquiries and directions as to carrying on testator's trades and sales of his property, see *Blackwell v. Bull*, 1 Keen, 182; *Whitmore v. Oxborrow*, 2 Y. & C. C. 18; *Travis v. Milne*, 9 Ha. 157.

7. Interest and Profits of Trade since Testator's Death to be distinguished.

ACCOUNT of personal estate—"distinguishing any part of such personal estate which has arisen, or been produced, from interest that has accrued due since the testator's death, or from profits derived from his trade of &c., made by carrying on his trade since his death."—*Stodhart v. Ryle*, V.-C., 10 Aug. 1816, B. 1773.

8. Inquiry as to Valuation of Stock-in-Trade, and if taken by Testator's Sons under Will.

"AN inquiry whether a valuation was made of the stock-in-trade and fixtures used in his trade by the testator, pursuant to the directions contained in his said will, and if so, what was the amount of such valuation, and whether such stock-in-trade and fixtures were taken at that amount by the testator's three sons T. &c., in accordance with the directions in that behalf contained in the said will, or how the same and every part thereof was disposed of, and to whom, and when, and for what consideration."—*Hunt v. Hunt*, V.-C. W., 21 Dec. 1872, A. 3272.

For orders on the same subjects in partnership actions, see Chap. XLIX., "PARTNERSHIP," pp. 2200 *et seq.*

9. Remuneration allowed to Executors for carrying on Farms.

"DECLARE that in the special circumstances of the case the Defts R. and C. ought to be allowed the sum of £120 out of the testator's personal estate for their care and pains and loss of time in managing and carrying on the testator's three farms of L., W., and T. in the pleadings mentioned; And Let, in addition to the accounts &c., an account be taken of the receipts and payments of the Defts R. and C.

in carrying on the said three farms, and of the profit or loss made or sustained thereby, and in taking such account the said Defts are to be allowed the sum of £120 out of the testator's personal estate for their care and pains and loss of time as aforesaid, and this account is to be without prejudice to any question as to the extent of the interest of the estate of the testator in the said farms."—*Forster v. Ridley*, L. JJ., 5 July, 1864, A. 1459; S. C., 4 N. R. 417; 4 D. J. & S. 452.

For inquiry as to allowance for management, see *Helling v. Hayes*, V. C. W., 4 May, 1872, A. 1168.

10. *Order authorizing Trustees to carry on Business for Limited Time.*

THE application by originating summons dated &c. of the Plts the trustees of the will of the above-named testator T— S—, deceased, which upon hearing &c. was adjourned to be heard in Court coming on &c., the Judge doth authorize the Plts to postpone the sale of the said F— P— business in the summons mentioned for a period of (two) years from the date of the death of the testator; And doth declare that the said surplus income during the life and the widowhood of the testator's widow falls into residue.—See *Re Smith, Arnold v. Smith*, North, J., 27 Nov. 1895, B. 3998; (1896) 1 Ch. 171.

11. *Inquiries &c. where Testator's Assets are sufficient to meet his Debts at the time of his Death, but insufficient to meet the Debts incurred by the carrying on of his Business pursuant to his Will.*

IF it shall appear that the testator's estate is more than sufficient for payment of the testator's funeral and testamentary expenses, the debts owing to his creditors at the time of his death, and the costs of this action, Let the following inquiries be made: 1. An inquiry what creditors there are whose debts have been incurred by reason of the testator's business being continued after his death under the power in his will contained; 2. An inquiry what amount of the testator's assets has been properly employed by the defendants in so continuing the testator's business, and what is the amount of such assets available for payment of the debts lastly hereinbefore mentioned, with liberty to any of the last-mentioned creditors to apply to the Court for payment of their debts out of the assets so available; And Let the applicant's costs of this application be added to the amount of his claim.—Costs of Plts and Defts to be costs in the action.—*Banks v. B.*, M. R., 28 March, 1887, A. 685.

NOTES.

Rights and Liabilities of Exors carrying on Business.—Exors, being bound to realize their testator's estate to the best advantage, may carry on his

business for such reasonable time as is necessary to enable them to sell it as a going concern: *Collinson v. Lister*, 20 Beav. 256, 365, 366; *Garrett v. Noble*, 6 Sim. 506; *Dowse v. Gorton*, (1891) A. C. 190; and if they do so may be entitled, even as against the testator's creditors, to an indemnity out of the estate in respect of liabilities properly incurred: *Dowse v. Gorton*, (1891) A. C. 199; and see *Re Owen*, *Frisby v. Owen*, 66 L. T. 718; *Hodges v. H.* (1899), 2 Ir. R. 480; and so where a receiver and manager has been appointed in an admon action to carry on the business in succession to the exor, and whether the will does or does not contain a power to carry on the business: *Re Brooke, B. v. B.*, (1894) 2 Ch. 600; and a third person injured in the reasonable course of management may be entitled to stand in the place of the trustee or exor as respects indemnity: *Re Raybould*, (1900) 1 Ch. 199; and, *quoad* beneficiaries under the will, a power in the exors to carry on the business for a reasonable time may be implied from a general power to postpone the sale and conversion of the estate, although the business is not specially referred to: *Re Chancellor, C. v. Brown*, 26 Ch. D. 42, C. A.; and see *Re Crowther*, *Midgley v. C.*, (1895) 2 Ch. 56, where the trustees, having absolute discretion as to postponement, were held to be justified in carrying on the testator's business for twenty-two years, and paying the whole of the profits to the tenant for life; but a power to postpone sale, coupled with a direction to sell the testator's business of a pawnbroker with all convenient speed, was held not to give power to carry on for an indefinite time, and under the circumstances the Court authorized the trustees to carry on the business for two years: *Re Smith, Arnold v. S.*, (1896) 1 Ch. 171; see Form 10, *sup.* p. 1560.

But, except for the purpose of realization, exors are not justified in continuing to carry on the testator's business, unless there is a distinct authority given by the will: *Kirkman v. Booth*, 11 Beav. 373; *Collinson v. Lister*, *sup.*

A power to exors who renounce to carry on the testator's business does not empower the admix to do so: *Lambert v. Rendle*, 3 N. R. 247; and a direction to carry on a trade forming a distinct portion of the testator's estate does not of itself authorize the investment of further sums in it: *M'Neillie v. Acton*, 4 D. M. & G. 744; and if it is to be carried on with a specified part of his property, only that part is liable for future trade debts: *Cutbush v. C.*, 1 Beav. 184; *Exp. Garland*, 10 Ves. 110; *Strickland v. Symons*, 26 Ch. D. 245, C. A.; *Re Johnson, Shearman v. Robinson*, 15 Ch. D. 548; on the subsequent bankruptcy of the firm the amount so directed to be left in it cannot be proved for: *Scott v. Izon*, 34 Beav. 434; and see Partnership Act, 1890, s. 3.

Where a newspaper, part of assets, was carried on under the decree, the stationer supplying paper had a lien on the fund in Court prior to creditors: *Tinkler v. Hindmarsh*, 2 Beav. 348; and where a victualler directed his trade to be carried on by his exors, a brewer and a spirit merchant who used to supply him, they were entitled to do so at fair market prices: *Smith v. Langford*, 2 Beav. 362.

The Court cannot on behalf of infants authorize the admor to carry on an intestate's trade: *Land v. L.*, 43 L. J. Ch. 311.

Exors cannot be made liable for allowing part of the testator's estate to continue in a business, under a power, though it is lost by misconduct of surviving partners: *Rowley v. Adams*, 2 H. L. C. 725, 772; and see *Ward v. W.*, *Id.* 777.

The exors may sell or pledge any part of the property properly employed in the business, and may even, it seems, mortgage the freehold premises in which the business is carried on: *Devitt v. Kearney*, 13 L. R. Ir. 45; *M'Neillie v. Acton*, 4 D. M. & G. 744.

And where all the realty and personalty was given upon trust for sale, and the trustees were empowered to carry on the testator's business, and employ therein all the capital invested therein at his death, and to increase or abridge the business and capital, they were held entitled to raise money for the business by an equitable mortgage of the realty: *Re Dimmock*, 52 L. T. 494.

Where the business had been properly carried on in accordance with the provisions of the will, and with the assent of the creditors, and in their interest as well as in that of the beneficiaries, the exors were entitled, in

priority to creditors, to indemnity out of the general estate, and not merely out of that portion of the assets which had come into existence or changed its form since the testator's death: *Dowse v. Gorton*, (1891) A. C. 190; and see *Re Owen, Frisby v. Owen*, 66 L. T. 718.

Receiving a sum of money from the firm on account of what might be due to the estate did not make the exors liable as partners: *Holme v. Hammond*, L. R. 7 Ex. 218.

The fact that the exors have allowed a sum due to the testator's estate from a firm in which he was a partner to remain outstanding does not entitle residuary legatees to an account of the profits made by the surviving partners since the testator's death: *Vyse v. Foster*, 8 Ch. 309; L. R. 7 H. L. 318.

Where the surviving partners insist on using part of the assets in the business, the exors are entitled to have a receiver: *Madgwick v. Wimble*, 6 Beav. 495.

A receiver and manager of an intestate's business has been appointed, although there was no legal pers. reprieve: *Steer v. S.*, 2 Dr. & S. 311.

Exors may be allowed remuneration: *Forster v. Ridley*, 4 D. J. & S. 452; Form 9, *sup.* p. 1559.

As to the principle on which an exor, who had been managing a hotel belonging to the testator's estate and supplying it with goods from his own brewers, was to account for profits and receive allowances, see *Re Williams, Morgan v. W.*, W. N. (92) 81; 40 W. R. 636.

Remedies of Creditors.—The remedy of a creditor of the business for a debt contracted after the death is against the exor, not the estate: *Farhall v. F.*, 12 Eq. 98; 7 Ch. 123; *Re Morgan, Pillgrem v. P.*, 18 Ch. D. 93, C. A.; *Strickland v. Symons*, 26 Ch. D. 245, C. A.; 22 Ch. D. 666; and see *Re Evans, E. v. E.*, 34 Ch. D. 597, C. A.; *Dowse v. Gorton*, 40 Ch. D. 536, 543, C. A.; (1891) A. C. 190; and is by an action for the amount, not by admon decree: *Owen v. Delamere*, 15 Eq. 134; but the creditor has a right to the benefit of the indemnity and lien which the exor as trustee has against the property devoted to the business, subject to equities between the heirs and *cs. q. t.*, *e.g.*, the exor being in default is not entitled to indemnity except on making good his default: *Re Johnson, Shearman v. Robinson*, 15 Ch. D. 548; *Exp. Garland*, 10 Ves. 110; *Gallagher v. Ferris*, 7 L. R. Ir. 489; *Strickland v. Symons*, 26 Ch. D. 245, 248, C. A.; *Re Blundell, B. v. B.*, 44 Ch. D. 1, 11, C. A.; *Re Raybould*, (1900) 1 Ch. 199, *sup.* p. 1561; *Jennings v. Mather*, (1901) 1 K. B. 108; and the exor is bound to render an account of the assets employed in the business, at the suit of a creditor of it since the death: *Thompson v. Dunn*, 5 Ch. 573; but it is premature for such creditors to apply to enforce their right in an admon action until, on further consideration, the exor is proved not to be in default: *Re Morris*, 23 L. R. Ir. 333.

An exor carrying on his testator's trade is personally liable for debts so contracted, although he avowedly acts as exor: *Labouchere v. Tupper*, 11 Moo. P. C. 198; 5 W. R. 797; and though the exor carries on the business in his own name, and the testator's assets employed in it are ostensibly the exor's property, a judgment creditor of the exor is not entitled to take such assets in execution: *Re Morgan, Pillgrem v. P.*, 18 Ch. D. 93, C. A.; and exors accepting new shares in a company as exors are personally liable: *Re Lerds Banking Co., Fearnside and Dean's Case*, 1 Ch. 231.

In *Re Evans, E. v. E.*, 34 Ch. D. 597, C. A., a judgment creditor was declared entitled by Kay, J., to a lien on the beneficial interest of the admix to whom the goods had been supplied, and which goods were sold on the day on which judgment was signed pursuant to an order previously made in an admon action.

By O. XVIII, 5, claims by or against an exor or admor may be joined with such claims by or against him personally as "are alleged to arise with reference to the estate": see *Padwick v. Scott*, 2 Ch. D. 743; *Farhall v. F.*, 7 Ch. 123.

On an originating summons for admon by creditors of a business carried on after the testator's death, the Court declined to make a judgment directing special inquiries: *Re Bach, Walker v. B.*, W. N. (92) 108.

And see further as to exors carrying on a trade, *Wms. Exors. 1682 et seq.*; *Lindl. 620 et seq.*

As to the liability of exors and of the estate for debts, subsequent to the death, contracted by a partnership or company of which the testator was a member, *v. Chap. XLIX.*, "PARTNERSHIP."

SECTION XVII.—OUTSTANDING ESTATE.

1. *Inquiry as to outstanding Estate, and as to taking Proceedings.*

AN inquiry what parts, if any, of the testator's said personal estate are outstanding and undisposed of, and upon what securities; And Let such proceedings, if any, as the Judge shall approve be taken for the purpose of realizing and getting in the same [*or*, and whether it will be fit and proper that any and what proceedings should be taken, and by whom, for the purpose of realizing and getting in the same, or any part thereof; And Let such proceedings, if any, as the Judge shall approve, be taken accordingly].—See *Startin v. Peckover*, V.-C. W., 6 June, 1857, B. 1217; *Willats v. Hooper*, V.-C. M., 8 June, 1875, B. 1366.

2. *Outstanding Estate to be got in.*

LET the Deft T. (*exor*) proceed to get in the outstanding personal estate of the testator, and take such proceedings therein as the Judge shall direct; And Let the Deft T., within — from the respective times of receipt, lodge the amounts which shall from time to time be received on account of such outstanding personal estate in Court, as directed in the schedule hereto.—[*Add Lodgment Schedule, Form No. 1, Vol. I., p. 206.*]

3. *Inquiry as to continuing Investments.*

AN inquiry whether it will be fit and proper, and for the benefit of the infant Plts, and the other persons interested under the will of the testator, that any, and what part or parts, of the testator's said residuary personal estate and effects should be retained in the investment or investments, state, or condition, in which the same was or were at the decease of the testator.—*Clark v. Dalrymple*, V.-C. M., 16 July, 1870, A. 2154.

4. *Inquiry as to continuing or calling in Securities.*

AN inquiry whether any and which of the securities whereon the testator's estate, or any part thereof, is outstanding, are proper to be

continued, and whether any, and which of them, are proper to be called in; And Let such of them as shall appear proper to be called in be called in accordingly, and put in suit, if necessary, in the names of the Defts [*the exors*], with the approbation of the Judge; And Let the said Defts be indemnified therein out of the testator's estate.—Lodge money to be received in Court &c.—[*Form 2, sup.*]

5. Inquiry as to converting Foreign Securities, &c.

"An inquiry whether it is expedient that any, and what part, of the foreign securities and shares in mining or other cos. in the statement of claim mentioned, forming part of the testator's estate, should be sold and converted into money, or what should be done therewith."—*Hargreaves v. Barton*, V.-C. M., 20 Jan. 1872, A. 99.

For order for exors to sell bonds in foreign railways in such manner as they might think fit, with special powers, including power to revoke contracts, and to resell and to make allowances to agents, see *Broune v. Collins*, V.-C. H. at Chambers, 22 Jan. 1875, A. 119.

For inquiry under what circumstances the intestate's shares in an insurance co. and his railway debenture stock remained unsold, and what was their value respectively at the time of the intestate's death, and whether any, and if any what, loss had been occasioned by their being retained unsold, see *Re Price, P. v. P.*, V.-C. H., 17 March, 1877, B. 439; and see Forms and Notes, Chap. XLL, "TRUSTEES."

6. Inquiries as to Investments—Compromise and Conversion of Estate.

1. An inquiry whether any and what investments have been made with any and what parts of the testator's residuary personal estate, or the produce thereof, or the money arising from the sale of his real estate, and when such investments were made, and whether they are still subsisting, or what has become thereof respectively. 2. An inquiry in what circumstances such parts of the testator's personal estate not specifically bequeathed as remain outstanding have been allowed to remain so outstanding, and whether it is fit and proper, and for the benefit of the persons interested in the testator's said personal estate, that the same, or any and what parts thereof, should be got in. 3. An inquiry whether any and what arrangements by way of compromise or otherwise were made by the Defts G. &c. (*represes*) with any and what persons, being debtors, or otherwise accountable to the estate of the testator, and whether such arrangements respectively were fit and proper and for the benefit of the persons interested in the testator's estate. 4. An inquiry of what the residuary trust estate of the testator now consists, and in whom the legal estate in such parts thereof as consist of freehold or copyhold estates is now vested, and whether any and what parts of the residuary trust estate respectively ought to be sold, got in, or converted into money.—*Agg-Gardener v. Agg*, V.-C. W., 24 July, 1858, A. 1588.

7. *Direction to continue Foreign Securities.*

DECLARE that the words "stocks in the foreign funds," contained in the will of the testator, were intended to comprise foreign securities to which the faith of the country or state in which they are funded (invested) is pledged; And Declare that all the securities mentioned in &c., except the £4½ p. c. loan of the city of Boston &c., are comprised in the foregoing declaration, and are not to be sold or converted during the widowhood of the Plt without her consent in writing.—*Ellis v. Eden*, 23 Beav. 543, 549, n.; and see *Montessor v. M.*, 1 Col. 693.

8. *Sum due on Bond from Father of Infant Cestuis que Trust to be paid by Instalments.*

ORDER on further consideration.—"And the said E., H., S., and C. (*sureties*), by their counsel consenting that their liabilities in respect of the joint and several bond dated &c. for £2,000, in the pleadings and in the Master's certificate mentioned, shall not be affected by time being allowed by this order to the said W. J. H. for payment of the sum secured by the said bond."—Tax costs—"Exor to be at liberty to retain costs relating to the bond without prejudice to the direction for W. J. H. to pay them; And the said W. J. H. by his counsel undertaking to insure his life for £1,000 in some office for the insurance of lives to be approved by the Deft, and to assign the policy to the Deft as exor of the will of the testator on or before 1st May, 1875, and by his counsel also undertaking to pay the premiums in respect of such policy, and that such policy shall stand as a security, in addition to the memorandum of deposit of title deeds in the Master's certificate dated &c. mentioned, and to the said bond, for payment of £2,000 therein respectively referred to; Let the said W. J. H. pay to the Deft, on or before the 1st day of March, 1875, the sum of £100."—Directions for payment by instalments of amount of bond, interest, and costs.—"But in case the said W. J. H. shall die on or before the said 30th day of December, 1881, then the part of the said sum of £2,000 remaining due and owing at the date of his death is to become immediately payable, and the order hereinbefore contained as to such part then remaining due is to be of no effect."—Liberty to apply.—*Hodgetts v. Fortescue*, 12 Jan. 1875, A. 181.

In this case the testator's son-in-law, W. J. H., was indebted to him in the sum of 2,000*l.* secured by a memorandum and deposit of title deeds of inadequate value, and a bond to which there were several sureties. The 2,000*l.* when paid was to be held on trusts for the benefit of the infant children. Under an inquiry directed by the decree, made in a suit by the infants by their next friend against their father, the exor and obligee of the bond, the Chief Clerk found that it would not be for the benefit of the infant Plts that the bond should be enforced at once, as their father was unable to pay it. And see *Ward v. W.*, 2 H. L. C. 786, as to getting in debts to the injury of *cs. q. t.*

9. *Inquiries as to Testator's Liability under Covenants and Trusts, as to Sale of Library, and felling Timber during his Tenancy for Life.*

AN inquiry whether the testator at the time of his death was, and whether his estate now is, subject to any and what claims and liabilities, by reason of any covenants entered into by him or otherwise, or of any trusts which the testator was liable to perform; And at the request of the Deft S., by his counsel, an inquiry whether or not the testator at any time sold any and what library, or parts of any library of books, held upon trust, under which he was entitled thereto for his life only, and under which any and what other person or persons was or were entitled thereto, subject to his life interest therein; And whether the testator ever, and when, cut down or caused to be cut down any and what quantity of timber, planted or left standing for ornament or shelter upon any and what estate or estates of which the testator was tenant for life only, or for any and what partial estate or interest, with remainder or reversion to any and what other person or persons; And whether the testator was at the time of his death, and whether his estate now is, subject to any and what liability or liabilities in respect of such library, or parts of any library of books, and in respect of such timber, or in respect of either and which of such particulars, and what is the amount of such liability or liabilities respectively; and what person or persons is or are now entitled to the amount of such liability or liabilities.—*Calvert v. Sebright*, V.-C. E., 19 Nov. 1847, A. 194; and see *Douglas v. D.*, V.-C. K.-B., 11 Dec. 1844, A. 953.

NOTES.

Exors are in general bound to get in outstanding assets within twelve months from the death of the testator, and are liable for loss occasioned by not doing so, unless they can show good reason: *Hughes v. Empson*, 22 Beav. 181; *Grayburn v. Clarkson*, 3 Ch. 605, where the estate of an exor who died thirteen months after the testator, whose will directed conversion with all convenient speed, was made liable, fifteen years afterwards, for loss from shares in an unlimited co.; and see *Sculthorpe v. Tipper*, 13 Eq. 232, *et sup.* p. 1142, Form 6, and note, p. 1150; Lewin, 311.

But they may exercise a reasonable discretion, and were not made liable for not selling shares for two years while the market was failing: *Marsden v. Kent*, 5 Ch. D. 598; although there was a direction to convert with all convenient speed: *Buxton v. B.*, 1 My. & C. 80; and it is sufficient if all reasonable attempts to realize have been made: *Ward v. W.*, 2 H. L. C. 777, 787; *Re Roberts, Knight v. Roberts*, 76 L. T. 479; Lewin, 1113; and where the will authorizes investments on mortgage, there is no rule imposing an absolute duty on trustees or exors to call in mortgage securities within twelve months, although of a hazardous nature or apparently insufficient by reason of agricultural depression: *Re Chapman, Cocks v. C.*, (1896) 2 Ch. 763, C. A.

Where there had been a loss by non-conversion of a security, the trustees were allowed the benefit of an inquiry to show the actual amount which would have been realized by a conversion at the proper time: *Gainsborough*

(*Earl*) *v. Watcombe Co.*, 54 L. J. Ch. 991; 53 L. T. 116; and *v. sup.* Chap. **XLI.**, "TRUSTEES," p. 1150.

Exors must get in all debts to the estate on personal security, although due from a co-exor: *Styles v. Guy*, 1 Mac. & G. 422; 1 H. & T. 523; *et sup.* p. 1130.

An exor ordered to pay into Court a balance invested on personal security in India was allowed a proper time for doing so: *Roy v. Gibbon*, 4 Ha. 65. As to payment in, *v. sup.* pp. 1508, 1509.

And see notes to Sect. **XXXI.**, *inf.* p. 1686 *et seq.*, as to the duty of exors to sell and convert outstanding estate.

One exor may settle an account with a person accountable to the estate: *Smith v. Everett*, 27 Beav. 446, 454; but a compromise by an exor, the effect of which was to relieve him from a liability he was under to the testator's estate, was set aside: *Stott v. Lord*, 8 Jur. N. S. 249; 31 L. J. Ch. 391; 5 L. T. 817; 10 W. R. 284; and *v. sup.* p. 1187.

Payment to exors' or trustees' agent is a discharge, and they are liable for him: *Robertson v. Armstrong*, 28 Beav. 123.

Payment to an agent as such will not operate as a discharge merely because he happens to be one of the exors: *Miller v. Douglas*, 56 L. J. Ch. 91; 55 L. T. 583; 35 W. R. 122.

The exor is the proper person to sue both at law and in equity for outstanding assets, and formerly if the exor was insolvent a receiver was appointed who could bring actions in his name: *Utterson v. Muir*, 2 Ves. jun. 95; but it is not now the practice to permit a receiver to carry on an action in the name of a bankrupt exor or admor: *Re Hopkins, Dowd v. Hawlin*, 19 Ch. D. 61, C. A.; and if an exor becomes bankrupt, and there is a co-exor willing to act, the Court will simply restrain the bankrupt from further acting: *Bowen v. Phillips*, (1897) 1 Ch. 174; and after a judgment against him for admor the exor and not the Plt is entitled, in the absence of misconduct, to the conduct of all proceedings for the benefit of the estate: *Harrison v. Richards*, 1 Ch. 475. Legatees suing the exor may add the surviving partner of the testator as a party "that they may have an account of the personal estate entire": *Newland v. Champion*, 1 Vez. 105; *Burrowes v. Gore*, 6 H. L. C. 907; 4 Jur. N. S. 1245; *Bowsher v. Watkins*, 1 Russ. & M. 277; *Travis v. Milne*, 9 Ha. 149. (But this does not apply to a partnership by way of shares in a co.: *Stainton v. Carron Co.*, 18 Beav. 146.)

Again, a legatee may sue a person who has (by a breach of the exors' duty of which he was aware) become possessed of part of the assets: *Consett v. Bell*, 1 Y. & C. C. 569, 579; and see *Hilliard v. Eiffe*, L. R. 7 H. L. 39; *Re Lovett, Ambler v. Lindsay*, 3 Ch. D. 198; or if there is collusion between the exor and the debtor: *Burrowes v. Gore*, 6 H. L. C. 907; 4 Jur. N. S. 1245; or between the exor and a stranger, such as the retainer of assets by the stranger with the exor's consent: *Gedge v. Traill*, 1 Russ. & M. 281 n.; *Re Lovett, Ambler v. Lindsay*, 3 Ch. D. 198; or if the exor refuses to sue: *Lancaster v. Evors*, 4 Beav. 158; or neglects to sue: *Morley v. White*, 8 Ch. 731 (where the debtor was a co-exor who had neither proved nor renounced); and the owner of a fund in Court, out of which the estate is entitled to be recouped payments made, should be a party: *S. C.*

An exor may assign the testator's book debts to a creditor, and give him a power of attorney to get them in, and the assignee may be made Deft to an admor action by another creditor: *Vane v. Rigden*, 5 Ch. 663.

And see further on this subject, *Barker v. Birch*, 1 D. & S. 376; *Doran v. Simpson*, 4 Ves. 651; *Troughton v. Binkes, Alsager v. Rowley*, 6 Ves. 573, 748; *Benfield v. Solomons*, 9 Ves. 86; *Buddleley v. Curwen*, 2 Coll. 151. And as to the liability of exors for not suing, see *Clack v. Holland*, 19 Beav. 262, and other cases, *sup.* p. 1127.

Where the Plt's solr buys up debts, the estate being insolvent, the question whether he is trustee of any profit cannot be raised by the Master's certificate in the absence of any direction in the order: *Re Tillet, Field v. Lydall*, 32 Ch. D. 639.

As to the right of creditors to sue persons in possession of real estate who collude with the heir or devisee, see *Burroughs v. Elton*, 11 Ves. 29; *Pearse v. Hewitt*, 7 Sim. 471.

Where a testator appoints a person who owes him money, or one of several joint, or joint and several, debtors, his exor or one of his exors, he thereby

extinguishes the debt at law as against legacies, although the exor does not prove the will: *Wms. Exors; Re Applebee, Leveson v. Beales*, (1891) 3 Ch. 422; *Re Griffin, G. v. G.*, (1899) 1 Ch. 408; but not as against creditors: *Ib.* 1313; nor at all in equity: *Ib.* 1314; *Ingle v. Richards*, 28 Beav. 366; unless it appears to have been his intention to do so: *Strong v. Bird*, 18 Eq. 315; *Re Applebee, sup.*

Under the common judgment an exor cannot be charged with part of the estate which he has not got in: *Shuttleworth v. Bristo*, 12 W. R. 40; 9 L. T. 317; and as to wilful default, *v. sup.* pp. 1162 *et seq.*; and Form 21, *sup.* p. 1473.

SECTION XVIII.—INQUIRIES AS TO PERSONS.

1. *Special Inquiry for Next of Kin under Statute of Distribution* (22 and 23 CAR. II. c. 10), *where there is primâ facie evidence of assignments or incumbrances.*

AN inquiry who were the persons entitled by virtue of or according to the Statute of Distribution, or otherwise, to the estate of A., deceased, the intestate in the pleadings [*or writ, or originating summons*], named living at the time of his [*or her*] death, and whether any of them are since dead, and, if so, who are their respective legal pers. represes.

2. *Another Form of like Inquiry.*

AN inquiry who are the persons entitled by virtue of or according to the Statute of Distribution, or otherwise, to the estate of A., deceased, the intestate in the pleadings [*or writ, or originating summons*] named.

The above Forms 1 and 2, which were approved in principle by the late L. J. Chitty, are intended to include inquiries as to assignments or incumbrances.

3. *Inquiry as to Testator's Marriage, and as to his Wife, Children, and Issue.*

"AN inquiry whether the testator B. was ever married, and if so, when and to whom; and whether he left a widow, and whether any and what children him surviving, and when such children, if any, were respectively born, and whether any of them are since dead, leaving any and what issue."—*Cooper v. Wicks*, V.-C. E., 29 April, 1842, A. 1022; *Rayment v. R.*, V.-C. W., 4 May, 1872, B. 1451.

4. *Inquiry as to Testator's Children.*

"AN inquiry what children the testator left him surviving, and when they were respectively born, and whether they are all now living, or, if

any of them are dead, when they respectively died, and whether they left any child or children respectively, and who are the respective legal pers. represves of such of the said children of the testator, if any, as are dead."—*Re Edmonds, E. v. Granger*, V.-C. M. at Chambers, 1 July, 1876, A. 1925.

For order (under O. xvi, 9a, of June, 1876, now O. xvi, 32) directing inquiries to ascertain certain classes and for appointment of a proper person in Chambers to represent each class, in order to decide question of construction, see *Re Peppitt, Chester v. Phillips*, V.-C. B., 16 Dec. 1876, B. 3544, Form 4, p. 120.

5. *The like.*

AN inquiry what children there were of the testator, and when they were respectively born, and whether they are all living, and, if any of them are dead, when they respectively died, and if any of them died under the age of twenty-one years, whether they left any, and if any, what issue, and whether any of such children being daughters have married.—*Patrick v. Crick*, V.-C. H., 17 May, 1877, B. 1577.

6. *Inquiry as to Testator's Children and Issue.*

1. AN inquiry what children there were of the testator who predeceased him, leaving any and what issue living at his death; or who survived him, and being sons, attained the age of twenty-one years, or died under that age leaving any and what issue, or being daughters, attained that age or married under that age with the consent of their guardians. 2. An inquiry whether such children as survived the testator and such issue are respectively living or dead, and if dead, when they died, and who are their legal pers. represves.—*Gale v. G.*, M. R., 25 Feb. 1871, A. 468.

For inquiry as to persons claiming to be second cousins, see *Eyre v. Harris*, M. R., 21 July, 1779, A. 663.

And for inquiry as to testator's cousins, descendants from his father's or mother's brothers or sisters, and as to their issue, see *Stevenson v. Abington*, M. R., 24 Nov. 1860, B. 2293.

7. *Inquiry as to Female Legatee and her Issue.*

AN inquiry whether M., in the testator's will named, survived the testator, and if so, when she was born, and whether she was ever, and, if ever, when, married and to whom, and whether she is living or dead, and if dead, when she died, and whether she left any, and, if any, what issue her surviving, and whether such issue are living or dead, and when they were respectively born, and if any of such issue are dead, when they respectively died.—*Re Gelderd, G. v. Logan*, M. R., 2 June, 1877, A. 1090.

8. *Inquiry as to Children, and their Mother, and any Appointment.*

AN inquiry what children C., in the pleadings named, has had, and when they were respectively born, and whether they are all living, or, if any of them are dead, when they respectively died; and whether the said C. is living or dead, and if dead, when she died; and whether she ever, and when, and in any and what manner, exercised the power of appointment contained in the testator's will.—*Cope v. Evans*, V.-C. K., 7 June, 1858, A. 1783.

9. *Presumption of Death—Preliminary Inquiries.*

AN inquiry whether A. is living or dead, and if dead, when he died, and whether he left any and what will, and whether he was ever married, and if so (when and) to whom, and whether there were any children of the said marriage, and who are his legal pers. represves.—*Re Allin*, V.-C. M., 15 June, 1867, A. 1403; 15 W. R. 1164; 17 L. T. 60.

As to presumption of death after long absence, see Sect. XXVII., *inf.* p. 1654.

10. *Inquiries as to Legatee, and if dead testate or intestate, and as to his Children or Next of Kin.*

AN inquiry whether A. &c., is living or dead; and if the said A. be dead, when he died, and what was his age at the time of his death, and whether he died intestate, or left any and what will, and whether he left any child or children him surviving; And in case he left any child or children him surviving, whether such child or children, or any and which of them, are living or dead, and if any such child or children be dead, who are their respective legal pers. represves; And in case the said A. left no child or children, and died intestate.—Inquiry for next of kin [Form 1, Sect. IV., *sup.* p. 1465].

11. *Inquiries as to Legatees and their Issue, and their Representatives.*

1. AN inquiry whether P. &c., respectively named in the will of the testator, are respectively living or dead, and if dead, when they died.
 2. AN inquiry whether the Plt W., and the Defts G. and S. respectively, have had any and what children or issue, and whether such children or issue are living or dead, and whether such of the said children or issue as are dead lived to attain the age of twenty-one years, or if daughters were married, and when, and to whom; and who are the legal pers. represves of any such children or issue as have died after having attained the age of twenty-one years, or after marriage if daughters.
 3. AN inquiry what children there were living at the

death of the testator, or afterwards born, of the said P., other than her daughters, the Plt. W., and the Defts G. and S.; and whether such other children, if any, are living or dead, and if dead, who are their respective legal pers. represves.—*Weedon v. Glover*, M. R. 26 Jan. 1858, B. 490.

As to service on the official solr where the fund exceeds 500*l.*, see O. XXII, 12 B., and *sup.* p. 209.

For inquiries as to parties out of the jurisdiction and next of kin of the testator, who would be next of kin of testator and of Plt if she were dead, and so subject, decree for accounts, see *Godkin v. Murphy*, 2 Y. & C. C. 353; as to persons living, and for represves of deceased, and if any claim made for legacy, see *Hunt v. Peacock*, 6 Ha. 365; as to children of surviving residuary legatees and of one deceased, and if any of the latter were deceased, and if so, as to their represves, and as to incumbrancers on their shares, and if all persons interested were parties, with decree for accounts, see *Fisk v. Norton*, 2 Ha. 382.

For inquiries as to children—where gift confined to those living at decease of tenant for life, see *Middleton v. Messenger*, 5 Ves. 137; where confined to those living when the eldest attained twenty-one, *Andrews v. Partington*, 3 Bro. C. C. 403; as to sum to be set apart for legacies of future children, regard being had to the mother's age, *Defflis v. Goldschmidt*, 1 Mer. 422; 19 Ves. 372.

NOTES.

CLASSES OF PERSONS—INQUIRIES.

The inquiries as to a class of persons or nearest or next of kin should stand first in the judgment, but are not expressly directed to be preliminary to taking the accounts, and this rests in the discretion of the Judge at Chambers, under O. LV, 33; and see Form 1, *sup.* p. 1465.

Where the residue is given to a class of persons, it is not proper to inquire in terms who are the residuary legatees, as such inquiry may involve questions of law and construction, as well as of fact, but the Court usually directs an inquiry for the class of persons to whom the residue appears to be bequeathed; and that the Court does not usually send an inquiry as to a mere question of law, but will sometimes send a mixed question of law and fact, *v. sup.* Vol. I., p. 328.

Under Jud. Act, 1873, s. 66, inquiries may be directed to be prosecuted in a District Registry.

By O. XXXIII, 2, any "necessary inquiries or accounts" may be directed at any stage of a cause or matter, though "there is some special or further relief sought for, or some special issue to be tried," as to which the cause must proceed in the ordinary manner: *Leaden v. Lewin*, 4 Ha. 634; *Teague v. Richards*, 11 Sim. 46.

Under a gift to a class, *primā facie*, the class to take is to be ascertained at the death of the testator, and not the period of division: *Bullock v. Downes*, 9 H. L. C. 1; *Re Ford, Patten v. Sparks*, 72 L. T. 5, C. A.; *Theobald on Wills*, 255 *et seq.*; *Hawkins*, 99, 100; and the whole property goes to those members of the class who are capable of taking at the death: *Re Coleman and Jarrom*, 4 Ch. D. 165.

Where one of a class dies before the testator (1 Jarm. 311; *Theobald*, 690), or the gift is revoked as to him (*Shaw v. McMahon*, 4 D. & War. 431), his share does not lapse, but goes to the others.

Secus, where the gift is to *personæ designatæ*: *Cruse v. Howell*, 4 Drew. 215, 217, *e.g.*, to "my nine children," and in such case sect. 33 of the Wills Act will apply: *Re Stansfield*, S. v. S., 15 Ch. D. 84.

A gift to "the sisters of A. as tenants in common" (*Doe d. Stewart v. Sheffield*, 13 East, 526); or to all the nephews of A. who were living at the time of his decease (*Dimond v. Bostock*, 10 Ch. 358); or to named children, and such children thereafter to be born as should attain twenty-one (*Re Jackson*,

Shiers v. Ashworth, 25 Ch. D. 162; *Re Stanhope's Trusts*, 27 Beav. 201; or to A., testator's niece, and the children of B., his sister (*Kingsbury v. Walter*, (1901) A. C. 187, H. L.); is a gift to a class, and only those who survive the testator take; and see *Fell v. Biddolph*, L. R. 10 C. P. 701.

As to the effect of a gift to the children of A. and B., see *Re Featherstone's Trusts*, 22 Ch. D. 111.

As to gifts to children in remainder, including children *en ventre sa mère*, see *Re Hallett, H. v. H.*, W. N. (92) 148, and cases there referred to.

Where reversionary interests are given direct to a class it is to be ascertained at the death, and not when each reversion falls in: *Hagger v. Payne*, 23 Beav. 474.

A gift to such of a class as shall attain twenty-one is not to be ascertained on the first of them attaining twenty-one: *Iredell v. I.*, 25 Beav. 485; and see *Armistage v. Williams*, 27 Beav. 348; *Pilkington v. P.*, 29 L. R. Ir. 370.

The rule in *Andrews v. Partington*, 3 Bro. C. C. 403, by which, under a gift of an aggregate fund to a class payable to them respectively at a given age, individuals coming into *esse* after one of the class has attained the age are excluded, applies to a voluntary settlement: *Re Knapp's Settlement, K. v. Vassall*, (1895) 1 Ch. 91, and is applicable, though not necessarily so, to a gift of income: *Re Powell, Crossland v. Holliday*, (1898) 1 Ch. 227, distinguishing and explaining *Re Wenmoth's Estate, W. v. W.*, 37 Ch. D. 266.

And it applies although the will creates a prior life interest which determines before any of the class attain the age: *Re Emmett, E. v. E.*, 13 Ch. D. 484, C. A., explaining *Kevern v. Williams*, 5 Sim. 171; & *Berkley v. Swinburne*, 16 Sim. 275.

The Court looks at the circumstances at the date of the will: *Quayle v. Davidson*, 7 W. R. 164.

Evidence.—Evidence of the declarations of a testator as to whom he intended to benefit, can only be received where the description of the legatee, or of the things bequeathed, is equally applicable, in all its parts, to two persons, or to two things. But evidence of the circumstances, the habits, and the state of his family at the time he made the will, is admissible, so as to put the Court in the position of the testator, in order to ascertain the bearing and application of the language which he uses, and whether there exists any person or thing to which the whole description given in the will can, with sufficient certainty, be applied: *Charter v. C.*, L. R. 7 H. L. 364.

And for the rules as to the admission of parol evidence in the construction of wills, see 1 Jarm. W. 379 *et seq.*; Wms. Exors. 1012; Hawkins, 9; Theobald, 110 *et seq.*; *Irvine v. Sullivan*, 8 Eq. 673; *Grant v. G.*, L. R. 5 C. P. 380, 727 (as to which see *Wells v. W.*, 18 Eq. 504); *Re Taylor, Cloak v. Hammond*, 34 Ch. D. 255, C. A.; *Gillett v. Gane*, 10 Eq. 29; *Re Ingle*, 11 Eq. 578; *Wilson v. O'Leary*, 7 Ch. 448; 12 Eq. 525; *Re Waller, White v. Scoles*, 68 L. J. Ch. 526, C. A. (former wills admissible).

Representation: numerous Parties.—By O. XVI, 9, where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a Judge to defend the said cause or matter, on behalf or for the benefit of all parties so interested: *et v. sup.* p. 121.

By r. 32 (a), in any case in which the right of an heir-at-law, or the next of kin, or a class, shall depend upon the construction of an instrument, and it shall not be known, or be difficult to ascertain, such heir-at-law, or next of kin, or class, the Court or Judge may, if convenient to have the questions of construction determined before such heir-at-law, next of kin, or class, shall have been ascertained by means of inquiry or otherwise, appoint some one or more persons to represent such heir-at-law, next of kin, or class, and the judgment of the Court or Judge in the presence of such person or persons is to be binding upon the party or parties, or class, so represented.

By r. 32 (b), in any other case in which an heir-at-law, or customary heir, or any next of kin, or a class shall be interested in any proceedings, the Court or Judge may, if, having regard to the nature and extent of the interest of such persons or any of them, it shall appear expedient on account of the difficulty of ascertaining such persons, or in order to save expense, appoint one or more persons to represent such heir, or to represent all or any of such next of kin or class, and the judgment or order of the Court or Judge in the presence of the persons so appointed shall be binding upon the persons so represented.

An order was made under this rule in *Re Peppitt, Chester v. Phillips*, 4 Ch. D. 230, *sup.* p. 1569.

As to the effect of this and other rules as to binding absent parties, see *May v. Newton*, 34 Ch. D. 347.

MEANING OF PARTICULAR EXPRESSIONS.

Children means "legitimate" children: Jarm. vol. ii. 217; Wms. Exors. 941 *et seq.*; unless there is a clear indication to the contrary: *Re Bolton, Brown v. B.*, 31 Ch. D. 542, C. A.; *Re Haseldine, Grange v. Sturdy*, 31 Ch. D. 511, C. A.; *Re Lowe, Danily v. Platt*, 61 L. J. Ch. 415; 40 W. R. 475; *Re Du Bochet*, (1901) 2 Ch. 441; so strong that a contrary intention cannot be imputed to the testator: *Megson v. Hindle*, 15 Ch. D. 198, C. A.; and see *Re Brown, Penrose v. Manning*, 63 L. T. 159; *Walsh v. Browne*, 62 L. T. 899; *Re Du Bochet, sup.*; and it is not sufficient that the illegitimate child is elsewhere described by the testator as his nephew: *Re Hall, Branstons v. Weightman*, 35 Ch. D. 551; and as to what will be a sufficient indication, see *Re Humfries, Smith v. Millidge*, 24 Ch. D. 691; *Re Bryon, Drummond v. Leigh*, 30 Ch. D. 110; *Re Horner, Eagleton v. H.*, 37 Ch. D. 695; *Hill v. Crook*, L. R. 6 H. L. 265; *Re Walker, W. v. Ludyens*, (1897) 2 Ch. 238 (where an illegitimate child was sufficiently recognized to come in under gift to "issue"); *Re Parker, P. v. Osborne*, (1897) 2 Ch. 208; *Re Harrison, H. v. Higson*, (1894) 1 Ch. 561; Theobald, 259 *et seq.*

The word primarily refers only to the issue of the first generation: Jarm. vol. ii. 147; *Clifford v. Koe*, 5 App. Ca. 447; *Re Kirk, Nicholson v. K.*, 52 L. T. 346; but the primary meaning may be displaced by circumstances, and the word converted into a word of limitation: *Clifford v. Koe, sup.*; or held to mean grandchildren: *Re Smith, Lord v. Hayward*, 35 Ch. D. 558, distinguishing *Radcliffe v. Buckley*, 10 Ves. 195.

A gift to reputed illegitimate children to be *in esse* at the death of a testator is valid: *Occleston v. Fullalove*, 9 Ch. 147; *Re Hastie's Trusts*, 35 Ch. D. 728; *Re Goodwin's Trust*, 17 Eq. 345; but see *Re Du Bochet, sup.*; but this does not affect the rule that there cannot be a valid gift to a future illegitimate child described solely by reference to its paternity: *Re Bolton, Brown v. B.*, 31 Ch. D. 542, C. A.; and whether an illegitimate child *en ventre* can take as a reputed child, *quære*: *S. C.*; and see *Re Shaw, Robinson v. S.*, (1894) 2 Ch. 573.

A gift over on death of A. (tenant for life) without leaving children is not sufficient to create a gift by implication to the children: *Re Rawlins' Trusts*, 45 Ch. D. 299, C. A.; *S. C., nom. Scalé v. Rawlins*, (1892) A. C. 342, H. L. "Relatives hereinbefore named" included illegitimate children of persons named as cousins: *Seale Hayne v. Jodrell*, (1891) A. C. 304.

As to the period when a class of children taking in remainder are to be ascertained, see *Re Milne, Grant v. Heysham*, 56 L. J. Ch. 543; 57 L. T. 828, C. A.; and that, in the case of a gift to wife and children, the leaning of the Court is towards the construction which gives a life interest to the wife with remainder to the children, see *Re McVicker's Contract*, 25 L. R. Ir. 307.

"*Cousins.*"—"*Second cousins*" will not include persons who have not the same great-grandfather or great-grandmother as the *propositus*, unless there is a special indication of intention: *Re Parker, Bentham v. Wilson*, 15 Ch. D. 528; but may include first cousins once removed, if there are no second cousins: *Re Bonner, Tucker v. Good*, 19 Ch. D. 201; *Wilks v. Bannister*, 30 Ch. D. 512; and as to the meaning of "the nearest and most deserving male cousins, and a regular Power of the family," see *Power v. Quealy*, 4 L. R. Ir. 20.

"*Descendants*" is less flexible than "issue," and requires a stronger context to confine it to children: *Ralph v. Carrick*, 11 Ch. D. 873, C. A.

Family.—The primary meaning of "family" is children: *Pigg v. Clarke*, 3 Ch. D. 672; *Burt v. Hellyar*, 14 Eq. 160; but a power to appoint among "family or next of kin" included all relatives: *Snow v. Teed*, 9 Eq. 622; and under a power to appoint among a "family" an illegitimate child recognized as a child may be included: *Humble v. Bowman*, 47 L. J. Ch. 62, disapproving *Freeland v. Pearson*, 3 Eq. 658; and as to the meaning of "family," see 2 Jarm. 96; *Sinnott v. Walsh*, 3 L. R. Ir. 12.

Heirs.—“Heirs” may have a twofold meaning—viz., heir-at-law as to real estate and next of kin as to personalty—if there is enough to show that the testator did not intend it to have its technical meaning: *Keay v. Boulton*, 25 Ch. D. 212; *Wingfield v. W.*, 9 Ch. D. 638.

But where both realty and personalty were given to testator’s “legal heirs and theirs for ever,” the heiresses took all as residue: *In the Goods of Dixon*, 4 P. D. 81.

Personalty given direct to “the heirs and assigns” of a deceased person went to his statutory next of kin: *Re Newton*, 4 Eq. 171; and “heirs of the body” of A. meant such of the next of kin of A. as were descended from her: *Re Jeaffreson*, 2 Eq. 276; but the use of the word “heirs,” &c., as to personalty as words of limitation will not prevent lapse: *Appleton v. Rowley*, 8 Eq. 139.

“Heirs,” as a word of substitution as to personalty, means those taking under the Statutes of Distribution: *Doodv v. Higgins*, 2 K. & J. 729; *Re Philps*, 7 Eq. 151; *Parsons v. P.*, 8 Eq. 260; *Finlason v. Tatlock*, 9 Eq. 258; *Re Stevens*, 15 Eq. 110.

For an instance of the general rule that the “heir” (“right heir male”) of a person named in a will must be ascertained as soon as possible, see *Re Grayson*, 48 L. J. Ch. 354; 40 L. T. 98; 27 W. R. 534.

Under a gift of realty to the right heirs of a stranger, the heirs take as joint tenants as *personæ designatæ*: *Berens v. Fellows*, 56 L. T. 391; 35 W. R. 356.

As to the effect of a devise to A. “for his life and the life of his heir,” see *Re Amos*, *Carrier v. Price*, (1891) 3 Ch. 159.

“Husband,” “Wife.”—Under a gift on death of a daughter to any husband with whom she might intermarry, if he should survive her, a divorced husband was held to take: *Re Bullmore, B. v. Wynter*, 22 Ch. D. 619; but see *Re Morrieson*, *Hitchins v. M.*, 40 Ch. D. 30, disapproving *Re Bullmore*, and holding that a divorced woman could not take property given after her former husband’s death to his “wife”; and see *Wms. Ex.* 9th ed. 962, 989.

For a case in which a gift to the “wife” of a married man for life was held to extend to an after-taken wife, see *Re Drew*, (1899) 1 Ch. 336.

As to husband and wife taking separately under a gift to a class including them, see *Re Gue*, *W. N.* (92) 88, 132; 61 L. J. Ch. 510; 40 W. R. 555; 67 L. T. 823.

“Nephews” and “Nieces” will not, in the absence of clear indication, include those by marriage: *Merrill v. Morton*, 17 Ch. D. 382; and see *Re Gue*, *sup.*

“Represves, Exors, &c.”—Under a gift to the “exors, admors, and assigns” of a deceased person (*Morris v. Howes*, 4 Ha. 599); or to his “exors and admors” (*Mackenzie v. M.*, 3 Mac. & G. 559); or to his “legal pers. represves” (*Re Grylls*, 6 Eq. 589; *Smith v. Barneby*, 2 Coll. 728); or “legal represves” (*Wing v. W.*, 24 W. R. 878); or “represves” (*Re Crawford*, 2 Drew. 230); or to his “exors or executrix” (*Trethewy v. Helyar*, 4 Ch. D. 53), the property bequeathed will, in general, become part of his residuary estate if he left a will, or be distributable under the Statute of Distribution if he left no will; and so where a testatrix, subsequently to the execution of her will, filled up a nomination form of money in Post Office Savings Bank in favour of her exor: *Re Read*, *Turner v. R.*, 75 L. T. 295.

But sometimes next of kin take under such gift: see 2 Jarm. 957; *Wms. Ex.* 9th ed. 996; *Stockdale v. Nicholson*, 4 Eq. 359; *Re Thompson*, *Machell v. Newman*, 55 L. T. 85.

For similar cases under settlements, see *St. John’s Coll. v. Effingham*; and *Re Best*, 22 W. R. 125, 599; L. R. 18 Eq. 686; *Briggs v. Upton*, 7 Ch. 376.

A gift to D. for life, and at his decease to his pers. represves, was a gift to D. absolutely: *Alger v. Parrott*, 3 Eq. 328.

Survivor.—“Survivor” is *primâ facie* to be read in its strict sense of longest liver: *Re Roper*, *Morrell v. Gissing*, 41 Ch. D. 409; following *Maden v. Taylor*, 45 L. J. Ch. 569; *Davidson v. Kimpton*, 18 Ch. D. 213, in preference to *Re Mortimer*, 56 L. J. Ch. 414; *Askew v. A.*, 57 L. J. Ch. 629; 58 L. T. 472; 36 W. R. 620.

And the mere fact that the shares of children are settled is not sufficient to show that "survivors" is to be read out of its natural sense, so as to benefit the surviving issue of children who do not survive: *Re Benn*, B. v. B., 29 Ch. D. 839, C. A.; in the absence of a general gift over on death and failure of issue of all the children: *Re Horner, Pomfret v. Graham*, 19 Ch. D. 186; doubting *Re Walker, Church v. Tyacke*, 12 Ch. D. 205; or a gift over, in the event of any tenant for life dying without children, to the surviving tenants for life and their respective children, in the same manner as their original shares: *Re Bowman, Re Lay, Whytehead v. Boulton*, 41 Ch. D. 525; but see *Harrison v. H.*, (1901) 2 Ch. 136; *Re Bilham*, (1901) 2 Ch. 169.

"Unmarried" means, *primâ facie*, "never having been married": *Dalrymple v. Hall*, 16 Ch. D. 715; *Re Sergeant, Mertens v. Walley*, 26 Ch. D. 575; *Re Chant*, (1900) 2 Ch. 345; *secus*, "if then sole and unmarried": *Re Lestingham's Trusts*, 24 Ch. D. 703; or "if he shall die unmarried and without leaving a child": *Re Chant, sup.*; and see *Re King, Salisbury v. Ridley*, W. N. (90) 105; 62 L. T. 789; Wms. Ex. 9th ed. 952.

NEXT OF KIN.

In construing wills, the expressions "nearest of kin," "nearest of blood," and "next of kin" are synonymous, and to be ascertained by the rules of civil law, so as to include the nearest of kin only, and not the persons who would be entitled according to the Statute of Distribution: *Withy v. Mangles*, 10 Cl. & F. 215; 8 Jur. 69; *Cooper v. Denison*, 13 Sim. 290; *Elmsley v. Young*, 2 My. & K. 82, 780; *Avison v. Simpson*, Joh. 43; 5 Jur. N. S. 594; 2 Jarm. W. 926, 957; and where the gift was to "the next of kin in blood according to the statutes, and in the manner in which the same would have been distributed if the testator had died intestate," his widow was excluded: *Re Fitzgerald*, 58 L. J. Ch. 662; 61 L. T. 221; 37 W. R. 553; W. N. (89) 91.

Any reference to the statute is, however, sufficient: *Bullock v. Downes*, 9 H. L. C. 1; *Re Ranking*, 6 Eq. 601; Wms. Ex. 9th ed. 983; and then the statutes regulate the interests as well as the persons to take: *S. C.*; *Mortimore v. Slater*, 25 W. R. 646; *Lucas v. Brundreth*, 28 Beav. 278. But the addition of "as if she had died unmarried" was not sufficient: *Halton v. Foster*, 3 Ch. 505; *Lucas v. Brundreth*, 28 Beav. 279.

On the other hand, a judgment or order directing an inquiry for "next of kin" means the next of kin under the statutes, though not so mentioned, unless a contrary intention is expressed or shown from the pleadings: see *Brandon v. B.*, 3 Swa. 318; *S. C.*, on rehearing, 4 W. R. 533, n.; *Elmsley v. Young*, 2 My. & K. 787.

Where "pers. represves," in a will, were referred to in the codicil as "relations and next of kin," the next of kin under the statutes took: *Re Grylls*, 6 Eq. 589; 2 Jarm. 957.

The decision of the Probate Court as to who are next of kin is conclusive in a suit between the same parties for admon: *Barrs v. Jackson*, 1 Ph. 582; 1 Y. & C. C. 585; and see *Bouchier v. Taylor*, 4 Bro. P. C. 708; *Boyse v. Colclough*, 1 K. & J. 134; but not on a point of construction: *Hastings v. Hane*, 6 Sim. 67.

As to "nearest of kin to myself in the male line," see *Boys v. Bradley*, 4 D. M. & G. 62; *Re Chapman, Ellick v. Cox*, 49 L. T. 673; 32 W. R. 424; and as to "next of kin in blood" to A. in case she had died intestate and unmarried: *Re Gray, Akers v. Sears*, (1896) 1 Ch. 802.

A power to appoint among "relatives" not being exercised, only the next of kin under the statutes were entitled: *Salisbury v. Denton*, 3 K. & J. 529; as to "relations," see *Lees v. Massey*, 3 D. F. & J. 113; 9 W. R. 425; Wms. Exors. 1352 *et seq.*; and that the presumption is that the half-blood are included, see *Re Reed*, 57 L. J. Ch. 790; 36 W. R. 682; and see *Seale Hayne v. Jodrell*, (1891) A. C. 304; *S. C.*, 44 Ch. D. 590, C. A.; where "relatives named" was held in the case to include relatives by affinity and illegitimate.

For a review of the cases when persons taking as next of kin after a life interest are to be ascertained, see *Wharton v. Barker*, 4 K. & J. 483; 6 W. R. 534; and see *Lees v. Massey*, 3 D. F. & J. 113; *Re Morley*, 25 W. R. 825; *Mortimore v. M.*, 4 App. Ca. 448; *S. C.*, 7 Ch. D. 332; *Sturge to G. W. Ry. Co.*, 19 Ch. D. 444; *Clarke v. Hayne*, 42 Ch. D. 529 (not following *Re*

Ainsworth, Druitt v. Seaward, 31 Ch. D. 234; and *Re Bradley, Brown v. Cottrell*, 58 L. T. 631; under a gift "after the death of A." to the testator's next of kin, A. takes a life estate by implication; *secus*, where the gift is to persons who happen to be some of the next of kin: *Re Springfield, Chamberlin v. S.*, (1894) 3 Ch. 603.

Presumptive next of kin of a tenant for life need not be parties on account of an ultimate limitation to them: *Fowler v. James*, 1 Ph. 803 (overruling *Wurdle v. Hargreaves*, 6 Jur. 478); and see *Clowes v. Hilliard*, 4 Ch. D. 413, *et sup.* p. 1477.

The A. G. as a party to the suit did not represent an illegitimate intestate, so as to dispense with an admor: *Bell v. Alexander*, 6 Ha. 543.

Personalty was transferred to an admor appointed so long as the next of kin remained of unsound mind: *Exp. Evelyn*, 2 My. & K. 3.

If a gift of a portion of residue fails, it goes to the next of kin, not to the residuary legatee: *Lloyd v. L.*, 4 Beav. 231; *Skrymsher v. Northcote*, 1 Sw. 566; 1 Wils. Ch. 248; *Green v. Pertwee*, 5 Ha. 249; 10 Jur. 538; unless there is a gift over showing a contrary intention: *Re Parker, Stephenson v. P.*, (1901) 1 Ch. 408; or the amount is unascertained: *Petre v. P.*, 14 Beav. 199; *De Lisle v. Hodges*, 17 Eq. 440; and so in the case of a legacy given out of a share of residue: *Lloyd v. L.*, 4 Beav. 231; but see *Re Judkin*, 25 Ch. D. 743, 749; and next of kin cannot be excluded from undisposed of residue by negative words: *Johnson v. J.*, 4 Beav. 318; nor the heir-at-law as to realty to be converted: *Fitch v. Weber*, 6 Ha. 145; and next of kin stand in like position as to personalty with the heir as to realty, and must be equally displaced as to title: *Underwood v. Wing*, 4 D. M. & G. 633, 658, 659; and see *Re Green*, 1 Eq. 288.

If there are no next of kin, one moiety (not being less than 500*l.*, see Intestates' Estates Act, 1890, 53 & 54 V. c. 29) goes to the widow, the other to the Crown: *Cave v. Roberts*, 8 Sim. 214; *Weatherall v. Thornburgh*, Form 6, *inf.* Sect. XXV., p. 1651; and see *Taylor v. Haygarth*, 14 Sim. 8; *Re Bond, Panes v. A. G.*, (1901) 1 Ch. 15.

The Court would not advance part of the fund to enable parties to try an issue as to next of kin: *Nye v. Maule*, 4 My. & C. 342; *Johnston v. Todd*, 3 Beav. 218; but in *Gregg v. Taylor*, 4 Russ. 279, and *Coombs v. Brooks*, 3 D. & S. 452, advances were made on security being given.

An advance to defray the expense of examining witnesses abroad was refused: *Peck v. Beechey*, 2 Sim. 40.

As to the Statute of Distribution (22 & 23 Car. 2, c. 10, made perpetual by 1 Jac. 2, c. 17, s. 7), see Wms. Exors. 9th ed. 1352 *et seq.*; Wms. Pers. Prop. 396; 13th ed. 471; Theobald, 306, 307. And that the division of personal estate among descendants of the intestate is always *per stirpes*, see *Re Natt, Wulker v. Gammage*, 37 Ch. D. 517.

The Intestates Act, 1890, (53 & 54 V. c. 29), does not apply to cases of partial intestacy: *Re Twigg, T. v. Black*, (1892) 1 Ch. 579; dower of intestate's widow is subject to abatement in respect of her charge under the Act: *Re Charriere*, (1896) 1 Ch. 912.

And as to the law of inheritance, see *Moore v. Simkin*, 31 Ch. D. 95; *Re Douglas, Wood v. D.*, 28 Ch. D. 327.

COSTS—CLASS INQUIRIES AND NEXT OF KIN.

In general all the parties in the same interest can only get one set of costs between them, and should not appear separately: *Re Taylor, Daubney v. Leake*, 1 Eq. 495; *Armstrong v. A.*, 12 Eq. 614; *Stevenson v. Abington*, 11 W. R. 936; 8 Jur. N. S. 811; 6 L. T. 345; and see *Joseph v. Goode*, 23 W. R. 225, *et sup.* pp. 1518, 1519.

But in special cases the costs of each next of kin succeeding in his claim may be allowed: *Bland v. Daniell*, W. N. (67) 169.

A residue being divisible among classes, the costs of ascertaining them were payable out of the whole residue before any apportionment: *Re Reeve*, 4 Ch. D. 841; but those of the members of a class from the share of the class: *Shuttleworth v. Houwarth*, Cr. & Ph. 228; as to what such costs include, see *Ib.* 232; and see *S. C.*, 4 My. & C. 492; *Eyre v. Marsden, Hutchinson v. Freeman*, *Ib.* 231, 490; *et sup.* pp. 1515, 1516.

Although a legacy had been carried to the separate account of a class of next of kin, the costs of ascertaining the class were made a charge on the

general estate: *Dugdale v. D.*, 12 Beav. 247; and see *Doddy v. Higgins*, 9 Ha. xxxii.; *Shuttleworth v. Howarth*, *sup.*

Though Plt's and Deft's claim as next of kin was displaced, they were allowed their costs from the fund: *v. sup.* p. 1516.

On bill by next of kin, the residue failing, the exor only was allowed his costs out of specific legacies: *Newbegin v. Bell*, 23 Beav. 386.

Next of kin, not parties, appearing on further directions, were entitled to the same costs as those made parties: *Hutchinson v. Freeman*, 4 My. & C. 490; *Bennett v. Wood*, 7 Sim. 522; and so as to a numerous class of legatees: *Shuttleworth v. Howarth*, 4 My. & C. 492, 496; *S. C.*, *sup.* p. 1513; and so under O. XVI, 40, where parties are served with the judgment or order, and have liberty to attend the proceedings.

ABSENT PARTIES.

As to sustaining a suit in the absence of some of a class, see O. XVI, 33—40.

By O. LV, 35, on hearing the summons to proceed in Chambers, the Judge may dispense with service of the judgment or order on absent parties, or direct substituted service, or notice by advertisement, or otherwise.

It is not necessary to direct class inquiries, with a view to parties only, in cases within O. XVI, 33—39, because one of the class is sufficient for the purposes of the judgment; and by r. 4, and O. LV, 33, they are to be served with notice of the judgment before the accounts and inquiries are prosecuted; but where they are to participate in any distribution of the estate, they should be ascertained by formal inquiries and certificate on which the Court may act.

By O. XVI, 46, the Court or Judge may proceed in the absence of a reprieve, or appoint one for the purposes of the cause or matter, on such notice, if any, as it thinks fit; but the Court will not order payment to such a reprieve. And see Chap. IX., "CHANGE OF PARTIES," *sup.* p. 121.

To adjudicate on the rights of the next of kin as a class, it was enough if some only of them were parties: *Culdecott v. C.*, Cr. & Ph. 183; *Topham v. Lightbody*, 4 Ha. 312. See now O. XVI, 32, *sup.* p. 1572.

SECTION XIX.—DOMICILE AND LEX LOCI.

1. Inquiry as to Domicile—Effect of Bequest—Next of Kin.

"1. An inquiry where the testator was domiciled at the time of making his will, and from thence up to and at the time of his death;
2. And in case it shall appear that the testator's domicile was other than Anglo-Indian or English, then an inquiry whether, according to the law of the country of the testator's domicile at the time of his death, the bequests and directions contained in the testator's will are wholly, or to any and what extent, valid, and what is the legal effect thereof, and in case the testator shall, according to such last-mentioned law, have died to any extent intestate, who are the persons according to such law entitled to the personal estate of which he may have died so intestate; 3. An inquiry who were the next of kin of the testator

living at the time of his death according to the laws of England, Scotland, and Jersey respectively, and whether any of such next of kin have since died, and if so, who are their respective legal pers. represves."—*Haldane v. Eckford*, V.-C. W., 8 July, 1865, A. 1418; S. C., 8 Eq. 631.

For inquiries as to testator's domicile, and whether exor abroad was duly appointed, and whether direction by will to remit assets to him was valid *lege loci*, and as to parties and the represves by the law of domicile of any parties deceased, see *Weatherby v. St. Giorgio*, 2 Ha. 630.

For orders sending cases for the opinion of foreign Courts, *v. sup.* Vol. I. pp. 845, 846.

2. Inquiry as to Domicile, and Property, and Effect of Will.

"AN inquiry where the testator was domiciled at the (time of making his will, and at the) time of his death; An inquiry of what the testator's property in Italy consisted, and whether the testator's will was sufficient to pass any and what part of such property, and to whom."—*Dunn v. Tatnall*, M. R., 31 March, 1835, A. 522.

3. Accounts against Administrators here and in Australia—Inquiries as to Domicile and Next of Kin.

1. ACCOUNT of personalty of W., deceased, the intestate, "come to the hands of the Plt as the admor in the colony of New South Wales, Australia, or to the hands of the Deft H. as administratrix in England, of the effects of the intestate;" 2. Inquiry what personal estate outstanding; "3. An inquiry whether the intestate was domiciled at the time of his death in England or Australia; 4. And if the intestate was domiciled in England"—Inquiry (Form 1, p. 1465) for statutory next of kin; "5. And if the intestate was domiciled in Australia at the time of his death, an inquiry who, according to the law of the colony or place where he was domiciled, were his next of kin living at his death, and whether any of them are since dead, and if so, who are their legal pers. represves respectively."—*Sladen v. Whitting*, V.-C. W., 28 April, 1860, B. 997.

4. Inquiry as to Residuary Legatee, her Domicile, and Next of Kin.

"AN inquiry whether S., the residuary legatee named in the will of the testatrix, is living or dead; and if dead, who are her legal pers. represves; And if the said S. be dead, where she was domiciled at the time of her death; and who at the time of her death were her next of kin according to the law of the place of her domicile at the time of her death; And if any of them are dead, who are their respective legal pers. represves."—*Godsman v. Nattrass*, V.-C. S., 3 July, 1860, A. 1394.

5. *Inquiry as to Persons entitled, under a Gift to Heirs, by the Law of France.*

AN inquiry who by the laws of France were the persons interested and described in the will of R. in &c., as his paternal and maternal heirs, entitled to share in the succession, living at his decease, and whether such persons are living or dead, and if any of them have died, who are or is entitled to their or his personal property; Accounts of receipts in respect of testator's share of legacy and residue and interest by his admor in India; And accounts of personal estate &c.—*Lardin v. Binny*, V.-C. W., 16 Dec. 1843, B. 298.

For inquiry who was entitled according to the law of Scotland to a heritable bond, such inquiry to be on notice to the Lord Advocate, see *Storey v. Scottney*, M. R., 24 Dec. 1799, B. 366.

For inquiry whether by the law of Scotland the Scotch descended heritable estate was liable to the payment of any, and which, of the debts of the testator (who died domiciled in England), and if it were so, whether by that law it was liable primarily or in exoneration of the personal estate, having regard to the fact that the pecuniary legatees would be wholly or partly unpaid if it were not so applied, see *Harrison v. H.*, L. R. 8 Ch. 342.

And for inquiry as to the law of Scotland, see *Campbell v. Houlditch*, V.-C. E., 19 Dec. 1820, A. 594.

As to heritable security, see 31 & 32 V. c. 101 (Titles, Scotland); 32 & 33 V. c. 116 (Heritable Securities, Scotland).

6. *Scotch Domicile—Inquiries as to Rights of Widow and Children.*

“DECLARE that the domicile of the testator on the 18th June, 1862, the date of the birth of the Deft D., and on the 13th August, 1863, the date of the testator's marriage with the Plt E., and thenceforth down to the time of his death, was in that part of the Kingdom of Great Britain called Scotland; And that the Plt E., the widow of the testator, is entitled to elect between her rights in his estate as the widow of a domiciled Scotchman and those under the testator's English will;” Usual admon accounts with a class inquiry; “7. An inquiry who was the heir-at-law of the testator according to the law of Scotland and the law of England respectively at the time of his death;” 8. Inquiry as to maintenance; “9. An inquiry what the testator's heritable property in Scotland consisted of at the time of his death, and whether the testator died intestate as to any or what part thereof, and if he died intestate, on whom the same devolved, and whether the same was or was not subject to any and what claim on behalf of the testator's widow to tierce, and what are the respective rights and liabilities of the person or persons on whom the same devolved, and of the testator's widow respectively, both as against the persons claiming under the testator's will and as against such of the testator's children as are entitled to legitim, and what were the respective values of such property, or of such parts thereof as are undisposed of by the testator.” Inquiries as to real estate in England and as to specific bequests; “12. An inquiry what at the time of the testator's death was the value

of his moveable estate in England or elsewhere, other than his specifically bequeathed estates; 13. An inquiry what is the nature and extent of the right, if any, of the testator's widow according to the law of Scotland in respect of her *jus relictæ*; 14. An inquiry whether the children of the testator are entitled according to the law of Scotland both to the benefits given them by the will and also to their legitim, and what is the nature and extent of the right to legitim of such children, and in case they are not so entitled, whether it will be for the benefit of such children as are infants to approbate or reprobate the provisions of the said will."—Direction for exors to transfer funds into Court.—Adjourn &c.—[*Add Lodgment Schedules, Nos. 1 and 2, Vol. I.*—*Douglas v. D.*, V.-C. W., 17 July, 1871, A. 2702; *S. C.*, 12 Eq. 617.

7. Inquiries as to Real Estates in Ceylon of a Testator domiciled in England—General Administration—Manager.

USUAL admon of personalty; 7. Inquiry as to getting in outstanding personal estate in Ceylon—"and whether the same ought to be sold, and whether in connection with the estates in Ceylon mentioned or referred to in the testator's will, or how otherwise;" 8, 9, and 10. Inquiries as to devised realty and incumbrances thereon, and heir-at-law; "And if it shall appear that such heir-at-law or other the person entitled to the real estate of the testator which did not pass by his will is a party to this action, Let the following &c.;" 11. Inquiry as to real estate other than any real estate devised by his will; 12. Inquiry as to incumbrances; 13. Account of rents and profits; "And Let the following &c.;" 14. An inquiry what was the testator's estate and interest at the time of his death in the said estates in Ceylon mentioned or referred to in his will, and whether such estates or any of them passed by his will; and if it shall appear that any of such estates did not pass by the testator's will, 15. An inquiry who, according to the law of the district in which such estates are situate, was the heir-at-law of the testator at the time of his death, and whether such heir be living or dead, and if dead who, by devise, descent, or otherwise, is entitled to such estates of the testator in Ceylon as descended to such heir-at-law; 16. And if it shall appear that the said estates in Ceylon passed by the said will, or that such heir-at-law or other the person entitled to the testator's said estates in Ceylon is a party to this action, an inquiry whether the said estates in Ceylon are subject to any and what charges or incumbrances, and what is due thereon respectively; 17. An inquiry whether the same estates ought to be sold, or how the same ought to be dealt with; 18. And Let a proper person be appointed to manage the testator's said estates in Ceylon, and to receive the rents, proceeds, and profits thereof, but no such manager is to be appointed of the said estates in Ceylon which did not pass by the testator's will, unless or until the heir-at-law of the testator, or other the person

entitled to such estate, is a party to this action."—Adjourn &c.—*Re Gordon, G. v. G.*, M. R., 2 June, 1877, A. 1805.

For decree in a creditor's suit dismissing the heir-at-law with costs, and directing usual accounts and inquiries as to personalty and the produce or proceeds of any real estate in India, see *Story v. Fry*, 1 Y. & C. C. 608, *et sup.* p. 1419.

8. *Accounts—Declarations as to Real Estates in Austria and Hungary—Liability for Deterioration in nature of Waste by Tenant for Life.*

UPON motion &c. by counsel for the Deft A. B., and upon hearing counsel for the Plt and the Deft C. D., Let the said judgment, dated &c., be varied, and as varied be as follows: Let the following accounts be taken &c. :—1. An account of all sums due from the estate of the testator to the Plt; 2. An account of all sums due from the Plt to the estate of the testator, and the balance of the two accounts is to be certified; And at the request of the Plt by his counsel, the Master is, at the expense of the Plt, to certify how much of the sums included in accounts 1 and 2 respectively are capital, and how much income; And for the purposes of taking the said accounts, Declare that the estate of the testator is liable for the amounts, if any, for which, by the laws of Austria and Hungary respectively, the said estate or the allodial heirs of the testator is or are liable in respect of deterioration of the estates comprised in the S. *fidei commis* and the H. *fidei commis* respectively; Let Plt be at liberty to take such proceedings in the Courts of Austria and Hungary respectively as he may be advised for the purpose of ascertaining the amounts of any such liabilities; And for the purpose of taking the said accounts, Declare that the Deft A. S., as the legal pers. respresve of the testator, is entitled, as against the Plt, to any sum which may be found due to the testator's estate or his allodial heirs according to the law of Austria for ameliorations in respect of lands and estates comprised in the S. *fidei commis* and the B. *fidei commis* respectively, not exceeding the amount which may be found due from his estate or his allodial heirs in respect of deterioration in respect of the same lands and estates respectively, and that the Deft A. S., as the legal pers. represve of the testator, is also entitled, as against the Plt, to any sum which may be found due to the testator's estate or his allodial heirs according to the laws of Hungary and Croatia for ameliorations in respect of lands and estates comprised in the H. *fidei commis*, not exceeding the sum which may be found due from his estate or his allodial heirs in respect of deteriorations in respect of the same lands and estates. Liberty to Deft A. S. to take proceedings in the Courts of Austria and Hungary respectively, to ascertain sums due for ameliorations; And for the purpose of taking the said account, by consent Declare that the income and outgoings of the estates in Austria, Hungary, and Croatia are apportionable between the Plt and the Deft

A. S. for the current half year, or other term, including the 25th April, 1883, and that such income includes produce, wine, tithe obligations, rent, and coupons, or other income of securities belonging to the entailed estates or *fidei commissa*, and of deposits in savings banks, and that such outgoings include allowances to officials, and servants' salaries, insurance, taxes, rates, and other public contributions, interest and instalments on mortgages and loans, and disbursements for sylvan economy. But the foregoing declarations are to be without prejudice to the right, if any, of the Deft A. S. to insist either in Austria or Hungary to claim for ameliorations in excess of deteriorations, and also to the right of either party to raise any question not inconsistent with the said declarations, and without prejudice to the power of the Judge to grant liberty to take any further or other proceedings in Austria or Hungary; And if the balance of the said accounts shall be certified to be due from the Plt to the Deft A. S., and the Plt by his counsel undertaking to pay the same, Let the Plt pay to the Deft A. S. what shall be certified to be the amount of such balance, but if the balance of the said accounts is certified to be due to the Plt from the estate of the testator, if the Deft A. S. shall admit assets of the testator, Let the Deft A. S. pay to the Plt what shall be certified to be the amount of such last-mentioned balance, but in default of such last-mentioned payment being made.—Usual admon judgment of real and personal estate at instance of a creditor.—Liberty to Defts to advertise for creditors, and to pay creditors other than the Plt and legatees.—Adjourn further consideration.—*Re Batthyany, Strattman v. B., Strattman v. Walford*, C. A., 13 June, 1887, A. 1015; S. C., 36 Ch. Div. 269; *sub nom. Batthyany v. Walford*.

NOTES.

Domicile and Nationality.—For a definition of the word “domicile,” and the rules for determining it, see *Lord v. Colvin*, 4 Drew. 366; *A. G. v. Fitzgerald*, 3 Drew. 610; Story, *Confl. §§ 41, 43*; Phill. *Internat. Law*, vol. iv. chap. iv. A. *et seq.*; Dicey, *Confl. of Laws*, 727; *Forbes v. F., Kay*, 64; *Hamilton v. Dallas*, 1 Ch. D. 257; *Re Craignish, C. v. Hewitt*, (1892) 3 Ch. 180, 192.

As to the different meanings of “residence” and “domicile,” see *Walcot v. Botfield*, Kay, 534; *Sharpe v. Crispin*, 1 P. & M. 611.

By the common law, a person born in a foreign country where his father is in the military service of the British Crown is not a British subject: *De Geer v. Stone*, 22 Ch. D. 243.

The status of a British subject is not extended by statute beyond the grandchildren of the last ancestor born in British territory: *De Geer v. Stone*, *sup.*

Acquisition, Change, and Abandonment of Domicile.—A domicile of origin cannot be destroyed by the will of the person, but only by act of law, and it is only in abeyance when a domicile of choice is acquired: *Udny v. U.*, L. R. 1 Sc. 441.

A man may change his domicile as often as he pleases, but not his allegiance: *Udny v. U.*, *Ib.* 452; *Haldane v. Eckford*, 8 Eq. 631.

The onus of proving a change of domicile of origin is on the party alleging it: *Bell v. Kennedy*, L. R. 1 Sc. 307; *Lord v. Colvin*, 4 Drew. 366; 5 Jur. N.S. 351; *Aikman v. A.*, 3 Macq. 854; *Lauderdale Peerage Case*, 10 App. Cas.

692; and every presumption is to be made in favour of such domicile: *S. C.*

To effect a change of domicile it is sufficient that there has been a change of residence of a permanent character voluntarily assumed, and even in the case of domicile of origin, the stricter view that there must have been intention *exuere patriam* (see *Moorhouse v. Lord*, 10 H. L. C. 272; *Re Capdevielle*, 2 H. & C. 272; *A. G. v. Wahlstatt*, 3 Ib. 374) in order to lose the domicile of origin, and acquire a domicile of choice, has not since been followed: *Udny v. U.*, *sup.*; *Haldane v. Eckford*, 8 Eq. 631; *King v. Foxwell*, 3 Ch. D. 518; but mere temporary residence will not suffice: *Lauderdale Peerage Case*, 10 App. Ca. 692, 758; and residence alone, however long continued, is insufficient without intention of choice: *Udny v. U.*, L. R. 1 H. L. Sc. 441, 456; *Re Patience, P. v. Main*, 29 Ch. D. 976; there must be an abandonment of the domicile of origin *et animo et facto*: *Lauderdale Peerage Case, sup.*; *Re Marrett, Chalmers v. Wingfield*, 36 Ch. D. 400, C. A.; and in determining whether there is the *animus manendi* it is always material to consider where a man's wife and children permanently reside and his establishment is kept up: *Platt v. A. G. of N. S. Wales*, 3 App. Ca. 336; and as to circumstances sufficient to show the *animus manendi*, see *Re Patience, P. v. Main*, 29 Ch. D. 976; *Re Craignish, C. v. Hewitt*, (1892) 3 Ch. 180, 193; and see as to domicile of origin and abandonment, *Aitchison v. Dixon*, 10 Eq. 589; *Douglas v. D.*, 12 Eq. 617; *Brunel v. B.*, Ib. 298; *Stevenson v. Masson*, 17 Eq. 78; *Doucet v. Geoghegan*, 9 Ch. D. 441; *Re Craignish*, (1892) 3 Ch. 180, 189.

As to an English peer acquiring French domicile, see *Hamilton v. Dallas*, 1 Ch. D. 257; *Platt v. A. G. for N. S. Wales*, 3 App. Ca. 336.

A British officer, by entering into the Queen's naval or military service, does not thereby lose his domicile of origin: *Exp. Cunningham, Re Mitchell*, 13 Q. B. D. 418; 53 L. J. Ch. 1067; *Re Macreight, Paxton v. M.*, 30 Ch. D. 165; *Yelverton v. Y.*, 1 Sw. & Tr. 574; *Brown v. Smith*, 15 Beav. 344.

As to Anglo-Indian domicile, see *Cockerell v. C.*, 2 Jur. N. S. 727; *Arnold v. A.*, 2 My. & C. 256; *Forbes v. Steven*, 10 Eq. 178; *Forbes v. F.*, Kay, 341; and as to the reason for the anomaly formerly introduced into the law of domicile by the earlier cases on the subject, see *Exp. Cunningham, Re Mitchell, sup.*; and see *Urquhart v. Butterfield*, 37 Ch. D. 357, 381, C. A.

A domicile cannot be acquired by society or connection with a locality, or residence in a country without subjection to its municipal laws and customs: *Abdul Messih v. Farra*, 13 App. Ca. 431; *Re Tootal's Trusts*, 23 Ch. D. 532.

Notwithstanding the constitution of the Supreme Court of China and Japan, and the jurisdiction conferred on that Court over British subjects having "a fixed place of residence" in China, a native of this country could not acquire by residence in China a new domicile, so as to exempt his personal estate on his death from the payment of legacy duty; and Englishmen residing in China could not acquire in China a domicile analogous to that existing in India, and known as Anglo-Indian domicile: *Re Tootal's Trusts*, 23 Ch. D. 532; and see Dicey, Appx. 723.

A domicile of choice may be abandoned without choosing a new one, in which case the domicile of origin reverts: *Udny v. U.*, L. R. 1 Sc. 441; *King v. Foxwell*, 3 Ch. D. 518; *Haldane v. Eckford*, 8 Eq. 631; and the abandonment is none the less operative because the motive was to avoid liability to divorce proceedings: *Firebrace v. F.*, 4 P. D. 63.

As to what is sufficient evidence of abandonment of domicile of choice, see *Bradford v. Young*, 29 Ch. D. 617, C. A.; and that the mere intention of leaving is not sufficient, *Re Marrett, Chalmers v. Wingfield*, 36 Ch. D. 400, C. A.; *A. G. v. Winans*, 83 L. T. 634.

As to facts sufficient to show revival of the domicile of origin in the case of a widow, see *Re Cooke's Trusts*, 56 L. J. Ch. 637; 56 L. T. 737; 35 W. R. 608; W. N. (87) 89; in the case of man and wife, *Re Marsland*, 55 L. J. Ch. 581; W. N. (86) 91; 54 L. T. 635; 34 W. R. 540.

For circumstances under which a Scotchman was held to have acquired an English domicile, see *Re Bullen-Smith, Berners v. B.*, W. N. (88) 61; 58 L. T. 578.

As to the intent to acquire a foreign domicile, and this being rebutted by facts, position, and duty, see *Hodgson v. Beauchesne*, 12 Moo. P. C. 285; *Aitchison v. Dixon*, 10 Eq. 589; Dicey, 133, 134; *Gillis v. G.*, I. R. 8 Eq. 597.

Succession to Property.—The law of the country of the domicile at the time of death regulates the succession to personal estate which is movable: *Dogliani v. Crispin*, L. R. 1 H. L. 301, *et sup.* p. 240; including government securities of a country other than that of the domicile: *Re Evrin*, 1 Cr. & J. 151; but not real estate or leaseholds: *Chatfield v. Berchtoldt*, 7 Ch. 192; *Freke v. Lord Carbery*, 16 Eq. 461; *Re Gentili*, Ir. Rep. 9 Eq. 541; 1 Jarm. W. 2, 4, n.; *Duncan v. Lawson*, 41 Ch. D. 394; *Re Anderson*, *Atkinson v. A.*, 21 Ch. D. 100; *Pepin v. Bruyere*, (1900) 2 Ch. 504.

Therefore a child born before wedlock of parents domiciled in Holland, being legitimated according to the law of Holland by the subsequent marriage of her parents, was held entitled to a share of the personal estate of an intestate domiciled in England, as one of her next of kin, under the Statute of Distribution: *Re Goodman's Trusts*, 17 Ch. D. 266, C. A.

And children born before wedlock, and, according to the law of Guernsey, legitimated by subsequent marriage of their parents, were held entitled equally with the children of the marriage: *Re Andros*, A. v. A., 24 Ch. D. 637.

By the Indian Succession Act, 1865, succession to immovable property in India is regulated by the law of India, whatever was the domicile of the deceased: see *Macdonald v. M.*, 14 Eq. 60.

The question of a person's legitimacy is one of status, to be determined by the law of the country where his parents are at his birth domiciled, and the English law, except as to succession to English real estate, recognizes the status as declared by the law of the domicile: *Re Goodman's Trusts*, 17 Ch. D. 266, C. A., where children legitimated by subsequent marriage according to the law of Holland were held entitled to share as next of kin; and on the death of a person domiciled in Portugal, legitimacy by the law there was sufficient title to personality here: *Dogliani v. Crispin*, L. R. 1 H. L. 301; *Goodman v. G.*, 8 Jur. N. S. 554; 3 Giff. 643; 6 L. T. 641; and see *Skottowe v. Young*, 11 Eq. 474; *Re Hallyburton*, 1 P. & M. 90; *Thurburn v. Steward*, L. R. 3 P. C. 478.

Will and Probate.—Probate shows the will to have been well executed according to the law of the domicile, but does not conclude the question of the testator's domicile: *Whicker v. Hume*, 7 H. L. C. 124; 4 Jur. N. S. 933; 1 D. M. & G. 506; 14 Beav. 509; *Bradford v. Young*, 26 Ch. D. 656; and a decree of the Probate Court is not conclusive *in rem* as to any question of domicile which it was necessary to decide for the purposes of the suit: *S. C.*; *Concha v. C.*, 11 App. Ca. 541; *De Mora v. Concha*, 29 Ch. D. 268, C. A.

In *Anstruther v. Chalmers*, 2 Sim. 1, a will of personalty executed by a Scotch lady, in Scotch form, in Scotland, was construed by the law of her domicile, which was English; and so a Spanish will in a Spanish colony by a domiciled Englishman: *Reynolds v. Kortright*, 18 Beav. 417; and the use of technical Scotch terms in a will of personal estate is not *per se* sufficient indication of an intention to induce the Court to construe it according to Scotch law: *Bradford v. Young*, 29 Ch. D. 617, C. A.; but where the will of an Englishman is expressed in the technical terms of the law of a foreign country, so as to show a clear intention that it should operate according to that law, the meaning of it must be ascertained by that law: *Bradford v. Young*, 26 Ch. D. 656; *S. C.*, 29 Ch. D. 617, 625, C. A.; and where by a contract entered into on a Scotch marriage between an Englishman and a Scotchwoman, the trusts of the real estate belonging to the husband were declared in English form, it was held that they must be construed according to English law: *Chamberlain v. Napier*, 15 Ch. D. 614; and see *Re Barnard*, B. v. White, 56 L. T. 9; W. N. (87) 8; *Re Megret*, (1901) 1 Ch. 547; *Re Muspratt-Williams*, W. N. (01) 14; and in general, in the construction of written instruments, the Court will look at all the circumstances to ascertain by the law of which country the parties desired to be bound: *Lloyd v. Guibert*, L. R. 1 Q. B. 122; *Re Missouri Steamship Co.*, 42 Ch. D. 321, C. A.; *Rousillon v. R.*, 14 Ch. D. 351, *sup.* Vol. I. p. 738. On the law of France, as to a will by a Frenchman in a foreign country, see *Crookenden v. Fuller*, 1 Sw. & Tr. 441; 5 Jur. N. S. 1222; *Laneville v. Anderson*, 6 Jur. N. S. 1260; 3 Sw. & Tr. 304; 30 L. J. P. 25.

Where the will of a domiciled Scotchman has been proved in Scotland, and

there are English assets, a legatee is not entitled to insist upon probate in England, but the Court has a discretion, and refused to grant it when it was not shown that the exors were not doing their duty, or that the grant was necessary to substantiate proceedings in Chancery: *In the goods of Ewing*, 6 P. D. 19.

Where the will of a Scotchman has been proved here in general form, the Chancery Division will make the ordinary judgment for admon of the personal estate of the testator, without limiting it to the English assets, and notwithstanding the opposition of the exors: *Stirling-Maxwell v. Cartwright*, 11 Ch. D. 522, C. A.

The will being in French, containing technical terms, the Court declined to construe it without the assistance of French lawyers, or until the testator's domicile had been ascertained: *Re Cliff*, (1892) 2 Ch. 229.

The beneficial interest in leaseholds will not pass under the will of a domiciled foreigner which is not attested as required by the Wills Act, although letters of admon with the will annexed have been granted: *Pepin v. Bruyere*, (1900) 2 Ch. 504. A will of a testatrix, domiciled in France, made in English form in pursuance of a power, but invalid according to French law, may be admitted to probate: *Re Huber*, (1896) P. 209; *Re Hallyburton*, L. R. 1 P. & D. 90 (following *Re Alexander*, 29 L. J. P. & M. 93, as binding though erroneous).

Where the donee of a power died in New Zealand, leaving a will exercising that power over property in England, and the will was duly proved in New Zealand, it was necessary, in order to prove the title to the fund in Court, to prove the will in England: *Exp. Limehouse Board of Works, Re Vallance*, 24 Ch. D. 177. As to the effect of a foreign will in execution of a power of appointment, *v. inf.* p. 1746.

A devise by an Englishman of land in Italy, upon trust for sale and conversion took effect as to the proceeds of sale, which became distributable according to English law, although *quod* the land the trusts partially failed of effect under the Italian law: *Re Percy, Whittham v. P.*, (1895) 1 Ch. 83.

Personalty adjudged abroad to children domiciled here is dealt with by our laws: *Gambier v. G.*, 7 Sim. 263. A child legitimate in France, but not here, of an Englishman domiciled in France could not take a bequest in an English will: *Re Wright*, 2 K. & J. 595.

As to illegitimate children taking as "children" under the will of an Englishman domiciled in India, see *Barlow v. Orde*, L. R. 3 P. C. 164.

Assignment.—An assignment of an English chose in action, invalid according to the law of the foreign country where it was made, and where both assignor and assignee were domiciled, will be treated as invalid here: *Lee v. Abdy*, 17 Q. B. D. 309; *Lebel v. Tucker*, L. R. 3 Q. B. 77; *Bradlaugh v. De Rin*, L. R. 3 C. P. 538; and see *Alcock v. Smith*, (1892) 1 Ch. 238, C. A.

Husband and Wife.—A wife, on marriage, acquires the domicile of her husband: *Harvey v. Farnie*, 8 App. Ca. 43.

Where a husband is domiciled in a foreign country at the time of the marriage, and so continues, a dissolution by the foreign Court for a matrimonial offence, though not such as would warrant a divorce in this country (e.g., in Scotland, a husband's adultery only), will be recognized by our Courts; but *quære*, whether so if the domicile were changed after marriage: *Harvey v. Farnie, sup.*, questioning *Niboyet v. N.*, 4 P. D. 1, C. A.

As to moveable goods, the rights of the wife of a Frenchman under the French marriage law as to community of goods are not affected by change of domicile, and accordingly on her husband's death, after acquiring an English domicile, she takes the same share of his personality as she would have taken if they had remained domiciled in France: *De Nicols v. Curlier*, (1900) A. C. 21, H. L. (reversing C. A., (1898) 2 Ch. 60; restoring (1898) 1 Ch. 403; and distinguishing *Lashley v. Hogg*, 4 Paton, 581); and the law is the same in respect to real and leasehold property, as the Statute of Frauds does not apply to the contract between the spouses which is in substance one of partnership: *S. C.* (No. 2); (1900) 2 Ch. 410.

A marriage in England between persons both of whom have a foreign domicile is invalid if it would be so according to the law of their domicile: *Sottomayor v. De Barros*, 3 P. D. 1, C. A.; but if only one of the parties has a foreign domicile, the validity must be determined by English law: *Sotto-*

mayor v. De Barros, 5 P. D. 94, per Hannen, J.; and a marriage between a Frenchman and an Englishwoman, duly solemnized in France under the Consular Marriage Act, 1849 (12 & 13 V. c. 68), now replaced by the Foreign Marriage Act, 1892 (55 & 56 V. c. 23), though declared invalid by a French Court, may be valid in this country: *Hay v. Northcote*, (1900) 2 Ch. 262; *Simonin v. Mallac*, 2 Sw. & T. 67.

Marriage between persons professing the Jewish religion, who are British subjects domiciled in England, is regulated by the law of England, and the exceptions as to formalities contained in the Marriage Acts, 1835, 1836 and 1840 (5 & 6 W. 4, c. 54, s. 2; 6 & 7 W. 4, c. 85, s. 2, and 3 & 4 V. c. 72, s. 5), will not give validity to a marriage between a Jew and his niece: *Re De Wilton*, (1900) 2 Ch. 481.

A marriage with the native of a polygamous tribe is not recognized as valid by English law: *Re Bethell, B. v. Hildyard*, 38 Ch. D. 220; *secus*, a marriage in a monogamous country as Japan: *Brinkley v. A. G.*, 15 P. D. 78.

A wife cannot acquire a domicile distinct from her husband's: *Dolphin v. Robins*, 7 H. L. C. 390; 5 Jur. N. S. 1271; though living apart: *Re Daly*, 25 Beav. 456; *Le Sueur v. Le S.*, 1 P. D. 139; and see *Ylvertton v. Y.*, 1 Sw. & T. 574; 6 Jur. N. S. 24; *Re Alexander*, 8 W. R. 451; if an alien, she is naturalized by marrying a subject: 7 & 8 V. c. 66, s. 16; and as to aliens, see 33 & 34 V. c. 14 (amended by 58 & 59 V. c. 43, as to residence of children of naturalized British subject in service of Crown), and 35 & 36 V. c. 39.

Infant.—An infant cannot change his domicile by his own act: *Forbes v. F.*, Kay, 341; but his domicile in general follows his father's, and if he is from infancy of unsound mind, it continues to do so after he is of full age: *Sharpe v. Crispin*, 1 P. & M. 611.

The domicile of a fatherless infant does not follow that of the mother, if the mother, in the interest of her child, abstains from exercising her power of changing the child's domicile when she changes her own: *Re Beaumont*, (1893) 3 Ch. 490.

As to the law of Scotland whereby an infant can choose his own domicile at the age of fourteen, see *Urquhart v. Butterfield*, 37 Ch. D. 357, C. A.

A notarial ante-nuptial contract entered into in France by an Englishwoman who was an infant was invalid on the ground of her infancy, according to the law of her domicile of origin: *Re Cooke's Trusts*, 56 L. J. Ch. 637; 56 L. T. 737; 35 W. R. 608; W. N. (87) 89.

Jurisdiction and Procedure.—Though the parties interested in the estate of a deceased foreigner may not be bound to resort to the Court of his domicile, and the English Court, if called upon to administer, may have to ascertain who are entitled according to the law of the domicile, yet an actual adjudication of the title by the Court of the domicile will be followed here: *Enohin v. Wylic*, 10 H. L. C. 1; *Ewing v. Orr-Ewing*, 10 App. Ca. 453; *Doglioni v. Crispin*, L. R. 1 H. L. 301; even if the judgment of the foreign Court has, by default of the party obtaining the judgment, proceeded on a mistake as to English law: *Castrique v. Imrie*, L. R. 4 H. L. 414; *Godard v. Gray*, L. R. 6 Q. B. 139; and see *Minna Craig Steamship Co. v. Chartered Mercantile Bank of India, &c.*, (1897) 1 Q. B. 55; (1897) 1 Q. B. 460, C. A.; or the whole of the facts were not before the foreign tribunal: *De Cosse Brissac v. Rathbone*, 6 H. & N. 301; for the Courts of this country are not Courts of Appeal from foreign tribunals, the decisions of which, if erroneous, must be reviewed by the mode of appeal provided in the foreign country: *Bank of Australasia v. Nias*, 16 Q. B. 717; *Re Trufort, Trafford v. Blanc*, 36 Ch. D. 600; and a foreign judgment, if not offending against English views of substantial justice, must be treated here as final, although it was irregularly obtained: *Pemberton v. Hughes*, (1899) 1 Ch. 781, C. A.

And, acting *in personam*, the Court of the locality in which the assets are situate has jurisdiction to make an admon judgment, though the law of the domicile may govern the mode of distribution: *Re Artola Hermanos, Exp. Chale*, 24 Q. B. D. 640, C. A.; *Ewing v. Orr-Ewing*, 9 App. Ca. 34, where, although the domicile of the testator and the bulk of the assets were Scotch, and the exors had removed all the English assets to Scotland before an action by an infant legatee for admon came on for hearing, the jurisdiction

of the English Court to make an admon judgment as to the whole estate was upheld.

But in such a case the Scotch Court is not bound to abstain from the exercise of its undoubted jurisdiction on the mere ground that there has been a previous admon judgment in England; and if a judgment is made in Scotland the question whether the proceedings should continue will be settled by the rule of *forum conveniens*; and the Scotch Court having sequestrated the estate, and appointed a judicial factor, their judgment to that effect was upheld, but so much of it as affirmed the exclusive competency of the Scotch Court, and interdicted the trustees of the will from accounting to any one otherwise than the judicial factor, was reversed: *Ewing v. Orr-Ewing*, 10 App. Ca. 453.

Although the law of a testator's domicile governs the foreign personal assets for the purpose of succession and enjoyment, yet for the purpose of legal representation of collection and admon, as distinguished from distribution among the successors, they are governed by the law of their own locality: *Blackwood v. The Queen*, 8 App. Ca. 82.

The fact that a prior bankruptcy had been commenced in a foreign country, not shown to be the country of domicile of the debtors, was no ground for staying bankruptcy proceedings in this country: *Re Artola Hermanos, Exp. Chale*, 24 Q. B. D. 640, C. A.

The priority of creditors is decided by the domicile of deceased, and not by the situation of the assets: *Wilson v. Ly. Dunsany*, 18 Beav. 293; and so in a creditor's action for admon, a defence that by the law of the country where the business of the testator was carried on, the firm's creditors could not proceed against the separate estate until they had exhausted the property of the firm, was held to involve procedure only and therefore to be bad: *Re Doetsch, Matheson v. Ludwig*, (1896) 2 Ch. 836; and the law of the domicile at the time of the death is to be applied without regard to subsequent changes though retrospective: *Re Aganoor*, 64 L. J. Ch. 521.

There is no jurisdiction to entertain an action involving a dispute as to title of foreign land, although all the parties are resident here: *Re Hawthorne, Graham v. Massey*, 23 Ch. D. 743; *British S. Africa Co. v. Companhia de Mocambique*, (1893) A. C. 602, H. L.; *S. C.*, (1892) 2 Q. B. 358, 365, 366, C. A.

The Court has no jurisdiction to entertain an action for damages for trespass to foreign land: *British S. Africa Co. v. Companhia de Mocambique*, (1893) A. C. 602, H. L., reversing C. A. (1892) 2 Q. B. 358, and showing that the refusal of the Courts to assume jurisdiction is not based on any technical ground capable of being displaced by the abolition of local venue by Rules of Court, O. xxxvi, 1.

A debt possesses an attribute of a locality, a simple contract debt being located where the debtor for the time being resides; a specialty where it is found at the creditor's death: *Commr. of Stamps v. Hope*, (1891) A. C. 476; *Re Maudslay, Sons, and Field*, (1900) 1 Ch. 602.

In the admon in this country of property bequeathed by a testator domiciled abroad, the *lex fori* prevails, and interest is payable according to English law: *Hamilton v. Dallas*, 38 L. T. 213.

Where a domiciled Scotchman by his will gave annuities which, by Scotch law, are charged on real estate, it was held that the English real estate must contribute to payment of such annuities, though the will contained no direction to that effect: *Re Hewit, Lawson v. Duncan*, (1891) 3 Ch. 568.

Australian assignees in insolvency were held entitled to the payment out of Court of a fund devolving, in default of appointment, on an intestate domiciled in England: *Re Davidson*, 15 Eq. 383; and so the official assignee of the Court for Relief of Insolvent Debtors at Bombay without taking out admon: *Re Lawson's Trusts*, (1896) 1 Ch. 175; but see *Re Hayward*, (1897) 1 Ch. 905, following *Re Blithman*, 2 Eq. 23, and holding that the life interest of a domiciled Englishman under a trust by will determinable on bankruptcy or alienation was not forfeited by an adjudication in bankruptcy in New Zealand which was subsequently annulled. In *Re Blithman, sup.*, an inquiry as to domicile was directed.

The legacy of an infant domiciled abroad may be paid to him on his attaining full age by the *lex loci*, though not of age by English law: *Re Hellmann*, 2 Eq. 363; not to the foreign guardian during minority: *S. C.*;

but see *Mackie v. Darling*, 12 Eq. 319, *et sup.* p. 1508; and the Court will not pay to the father as of right and without evidence as to the application for the benefit of the infant, although by the law of the domicile the father is entitled to receive the money as legal guardian: *Re Chatard's Settlement*, (1899) 1 Ch. 712.

The Court would not, in the case of a married woman's legacy, disregard a restraint on anticipation, though invalid in the country of her domicile: *Peillon v. Brooking*, 25 Beav. 218; nor would it treat a Scotch divorce after an English marriage as making valid a subsequent marriage: *Shaw v. Gould*, L. R. 3 H. L. 55; *Re Wilson*, 1 Eq. 247; nor would it follow the foreign law, so as to give priority against equitable assets to a debt contracted there: *Pardo v. Bingham*, 6 Eq. 485.

A Scotch advocate's testimony was required to show that the fund was unaffected by a Scotch settlement: *Re Todd*, 19 Beav. 582. Where foreign advocates refer in evidence to passages in the code of their country, the Court is at liberty to consider such passages, not as evidence *per se*, but as part of the testimony of the witnesses: *Concha v. Murrietta*, *De Mora v. Concha*, 40 Ch. D. 543, C. A.

On a dispute as to foreign law, the Court sends a case for the opinion of a Court of the country, under the British Law Ascertainment Act (22 & 23 V. c. 63), *sup.* Vol. I. p. 846.

Where a Plt in a creditor's action sued in respect of a claim, the amount and validity of which could only be ascertained by proceedings in a foreign Court, accounts were not to be directed until it was ascertained that a sum was due: *Batthyany v. Walford*, 36 Ch. D. 269, C. A., *sup.* Form 8, p. 1581.

As to the circumstances under which the Courts of this country will consider a Debt bound by a foreign judgment, see *Rousillon v. R.*, 14 Ch. D. 351, and *sup.* Vol. I. p. 738.

By the constitution of a French co., a Debt was held bound by service there (as his domicile *pro hac vice*) of proceedings relating to the co.: *Copin v. Adamson*, L. R. 9 Ex. 345; 1 Ex. D. 17, C. A.; but see *The Delta*, 1 Prob. D. 393.

Scotch creditors of a legatee under an Englishman's will were restrained from proceeding against the exors, on their undertaking forthwith to obtain an admon decree in England: *Baillie v. B.*, 5 Eq. 175.

And as to probate, and as to legacy duty, *v. sup.* Vol. I. pp. 238 *et seq.*; and on the question of admission of wills to probate as affected by domicile, p. 1400.

SECTION XX.—ELECTION TO TAKE UNDER OR AGAINST THE WILL.

1. Parties declared bound to elect between Settlement and Will.

DECLARE that the Defts C. and A. his wife are respectively bound to elect between the benefits of the covenant of the testator to pay the sum of £— per ann., contained in the settlement made on the marriage of the said Defts, and the benefits given to them respectively by the testator's will.—*Hart v. Tulk*, V.-C. P., 12 March, 1852, A. 681.

2. Election by Infants as to taking under Settlement—Inquiry.

DECLARE that the children of &c. ought to elect whether they will take according to the provisions of the indenture of settlement dated

&c., or against the same ; And the said &c. being infants, Let an inquiry be made whether it will be for their benefit to take under the provisions of the said settlement, or against the same.—*Seton v. Smith*, V.-C., 19 June, 1840, B. 1246 ; 11 Sim. 59.

For inquiry (added in Dom. Proc.) whether it would be for the benefit of a married woman and her children (infants) to take under the provisions of the said will and codicils, or against the same, see *Cooper v. C.*, L. R. 7 H. L. 79.

3. *Election by Court for four Infant Defendants (one being a Person of unsound Mind not so found) and their possible Issue—for Will and against Settlement.*

It appearing by the evidence that it is for the benefit of the Deft S. B. and of the issue or possible issue of the Defts J., S., M., and S. that the said Defts should elect for themselves and their issue to take under the provisions of the above-mentioned will and not under the provisions of the above-mentioned settlement, This Court doth Declare that they ought so to elect, and that each of the said Defts J., S., M., and S. and his or her issue respectively take under the provisions of the above-mentioned will and not under the provisions of the above-mentioned settlement.—*Re Barnett, Baker v. Barnett*, Kekewich, J., 29 March, 1900, A. 1187 ; W. N. (1900) p. 81.

4. *Infant Heir and Widow to elect—Election by the Court for the Infant—by Counsel for the Widow.*

TRUSTS of the will to be performed—“ And this Court (declining to express any opinion upon the question, whether the moneys remaining due under the obligation contained in the marriage contract, dated &c., and secured by the bond and disposition in security, dated &c., were effectually disposed of by the will and codicils of the testator) Declare, that the Deft A., the heir-at-law, and the Deft C., the widow, of the testator, are not entitled to claim both the devises and bequests in the said will contained for their benefit respectively, and the money remaining due under the obligation contained in the marriage contract, as heritable property by the law of Scotland not passing by the will and codicils, but that they are bound respectively to make their election whether they will respectively claim the devises and bequests in the said will contained for their benefit respectively, or the moneys remaining due under such obligation ; And Declare, that it is for the benefit of the infant Deft A. to take the benefit of the devises and bequests in the will contained for his use ; and the Deft C., by her counsel at the bar, electing in like manner to take under the will, Declare, that the moneys remaining due under the obligation contained in the marriage contract, and secured as aforesaid, constitute part of the personal estate of the testator ; And Let the Defts W. &c. (exors), be at liberty

to take such proceedings as by the law of Scotland are required for vesting in them the bond and disposition in security in the pleadings mentioned, and the right to recover the moneys remaining due thereon." Accounts of personal and real estates.—*Lamb v. L.*, V.-C. K., 4 July, 1857, B. 1417; *S. C.*, 5 W. R. 772; and see *Douglas v. D.*, Form 6, *sup.* p. 1579.

5. Devise of Wife's Property—Inquiry if she elected to take under the Will.

AN inquiry to whom the premises in &c., in the testator's will mentioned, belonged at the testator's death; and if the same belonged to his widow M., whether she elected in her lifetime to take under the testator's will.—*Peck v. P.*, M. R., 19 Feb. 1859, B. 879.

6. Further Order, Widow having elected, Declaration that her Property passed.

AND it appearing by the Master's certificate, dated &c., that the testator's widow M., deceased, elected in her lifetime to take under the testator's will, Declare that the premises which belonged to her, situate &c., in the testator's will mentioned, passed in Equity under the devise thereof to the Plt, made by such will, and that the Deft, as the heir-at-law of the said M., is a trustee of such premises for the Plt.—*Peck v. P.*, M. R., 7 July, 1860, B. 1713.

7. Election against Will—Compensation.

"DECLARE that the Deft W., being entitled in his own right to one-fourth part of the property described in the will of the testator as his farm P., and being also entitled in his own right to one-fourth part of the property described in the said will as the farm called T., and the said will purporting to devise to him one-half of the said farm, and the said Deft being also entitled under the said will to one moiety of the sum of £200 thereby bequeathed unto him and the Deft E. towards rebuilding the house &c. on the said farm, is bound to elect, as between himself and the Plts and the Deft E., whether he will give up to the Plts his said one-fourth part of the farm P., and give up to the Deft E. one moiety of his one-fourth part of the said farm called T., or whether he will renounce all benefits given or devised to him by the said will; And adjudge the same accordingly; And the Deft W., by his counsel (at bar) electing to renounce all benefits given or devised to him by the said will, Declare that three-fourths parts of the farm called P. belong to the Plts, and the remaining one-fourth part thereof belongs to the Deft W.; And that one-fourth part of the farm called T. belongs to the Plt, and one other fourth part thereof to the Deft W.;

and that one other fourth part thereof belongs to the Deft E., subject to the limitations &c.”—Deft W. to deliver possession.—Account of rents against him; 2. Inquiry as to receipt and application of the £200; “3. And Let the following &c., An inquiry what are the respective values of the one-fourth part of the farm P. of which the Plts have been deprived by the election of the Deft W., and of the vested interest of the Deft E. in (one-fourth) of the same farm of which she has been deprived by the same election; And Let all the estate and interest to which the Deft would have been entitled in the farm called T. under the said will, and which has been renounced by him, be apportioned between the Plts and the Deft E. in proportion to the values to be ascertained by the said inquiry.”—Adjourn &c.—*Howells v. Jenkins*, L. JJ., 25 July, 1863, A. 2020; 1 D. J. & S. 617.

For order as to a divorced wife making compensation out of the income under her marriage settlement to persons disappointed by her election to take against it, see *Codrington v. C.*, L. R. 7 H. L. 868.

8. *Proof against Estate of deceased Person for Loss occasioned by her Election to take against Testator's Will.*

“DECLARE that the Plt (*assignee of an interest in property belonging to W., purported to be given by testator's will to the Plt's assignor*) is entitled to prove against the estate of W. in the statement of claim named for the amount of the loss sustained by him at the death of the said W., by reason of her having sold the six cottages in the statement of claim mentioned, and for the amount of his costs of this action; And Let &c.; 1. An inquiry what was the value of the said six cottages at the death of the said W.; 2. An inquiry what was the amount of benefit received by the said W. under the will of the testator.”—Adjourn &c.—Liberty to apply.—*Rogers v. Jones*, M. R., 3 August, 1876, B. 1761; S. C., 3 Ch. D. 688, *et inf.*

9. *Election to take under Will—Release to be executed.*

“AND Declare that the Deft, electing to take the estates appointed by the will of the testator, is bound to relinquish his share of the £10,118 : 18s. 6d. settlement fund for the benefit of the other younger children of the testator, according to the directions of the will; And Let the Deft execute a proper release of his share and interest under the said settlement to the trustees thereof, such release to be settled by the Judge.”—*Fleming v. Buchanan*, L. JJ., 7 May, 1853, A. 1206, on Further Consideration.

NOTES.

If a testator attempts by his will to give property which does not belong to him to A., and also gives benefits to B., the owner of that property, B. is put to his election, whether, on the one hand, to take the benefits given to

him by the will, and allow A. to take his (B.'s) property as if it had been the testator's, or, on the other hand, he may, of course, refuse to allow his own property to pass by the will as if it had been the testator's; but then he must relinquish the benefits given him by the will, or (if they exceed in value the property of his which the testator purported to deal with) so much of them as shall be equal to that property: *Streatfield v. S.*, Cas. t. Talb. 176; 1 L. Cas. Eq. 397; 7th ed. 416; 1 Jarm. W. 415 *et seq.*; Wms. Exors. 1304 *et seq.*

The doctrine is founded on the presumption of a general intention that every part of an instrument shall take effect, which may be rebutted by an inconsistent particular intention apparent in the instrument: *Re Vardon's Trusts*, 31 Ch. D. 275; *Re Wells*, *Hardisty v. W.*, 42 Ch. D. 646; and therefore a married woman who is, by the will, restrained from anticipation cannot be put to election under it: *Re Vardon's Trusts*, *sup.*; *secus*, where no intention is shown that the payment shall always continue, *e.g.*, where a life interest is given to a man until he shall assign or charge, or some event shall happen whereby the income, if belonging absolutely to him, would become vested in another: *Carter v. Silber*, (1891) 3 Ch. 553, *per* Romer, J.; *S. C.*, (1892) 2 Ch. 278, C. A.; (1893) A. C. 360, H. L., *nom.* *Edwards v. Carter*.

The presumption is that the testator did not intend to deal with any property except his own: *Synge v. S.*, 9 Ch. 128; 22 W. R. 227; *Re Booker*, W. N. (86) 18; *Pickersgill v. Rodger*, 5 Ch. D. 170, 171; but this may be rebutted by evidence, even parol, outside the will: *S. C.*

Mortgagees of undivided shares of property in possession of testator as owner of other shares were put to their election: *Wilkinson v. Dent*, 6 Ch. 339.

By electing to take against the will the legatee does not forfeit all interest under it, but has to make compensation to those who are disappointed by his election, see *Streatfield v. S.*, *sup.*; *Pickersgill v. Rodger*, 5 Ch. D. 163; *Howells v. Jenkins*, 1 D. J. & S. 617, *et sup.*, Form 7; *Gretton v. Haward*, 1 Sw. 409; and cases cited 433, n.; and after his death, his estate is liable to make compensation: *Rogers v. Jones*, 3 Ch. D. 688, *et sup.*, Form 8; but the "engrafted" doctrine of compensation has no application to any case in which the legatee elects to take under the will: *Re Lord Chesham, Cavendish v. Dacre*, 31 Ch. D. 466.

A person who is put to election may in general maintain a suit to have the respective values of the properties ascertained: *Douglas v. D.*, 12 Eq. 617.

The rules as to election apply to any kind of property, real or personal, immediate, contingent, or remote: *Wilson v. Townshend*, 2 Ves. jun. 697; *Webb v. E. Shaftesbury*, 7 Ves. 480; and to the share of a next of kin or residuary legatee: *Cooper v. C.*, L. R. 7 H. L. 53; but not to property which the legatee cannot relinquish, *e.g.*, heirlooms annexed to a mansion-house of which he is tenant for life: *Re Lord Chesham, Cavendish v. Dacre*, 31 Ch. D. 466; or property of a married woman subject to a restraint on anticipation: *Re Vardon's Trusts*, 31 Ch. D. 275, C. A.; *Re Wheatley, Smith v. Spence*, 27 Ch. D. 606.

But only between the will and something *dehors* the will; so that there is no election between two clauses in the same will: *Wollaston v. King*, 8 Eq. 165.

And a provision in a will which is *ex facie* void, as on the ground of remoteness, does not raise a case of election; *Re Warren's Trusts*, 26 Ch. D. 208; *Re Handcock's Trusts*, 23 L. R. Ir. 34; but see *Re Brooksbank, Beauclerk v. James*, 34 Ch. D. 160, 165.

And where the will is absolutely invalid, *e.g.*, that of a married woman entitled under the old law in fee simple, but not for her separate use, the heir-at-law is not put to any election: *De Burgh Lawson v. De B. L.*, 55 L. J. Ch. 46; *Hearle v. Greenbank*, 1 Vez. 507; *Rich v. Cockell*, 9 Ves. 369.

But a case of election arises where a testator affects to deal with property belonging to a legatee in exercise of a supposed power of appointment which does not in fact exist: *Re Brooksbank, Beauclerk v. James*, 34 Ch. D. 165.

A married woman joining in a settlement by which funds of hers were purported to be settled by her, and other funds were brought in by her

husband and parents, was bound to elect to take under or against the settlement: *Codrington v. C.*, L. R. 7 H. L. 854.

Before the Wills Act the heir was put to his election if a testator purported to devise after-acquired lands by such words as "all the real estate I shall die possessed of," and gave other benefits to the heir: *Churchman v. Ireland*, 1 Russ. & My. 250; *Hance v. Truwhitt*, 2 J. & H. 216; but not by a devise invalid as to realty but valid as to personalty: *Sheddon v. Goodrich*, 8 Ves. 481; unless the testator annexed an express condition not to dispute the devise: *S. C.*; *Boughton v. B.*, 2 Vez. 12; 1 Jarm. W. 419; nor in cases of revocation of estate: *Ib.* 420, 421.

If before the 55 G. III. c. 192, the testator had devised copyholds, but omitted to surrender them to the use of his will, the heir had to elect: *Unett v. Wilkes*, Amb. 430.

But a mere general devise of realty did not show a sufficient intention to pass copyholds: *Judd v. Pratt*, 13 Ves. 168; 15 Ves. 390.

A Scotch heir (*Orrell v. O.*, 6 Ch. 302), or the widow of a domiciled Englishman with Scotch property (*Douglas v. D.*, 12 Eq. 617, Form 6, *sup.* p. 1579), or a colonial heir (*Dewar v. Mailland*, 2 Eq. 384), must elect between land in Scotland or in the colony which the testator has invalidly devised, and other benefits given by the will; but a general devise of real estate "whosoever," was held not to have been intended to pass Scotch estates: *Maxwell v. M.*, 2 D. M. & G. 705.

Infants, and married women under the old law, cannot declare an election. The course, therefore, is to direct an inquiry whether it will be for the benefit of the infant (see Forms, *sup.* p. 1589; *Brown v. B.*, 2 Eq. 481), or of the married woman and her children (see *Cooper v. C.*, L. R. 7 H. L. 53, 79 *et sup.* p. 1589), to take under or against the will. But the Court may, if it has the materials before it, elect on behalf of the infants without a reference: *Blunt v. Lack*, 26 L. J. Ch. 148; *Lamb v. L.*, 5 W. R. 772, Form 4, *sup.* p. 1589; and see *Re Barnett*, *Baker v. Barnett*, W. N. (1900) 81, Form 3, *sup.* p. 1589, where the Court made a declaration that it would be for the benefit of the issue or possible issue of the Defts that the Defts should elect for themselves and their issue to take under the provisions of a will and not of a settlement.

As to the acceptance by a lunatic of a beneficial devise subject to an onerous condition, and the jurisdiction of the Court in Lunacy notwithstanding the statute *De Prerogativa Regis* (17 Edw. II. c. 10) to give up, on behalf of a lunatic, an interest in his real estate in order thereby to comply with a condition and preserve or acquire for him an enhanced benefit, see *Re Earl of Sefton*, (1898) 2 Ch. 378, C. A.

Where the donee of a special power of appointment appoints to an object of the power, upon a trust or condition for persons who are not objects, and gives to the object of the power benefits out of the testator's own property, no case of election arises, as the trust or condition is rejected: *Woolridge v. W.*, Johns. 63; *Carver v. Bowles*, 2 Russ. & M. 304 (as explained in *Re White*, W. v. W., 22 Ch. D. 555); and see *Churchill v. C.*, 5 Eq. 44; *Roach v. Trood*, 3 Ch. D. 427; but it is otherwise if the testator has merely attempted to impose upon the property, subject to the power, an obligation to produce an equality between the objects of the power and other members of his family, e.g., children by a subsequent marriage: *Re White*, W. v. W., *sup.*

When once made, and communicated to the other parties affected, the election is final, and cannot be altered: *Scarf v. Jardine*, 7 App. Ca. 345.

The objects of special powers of appointment are not put to their election by the testator bequeathing other property to them and purporting to exercise the power so as to give an interest to non-objects: *Woodridge v. W.*, Johns. 63; *Churchill v. C.*, 5 Eq. 44; and see *Roach v. Trood*, 3 Ch. D. 429.

A widow may, by the terms of her husband's will, be put to election between the gifts in the will and her dower: *sup.* p. 960; 1 L. C. Eq. 357; 6th ed. 420; 1 Jarm. W. 429 *et seq.*; or freebench: *Thompson v. Burra*, 16 Eq. 592; but there must be strong grounds for holding that she was not intended by the testator to take both: *S. C.*

Election may be implied from conduct: see *Streatfield v. S.*, 1 L. C. Eq. 430; 7th ed. 416; but it "must be by a person who has positive information

as to his right to the property, and with that knowledge really means to give that property up": *per* James, L. J., in *Wilson v. Thornbury*, 10 Ch. 248; *Wintour v. Clifton*, 21 Beav. 447; 8 D. M. & G. 641; *Re Davidson, Martin v. Trimmer*, 11 Ch. D. 341.

SECTION XXI.—DECLARATIONS RELATING TO GENERAL BEQUESTS AND DEVISES.

1. Declaration of Person meant—Class.

DECLARE, that the Plt is the person meant and intended by the testator under the description in his will of his first cousin V., son of his late uncle P., and is entitled under the said will to one equal moiety of the testator's residuary estate.—*Bernasconi v. Atkinson*, V.-C. W., 13 Jan. 1853, A. 276; 10 Ha. 345.

For declaration as to children taking *per capita*, subject to survivorship in case of decease before twenty-one or marriage, see *Berkley v. Swinburne*, 16 Sim. 289; and as to devolutions of shares, *Goodman v. G.*, 1 D. & S. 699.

For declarations that descendants took *per stirpes*, and not *per capita*, and that the principle was to be applied to every subdivision, see *Gibson v. Fisher*, 5 Eq. 51; but see *Re Wilson, Parker v. Winder*, 24 Ch. D. 664.

For an inquiry who is the person meant and intended by the testator under the description in his will of, &c., see *Whitbread v. Kingham*, V.-C. H., 14 Dec. 1876, B. 1893.

2. Legacy declared waived.

AN account of the legacies &c., except the legacy of £— given to the Deft B. for his trouble in acting under the testator's will, he declining to act in the trusts thereof, and waiving the said legacy.

As to accepting one gift in a will and refusing another, *v. inf.* p. 1619.

3. Legacy declared lapsed.

DECLARE that the bequest of &c. is, by &c., become lapsed, and is divisible among the persons entitled by virtue of or according to the Statute of Distribution to the estate of the testator A. living at the time of his death.—Inquiry for statutory next of kin.—See Form 1, p. 1465.

4. Legacy to dissolved Charity declared lapsed.

"DECLARE, that in consequence of the dissolution in the lifetime of the testatrix of the B. Society mentioned in her will, the gift of £— bequeathed to the treasurer of the said society, lapsed and fell into the

residue of the testatrix's estate."—*Fisk v. A. G.*, V.-C. W., 12 July, 1867, A. 1759; 4 Eq. 521; *Re Rymer, R. v. Stanfield*, (1895) 1 Ch. 19, C. A.; *et v. sup.* pp. 1293, 1343.

5. *Legacy declared valid, free from Illegal Obligation.*

DECLARE that the gift of £1,000 New Consols, bequeathed by the will of the testatrix to the incumbent &c. of L., is a good and valid bequest, and that they take the same free from the obligation of keeping in repair the testatrix's family grave, &c.—*Fisk v. A. G.*, *supra*.

6. *Residue declared distributable under the Statute of Distribution.*

"DECLARE, that the other moiety of such last-mentioned moiety is divisible between the Plt and the other persons entitled &c."—See Form 3.—Inquiry for statutory next of kin [Form 1, p. 1465].—*Dent v. West*, L. C., 1 March, 1773, A. 366.

7. *Next of Kin declared entitled to Legacy.*

DECLARE that the persons entitled by virtue of or according to the Statute of Distribution to the estate of X., living at the time of the death of the said testatrix E. F., are entitled to the legacy of £—— bequeathed by the will of the said E. F. to X., or his legal pers. represves.—See *Re Thompson, Machell v. Newman*, Kay, J., 30 June, 1886, B. 782; S. C., 55 L. T. 85.

8. *Will declared effectual Appointment, and to make Fund part of General Personal Estate.*

APPOINT the Plt H. to represent the next of kin of the testatrix A. I. for the purposes of this action; And declare that the will of the testatrix A. I., operated as an effectual and complete appointment of the entirety of the legacy of £770 bequeathed by the will of her father, M. I., stated in the first paragraph of the Statement of Claim, and that the said sum of £770 became by such appointment part of the general personal estate of the said testatrix, and ought to be administered accordingly; And the Plt and the Defts waiving accounts of the testatrix's personal estate, Let the £507 Cons. in Court to the credit of &c. be transferred to the Plt H. as the legal pers. represve of the testatrix, as directed in the Payment Schedule hereto; And Let the Plt W. I., the trustee of the will of the said M. I., pay to the Plt H. as such legal pers. represve the sum of £270 (balance of the said legacy), admitted by his counsel to be in his hands, and all interest received by him in respect thereof; Tax costs of all parties,

and H. to pay them out of general personal estate.—[*Add Payment Schedule, Form No. 34.*]—*Re Ickeringill, Hinsley v. I.*, V.-C. H., 19 March, 1881, A. 1154; *S. C.*, 17 Ch. D. 151.

9. *Bequest declared not to be Specific, but subject to payment of Legacies thereout.*

UPON motion by way of appeal &c., DECLARE that the legacy of all the testator's personal estate and effects of which he should die possessed, and which should not consist of money or securities for money bequeathed by the said will to A. B., is not a specific legacy, and that all the pecuniary legacies are payable in full before the said A. B. can be entitled to anything under the said bequest to her; but this declaration is without prejudice to any question as between A. B. and the testator's heir-at-law as to the liability of the real estate to the payment of such pecuniary legacies in priority to the property bequeathed to her; Let, in addition to the accounts and inquiries directed by the order dated &c., the following inquiry be made:—An inquiry what property, chattels, and effects were comprised in the said bequest to A. B., and what has, since the testator's death, become thereof; Let a valuation be put on all of such property, chattels and effects comprised in the said bequest to A. B. as have been delivered to E. and F., or either of them, under the order dated &c. or otherwise, or which since the death of the testator have been or are now in their, or either of their possession, or in the possession of any person or persons by their or either of their authority or for their or either of their use.—*Costa. —Re Ovey, Broadbent v. Barrow*, C. A., 3 May, 1882, B. 923; *S. C.*, 29 Ch. D. 560, C. A.

10. *Intestacy declared, save as to Things ejusdem generis.*

“DECLARE, that according to the true construction of the will of N. &c., only such articles passed by the bequest of ‘all her household furniture and effects, plate &c.,’ as are *ejusdem generis* with the articles therein so particularly mentioned, and that she died intestate as to the residue of her personal estate, if any.”—*Newman v. N.*, M. R., 8 Nov. 1858, B. 438.

11. *Bequest held to be in satisfaction of Testator's Covenants.*

“AND this Court being of opinion that the bequests contained in the will of the testator W. B. are to be deemed to have been given in satisfaction of the covenant by the testator contained in the indenture of settlement, dated,” Let &c.—See *Romaine v. Onslow*, V.-C. H., 20 March, 1876, B. 556; *S. C.*, 24 W. R. 899.

For a declaration that the Deft was not entitled to claim both his debt due from testator and the legacy given to him by the testator's will, but had a

right to make his election, whether to claim his debt out of the testator's estate, or accept the legacy, after the account of the personal estate should be taken, see *E. Stafford v. Cantillon (Bulkeley)*, L. C., 23 Feb. 1750, A. 321; *S. C.*, 2 Vez. 170.

12. *Shares of Residue declared adeemed pro tanto by subsequent Advances.*

"DECLARE, that the residuary bequests contained in the testator's will to his two children, the Plt S. and the Deft M., were respectively adeemed, as to the bequest to the said Deft M., by the several advances of &c., making together £2,000, mentioned &c., and as to the bequest to the said Plt S. by the sum of £8,500 in the indenture of the 11th November, 1869, mentioned &c., and which by the same indenture the testator covenanted to pay as therein mentioned to the Plts H. and L., as trustees of such indenture; And Let the said sums of £2,000 and £8,500 be brought into hotchpot (but without interest) in computing the respective shares of the Deft M. and the Plt S. in the testator's residuary personal estate."—*Stevenson v. Masson*, V.-C. B., 4 Dec. 1873, B. 3359; *S. C.*, 17 Eq. 78.

13. *Bequest to Grandchildren, divisible at a future Time, declared to vest immediately, subject to letting in any born within Twenty Years afterwards.*

"DECLARE, that according to the true construction of the residuary bequest in the will of the testator &c., all the grandchildren of the testator who were living at the time of his death took immediate vested and transmissible interests in his residuary estate, subject to be opened and to let in any grandchildren of the testator who may be born before the expiration of twenty years from the date of his decease."—*Oppenheim v. Henry*, V.-C. W., 26 Feb. 1853, B. 601; 10 Ha. 441.

14. *Bequest declared void for Remoteness.*

"DECLARE, that according to the true construction of the will of S., the testatrix &c., the class of persons, consisting of children and grandchildren of the Plt, to whom the testatrix's residuary estate is by the said will expressed to be given upon the Plt's death, includes persons who cannot take by reason of remoteness; And that the trust for such class, and also the gift over, in case there should be no child or other issue to take a vested interest under such trust, are respectively void for remoteness; And that the testatrix's residuary real and personal estate, after the Plt's death, is therefore undisposed of by the said will, and belongs to the Plt, as the heir-at-law and sole next of kin of the testatrix; But this declaration is without prejudice to the trust

declared by the will for the benefit of the Plt's children, if any, during his life, in the events in the will in that behalf mentioned, or in any or either of such events."—*Seaman v. Woods*, M. R., 25 July, 1856, B. 432; 22 Beav. 595.

15. *Gift charged on Real Estate void for Remoteness, and to sink into Estate.*

"DECLARE, that according to the true construction of the will of A., the testator &c., the gift of £2,000 by the said will directed to be raised out of the testator's real estate at R., in trust for &c., is void for remoteness, and that the said sum of £2,000 ought not to be raised, but ought to sink into the said estate."—*Markham v. Tibbits*, V.-C. S., 28 Feb. 1868, B. 979.

16. *Gift void for Remoteness—Consequent Inquiries.*

"DECLARE, that according to the true construction of the will of the testatrix, the trusts expressed in the said will concerning the moneys arising from the sale of her freehold and copyhold estates situate at &c., and all her household furniture &c., which were intended to take effect after the death of the eldest son of S. and E., are void for remoteness; and that so much of the said sums as arose from the sale of real estate devolved upon the heir-at-law of the testatrix, and that his legal pers. represves are now entitled thereto; and that so much of the said sums as arose from (pure) personal estate passed to the next of kin of the testatrix living at her death; And Let the following inquiries &c.: 1. An inquiry whether any and which of such freehold and leasehold estates now remain unsold, and who (is or) are now in possession of the receipts and profits thereof, and of what particulars such estates now consist. 2. An inquiry what portion of the £— New Consols in Court to the credit of &c., now constituting the produce of such (freehold and leasehold) estates, directed by the will to be sold and converted, arose from real estate, and what portion thereof arose from personal estate." 3 and 4. Inquiries for the heir-at-law and for the next of kin [Forms 9, 1, pp. 1394, 1465]. 5. Inquiry whether any shares incumbered, and who now entitled.—*Stuart v. Cockerell*, V.-C. M., 21 June, 1869, B. 1722; *S. C.*, 7 Eq. 363; affirmed, L. JJ., 13 July, 1870, B. 2359; 5 Ch. 718.

17. *Declaration under Accumulations Act, 1800 (39 & 40 G. III. c. 98).*

"DECLARE, that having regard to the Accumulations Act, 1800, according to the true construction of the will of H., the testator &c., the accumulations directed by the said will only took effect to diminish, for the period of twenty-one years from the testator's death, the gift

to his daughter E., the wife of the Deft H., of the share of his residuary estate bequeathed to her; and that the said E. is, from the expiration of the aforesaid period of twenty-one years until the death of the Deft H., entitled to the income of the said share and of the accumulations thereof."—*Combe v. Hughes*, M. R., 27 Jan. 1865; affirmed by L. JJ., 3 May, 1865, A. 1011; 2 D. J. & S. 657.

18. *Accumulation of Income—Repairs to Buildings—Rebuilding—Inquiries.*

DECLARE that, subject to the due performance and execution of the trusts and powers of the will of X. for rebuilding, reinstating, and substantially repairing the messuages and buildings in the said will mentioned, the trust for the investment of the clear surplus income of the testator's estate, after answering the several purposes in the said will specified, is invalid as from the expiration of the period of 21 years from the testator's death, and that as from that date (subject and without prejudice as aforesaid) the income of the testator's estate became payable and divisible as follows, that is to say, as regards such portion of the said income as has arisen or shall arise from real estate, the same belongs and is payable to the heir-at-law of the testator at the time of his death, or his real-repreeve, and as regards such of the said income as has arisen or shall arise from the personal estate of the testator, the same belongs and is divisible between the next of kin of the testator, according to the statutes for the distribution of intestates' estates, living at the time of his death, or their respective legal pers. repreeves. Liberty to apply at Chambers for directions as to receiver's balances and otherwise, to give effect to declaration. And at request of A. B., as representing such class, Let the following inquiries be made:—(1) An inquiry what sums ought from time to time to be applied in keeping the said messuages and buildings in ordinary tenantable repair, and in insuring the same in accordance with the directions in the said will. (2) An inquiry whether any messuages or buildings for the rebuilding or substantial repair whereof the estate of the testator is or shall be liable, require to be rebuilt, reinstated, or substantially repaired, and, if so, what sums ought to be applied for that purpose. Liberty to apply as to the fund out of which any rebuilding &c. should be borne. Let the following further inquiries be made: (3) An inquiry as to heir-at-law of testator. (4) An inquiry as to next of kin of testator. (5) An inquiry in what proportions the annuities from time to time payable out of the testator's estate ought to be borne as between the net income of the real estate, and the net income of the personal estate of the testator. Liberty to apply generally. Costs to be taxed and paid out of fund in Court, without prejudice to any question as to how and in what proportions the same should ultimately be borne.—*Re Mason*, M. v. M., Stirling, J., 7 Aug. 1891, B. 2496; S. C., (1891) 3 Ch. 467.

19. *Person deemed dead and unmarried, and his Share fallen into Residue.*

DECLARE, that R., in the pleadings &c., having left England for the United States of America in the month of July, 1849, being a bachelor at the time of his departure, and not having been heard of since the month of October, 1849, when the letter, written by him, and dated New Orleans, 17 September 1849, in the Master's certificate mentioned, was received in England by his brother E., in the pleadings also named, the said R. is to be deemed to be dead on the 17 September, 1856, without ever having been married; And Declare that by and on the death of the said R. unmarried and without issue, at such time as aforesaid, the sum of £1,000 bequeathed to him, or for his benefit, by the will of the testatrix G., and payable out of the trust funds now vested in the Defts F. G. &c., as the trustees of the said will, fell into and became part of the residue of the estate of the testatrix.—*Greenwood v. G.*, V.-C. S., 16 Nov. 1857, A. 743.

For declaration that a person not heard of since 1843 was to be presumed to have died in 1846, see *Green v. G.*, V.-C. S., 16 July, 1861. As to presumption of death, see Sect. XXVII., *inf.* p. 1654.

20. *Declaration that a Devise on a Double Contingency failed.*

DECLARE, that the testator's daughter S. having died in his lifetime under twenty-one years of age, but married, the devise over of the two messuages &c. to the Deft E., her heirs and assigns, in the event of the death of the said S. under twenty-one and unmarried, did not take effect, and that the said two messuages descended to the Deft I., the testator's eldest son and heir-at-law, and that the same are by the said will charged with the testator's debts and funeral expenses.—*Williams v. Chitty*, L. C., 16 Aug. 1797, B. 750.

For declaration that the heir is entitled to the estate in question, subject to dower, see *Clarke v. Franklin*, 4 K. & J. 268.

For decree declaring that a moiety of testator's freeholds, devised to two sons, one of whom predeceased him, descended to his heir-at-law, the moiety of copyholds to his customary heir, see *Windus v. W.*, M. R., 29 Feb. 1856, B. 769; 6 D. M. & G. 554; 21 Beav. 373.

For declaration, that under a devise after the death of testator's wife, "to his then male heir and his heirs in strict tail male," the eldest son and male heir at common law took gavelkind land as well as that in common socage, see *Thorp v. Owen*, 2 Sm. & G. 95.

For declaration that the share of an intestate in copyholds, derived under an executory devise, devolved on the common law and not on the customary heirs, see *Mallinson v. Siddle*, 39 L. J. Ch. 426; 18 W. R. 569.

For decree declaring estates were devised to W. B., the testator's first cousin once removed, it appearing testator left no second cousin named W. M., see *Bennett v. Marshall*, 2 K. & J. 744, *et v. sup.* pp. 1569, 1573.

21. *Devisees declared seised in trust for Tenants in Common in tail, including a Bankrupt, with Remainders.*

DECLARE, that according to the true construction of the will, dated &c., of the testator, the Defts T. &c., the devisees in trust in the said

will named, are seised of the messuage &c., situate &c., in the said will mentioned, in trust for the Plts, nine of the children of M. deceased, and the Defts L. &c., as the assignees of F., a bankrupt [now the Deft L. the trustee of the property of F., a bankrupt], the tenth and only remaining child of the said M., as tenants in common in tail general, the said L. &c., the assignees [now the Deft L. the trustee &c.], representing F. and the heirs of his body as to such estate and interest as would have been taken by F. and the heirs of his body had he not become bankrupt, with cross remainders between them, the Plts and the Defts L. &c., as such assignees [now the Deft L. the trustee &c.], with remainder to the Deft J., the widow of the said M., for her life, with remainder to the Defts I. and the testator, who survived M., as tenants in common in fee.—*Mandeno v. M.*, V.-C. W., 15 Nov. 1853, B. 144; *S. C.*, Kay, ii.

22. *Forfeiture declared.*

AND the Deft A., by her counsel, admitting that she never has resided, and does not intend to reside, in the mansion-house situate &c., Declare, that according to the true construction of the will of the testator &c., the said Deft has forfeited the estate for life given to her by the said testator's will; And (by consent of the Plt by his counsel) declare that such forfeiture takes place from this day.—*Dunne v. D.*, V.-C. S., 30 Jan. 1855, A. 401; 3 Sm. & G. 22.

For decree declaring the effect of obligation imposed by the will on the devisee for life of a mansion-house, &c., to reside for six months in every year, with penalty or forfeiture, see *Walcot v. Botfield*, Kay, 549; and as to the personal use and occupation of land, *Rabbeth v. Squire*, 4 D. & J. 406, 412; 1 Jarm. 741; Theobald, 189; *Mannox v. Greener*, 14 Eq. 456.

For order for payment of dividends to tenant for life until alienation, &c., see Payment Schedule, Form No. 16, Vol. I.

For declaration that life interest ceased on insolvency, see *Rochford v. Hackman*, 1851, B. 791; *S. C.*, 9 Ha. 475; and see notes, *inf.* p. 1606.

For declaration of forfeiture for non-residence, see *Re Haynes, Kemp v. H.*, 37 Ch. D. 306.

For inquiry as to incumbrances by co-heirs, see *Blackburn v. Belcher*, V.-C. W., 15 March, 1872, A. 652.

NOTES.

LEGACIES CHARGED ON REALTY.

The rules as to what words will charge legacies on the realty are the same as those as to a charge of debts: *Wheeler v. Howell*, 3 K. & J. 198. As to what creates a charge of debts, *v. sup.* p. 1424.

Where legacies are given generally, and then the residue of real and personal estate is given in one mass, that charges the legacies on the land: *Re Bellis*, 5 Ch. D. 504; *Greville v. Browne*, 7 H. L. C. 689; *Bray v. Stevens*, 12 Ch. D. 162; *Re Smith, S. v. S.*, (1899) 1 Ch. 365; *Re Adams and Perry*, (1899) 1 Ch. 554; *Re Dyson and Fowke*, (1896) 2 Ch. 720; *Re Bawden, National Provincial Bank v. Cresswell*, (1894) 1 Ch. 693; although they are

directed to be paid by the exors: *S. C.*; *Re Brooke, B. v. Rooke*, 3 Ch. D. 630; *Wheeler v. Howell*, 3 K. & J. 198; for only the "residue" after paying them goes to the residuary devisees: *Greville v. Browne*, 7 H. L. C. 700, 703; and whether the exors are devisees of the realty (*Field v. Peckett*, 29 Beav. 568) or not: *Re Brooke*, 3 Ch. D. 630 (but see *Wheeler v. Howell*, *sup.*, and the rule as to a charge of debts, *sup.* p. 1424); and though there is a specific devise of part of the realty: *Francis v. Clemow*, Kay, 435, or an annuity to the same legatee expressly charged on the realty: *Greville v. Browne*, 7 H. L. C. 689; or mortgaged estates are specifically devised free from the mortgages, which are thus thrown on the residue: *Re Smith, S. v. S.*, (1899) 1 Ch. 365; and the rule is not confined to cases in which the residuary real and personal estate are given together *eo nomine* as "residue," or the "rest," or the like: *Re Bawden, National Provincial Bank v. Cresswell*, (1894) 1 Ch. 693.

But legacies thus charged on the real estate are payable primarily out of the personalty, unless the testator expressly directs that they shall be paid out of the mixed residue, in which case they are payable rateably out of the realty and personalty: *Elliott v. Dearsley*, 16 Ch. D. 322, C. A.; *Re Boards, Knight v. K.*, (1895) 1 Ch. 499 (explaining dictum in *Gainsford v. Dunn*, L. R. 17 Eq. 405, upon this point).

And as to what words are sufficient to charge legacies on real estate exclusively in exoneration of the personal estate, see *Re Needham, Robinson v. N.*, 54 L. J. Ch. 75.

The rule was not applied to legacies expressly directed to be paid out of personalty: *Gyett v. Williams*, 2 J. & H. 429.

Where a testator gives legacies and charges them on his real estate, and then specifically devises real estate to A., and other real estate "subject as aforesaid" to B., both devisees take subject to the charge: *Bank of Ireland v. McCarthy*, (1898) A. C. 181, H. L.

Annuities charged on land have no priority over legacies similarly charged: *Roper v. R.*, 3 Ch. D. 714; but an annuity charged on specific realty had priority over legacies charged on the realty generally: *Briggs v. George*, W. N. (81) 122; 45 L. T. 249; 29 W. R. 295.

A legacy in lieu of dower to a widow who elects to take the legacy has priority over pecuniary legacies: *Norcott v. Gordon*, 14 Sim. 258; *Re Greenwood, G. v. G.*, (1892) 2 Ch. 295, 298; but not where there is no realty: *Acey v. Simpson*, 5 Beav. 35; or it is all free from dower: *Roper v. R.*, *sup.*; or, since the Dower Act, is disposed of by the husband's will: *Re Greenwood, G. v. G.*, (1892) 2 Ch. 295.

Where a legacy was charged on land which proved insufficient, the legatee was held not entitled to an account of back rents: *Garfitt v. Allen, A. v. Longstaffe*, 37 Ch. D. 48.

Where real estate was devised to a devisee, "he paying thereout" certain legacies, the devisee was not a trustee of the legacies so as to be liable to account for rents and profits, previously to a sale by order of the Court, of realty of which he was in possession: *Newbold v. Beckett*, 62 L. T. 533.

A devisee of real estate charged with a legacy, having been let into possession on his promise to pay the legacy, was held personally liable to the legatee: *Barry v. B.*, 28 L. R. Ir. 45.

As to annuities being charged on land and on *corpus*, or only on income, *v. inf.* p. 1638.

CUMULATIVE LEGACIES.

Where two legacies of the same amount, or of the same thing, are given, the one is, in general, taken to be a repetition by mistake of the other: *St. Albans v. Beauclerk*, 2 Atk. 636.

A second legacy by another instrument is *primâ facie* cumulative whatever its amount: *Wilson v. O'Leary*, 7 Ch. 448; 12 Eq. 525; *Cresswell v. C.*, 6 Eq. 69; *Johnstone v. L. Harrowby*, 1 D. F. & J. 183; Joh. 425; unless the second instrument professes or appears to be in substitution for the first: *St. Albans v. Beauclerk*, 2 Atk. 636; *Tuckey v. Henderson*, 33 Beav. 174; or is of the same date, and appears to be a mere copy: *Whyte v. W.*, 17 Eq. 50; and evidence of an attesting witness was admitted on this point: *Hubbard v. Alexander*, 3 Ch. D. 738; but see *Wilson v. O'Leary*, 7 Ch. 448.

And the rule extends to an additional legacy given by a codicil to a legatee named in the will: *Re Hall, H. v. H.*, 51 L. T. 86.

And as to repetition of or cumulative legacies, see *Wms. Exors.* 1155 *et seq.*; *Hooley v. Hatton*, 2 L. Ca. Eq. 865; *Lee v. Pain*, 4 Ha. 201; *Theobald*, 134—138.

SATISFACTION AND ADEMPMENT OF LEGACIES BY ADVANCES TO THE LEGATEE.

As to the satisfaction or ademption of legacies by advances made by the testator after the date of the will, see *Exp. Pye*, 2 L. Ca. Eq. 365, and notes, p. 383.

The principle does not apply to advances before the date of the will: *Taylor v. Cartwright*, 14 Eq. 176; 20 W. R. 603; *Re Peacock*, 14 Eq. 236; unless by special contract: *Upton v. Prince*, Cas. t. Talb. 71; or where the will directs that they shall be taken into account: *Field v. Seward*, 5 Ch. D. 538.

The advance need not be made on marriage, or any other special occasion: *Leighton v. L.*, 18 Eq. 458; *q. v.* as to the evidence necessary to rebut the presumption of satisfaction. As to what constitutes an advancement, see *Taylor v. T.*, 20 Eq. 155; *Re Peacock*, 14 Eq. 236; *Re Blockley, B. v. B.*, 29 Ch. D. 250.

A direction in the will that advances should be charged against shares of residue, showed that a pecuniary legacy to a child who took a share of residue also was not to be charged with advances: *Smith v. Crabtree*, 6 Ch. D. 591.

The presumption was not rebutted by some difference in the limitations: *Russell v. St. Aubyn*, 2 Ch. D. 398; *Romaine v. Onslow*, 24 W. R. 899; and see *Fairer v. Park*, 3 Ch. D. 309.

A gift of a share of residue given by the father's will was not an "advancement or payment" within the meaning of the will of the grandfather: *Cooper v. C.*, 8 Ch. 813; nor was the receipt by grandchildren of part of the grandfather's property under an agreement (not voluntary) by which, in the event, what would otherwise have gone to the father came to them: *S. C.*

A legacy to an intended wife was held satisfied by a settlement of the same amount on marriage subsequently: *Mascal v. M.*, 1 Vez. 323.

The doctrine is applicable to residuary gifts: *Montefiore v. Guedalla*, 1 D. F. & J. 93; *Stevenson v. Masson*, 17 Eq. 78; but only as between children or persons to whom the testator was *in loco parentis*: *Meinertzen v. Walters*, 7 Ch. 670; *Fowkes v. Pascoe*, 10 Ch. 343; and depends on the circumstances: *Cooper v. C.*, 8 Ch. 813.

The presumption does not apply in the case of a mother; in such a case the intention is a question of evidence: see *Bennet v. B.*, 10 Ch. D. 474.

In the absence of any direction by the testator to the contrary, advancements to children on account of their portions bear no interest up to his death, but interest from his death, or from the death of the tenant for life, whichever last happens: *Stewart v. S.*, 15 Ch. D. 539; *v. sup.* p. 1512.

As to hotchpot, *v. sup.* p. 1512.

As to advancements by way of portion within the Statute of Distribution, *v. inf.* Chap. XLV., "SETTLEMENT," pp. 1739, 1740.

As to the satisfaction of a debt, covenant, or portion by an equal or greater legacy, see *Talbot v. Shrewsbury*, 2 L. Ca. Eq. 375; *Chancey's Case*, 1b. 376; *Wms. Exors.* 1162 *et seq.*; *Chichester v. Coventry*, L. R. 2 H. L. 71; *Atkinson v. Littlewood*, 18 Eq. 595; *Romaine v. Onslow*, 24 W. R. 899, *et sup.*; *Mayd v. Field*, 3 Ch. D. 587 (a case of a legacy by a married woman); and *Smyth v. Johnston*, 31 L. T. 876, where shares of residue given to daughters were held not to be in satisfaction of covenants in marriage settlements; and *Re Fletcher, Gillings v. F.*, 38 Ch. D. 373, where a legacy to a wife of the exact amount which the testator owed her was adeemed by payment of the debt in his lifetime.

A direction by a testator that his "debts" (not mentioning "legacies") are to be paid is sufficient to exclude the presumption that a legacy to a creditor, equal to or exceeding the debt, is a satisfaction of it: *Re Huish, Bradshaw v. H.*, 43 Ch. D. 260.

A legacy with no time fixed for payment is no satisfaction of a debt of lesser amount payable to the legatee by the testator within three months after his death: *Re Horlock, Calham v. Smith*, (1895) 1 Ch. 516; *Re Douce*, 50 L. J. Ch. 285; *Coates v. C.* (1898), 1 I. R. 258; nor a specific bequest of a nature different from a debt: *Coates v. C.*, *sup.*

And as to the difficulty of presuming satisfaction where two documents (*e.g.*, deed and will) are contemporaneous, see *Horlock v. Wiggins*, 39 Ch. D. 142, C. A.

An assignment by a testator after the date of his will to two of three of the legatees named in the will was held to be an ademption, as regards the two assignees, of the value of the property assigned: *Re Vickers, V. v. V.*, 37 Ch. D. 525; and so a settlement on daughter's marriage on trusts differing from those of the will: *Re Furness*, (1901) 2 Ch. 346.

Pecuniary legacies to two sisters absolutely were held not to be in satisfaction of similar sums in the hands of the testator in trust for the same sisters for their separate use for life, remainder to their children respectively: *Fairer v. Park*, 3 Ch. D. 309.

A husband's covenant to pay 1,200*l.* at his death to his wife, to whom an annuity was also to be paid, was not satisfied by his intestacy: *James v. Castle*, 33 L. T. 665. And see Chap. XLV., "SETTLEMENT."

GIFTS TO ATTESTING WITNESSES.

The Wills Act, s. 15, makes void beneficial gifts by will to an attesting witness, or the wife or husband of one; but not to the husband of a witness as trustee: *Cresswell v. C.*, 6 Eq. 69.

Nor where the legatee marries the attesting witness after the attestation: *Thorpe v. Bestwick*, 6 Q. B. D. 311.

Legacies by will were not lost by attesting a codicil: *Gurney v. G.*, 3 Drew. 208; and legacies void through attestation were made good by a codicil, with other witnesses, confirming the will: *Anderson v. A.*, 13 Eq. 381; and if there is a codicil independently attested confirming the will, the legatee may take the benefit, although he attests a later codicil: *Re Trotter, T. v. T.*, (1899) 1 Ch. 764; but a witness who attested a codicil lost her interest under a parol trust declared in her favour of property bequeathed thereby: *Re Fleetwood, Sidgreaves v. Brewer*, 15 Ch. D. 594.

A solr who attests a will containing a direction allowing him to make professional charges, cannot take the benefit of such direction: *Re Barber, Burgess v. Vinnicombe*, 31 Ch. D. 665; *Re Pooley*, 40 Ch. D. 1, C. A.

Where one of a class to whom a gift is made is an attesting witness, his share goes to increase the shares of the others, and is not undisposed of: *Fell v. Biddolph*, L. R. 10 C. P. 701; *Re Fleetwood, sup.*; and if a life estate is given to an attesting witness the reversion is accelerated: *Jull v. Jacobs*, 3 Ch. D. 703. *Secus*, if the gift in remainder is to the children of a childless man with ultimate remainder on his dying without issue to a class then to be ascertained: *Re Townend, T. v. T.*, 34 Ch. D. 357.

But where the gift was to a class, and if any died during a tenancy for his life his share was to go to his children, and the husband of one of the class was an attesting witness, the gift to the children was accelerated: *Re Clark, C. v. Randall*, 31 Ch. D. 72.

REQUESTS TO EXECUTORS.

A gift to an exor as exor is subject to an implied condition that he shall prove the will: *Wms. Exors. 1146 et seq.*; but sending home a power of attorney from Australia to enable another person to administer the estate was sufficient: *Lewis v. Mathews*, 8 Eq. 277.

The mere fact that the gift of the legacy precedes the appointment of the legatee as exor, or that the legacies to several exors differ in amount, does not rebut the presumption of a condition: *Re Appleton, Barber v. Tebbit*, 29 Ch. D. 893, C. A., questioning *Jewis v. Lawrence*, 8 Eq. 345; but the fact of the gift being "as a remembrance" will do so: *Bubb v. Yelverton*, 13 Eq. 131; and *semble*, parol evidence is admissible to rebut the presumption: *Re Appleton, sup.*

The rule does not apply to a gift of the residue or a share of it: *Griffiths v. Pruett*, 11 Sim. 202; *Christian v. Devereux*, 12 Sim. 264; and see *Hollingsworth v. Grasett*, 15 Sim. 52.

The rule applied to a legacy to an exor "for his absolute use," where there was another "as an additional acknowledgment for his trouble": *Slaney v. Watney*, 2 Eq. 418.

An exor took his legacy on proving, though he had previously renounced probate: *Algermann v. Ford*, 7 Jur. N. S. 668.

In *Saltmarsh v. Barrett*, 3 D. F. & J. 279, a gift of the residue, subject to charges to the three exors by name, was held to be in trust for the next of kin. But whether a trustee or exor is to take beneficially or not is a question of intention on the will: *Williams v. Arkle*, L. R. 7 H. L. 606; *Re West, George v. Grose*, (1900) 1 Ch. 48.

On a gift of whole property to a grandson, one of three exors, upon trusts which did not exhaust the whole income, the surplus was his beneficially: *Clarke v. Hilton*, 2 Eq. 810; *Irvine v. Sullivan*, 8 Eq. 673; *secus*, as to a gift to three exors "in and for the consideration" of paying the income to the widow for life: *Bird v. Harris*, 9 Eq. 204.

Where there is no gift of the residue, the exors do not in general take beneficially: 11 G. IV. & 1 W. IV. c. 40 (Exors Act, 1830); *Travers v. T.*, 14 Eq. 275; *Re West, sup.*; unless an intention to benefit them sufficiently appears: *Fuge v. F.*, 27 L. R. Ir. 59; *Harrison v. H.*, 2 H. & M. 237.

Before this Act, a legacy to the exor's wife did not prevent his taking the undisposed-of residue beneficially: *Fruer v. Bouquet*, 21 Beav. 33, aff. 36, n.; and see *Williams v. Roberts*, 4 Jur. N. S. 18; 27 L. J. Ch. 177; 6 W. R. 93.

Though there was no gift of residue, the exors, there being no next of kin, took the personal estate as against the Crown: *Re Knowles, Roose v. Chalk*, 49 L. J. Ch. 625; 43 L. T. 152; 28 W. R. 975; *secus* where on the face of the will it appeared that the exors were intended to take no more than the legacies given to them: *Re Hudson's Trusts*, 52 L. J. Ch. 789; W. N. (83) 66.

And parol evidence was held admissible to rebut the presumption against the exor taking beneficially, arising from blanks in the will: *Re Bacon's Will, Camm v. Coe*, 31 Ch. D. 460.

Where the residue is expressly bequeathed to the exor, the onus is on those claiming the property against him to show that he is a trustee: *Williams v. Arkle*, L. R. 7 H. L. 606; and see *Fuge v. F.*, 27 L. R. Ir. 59.

And see *sup.* p. 1575; Wms. Exors. 1342 *et seq.*; 2 Jarm. W. 964.

CONTINGENT REMAINDER.

A limitation under a will which would have been a contingent remainder but for an outstanding mortgage will not be defeated by a subsequent reconveyance to the uses of the will: *Re Freme, F. v. Logan*, W. N. (91) 113; 60 L. J. Ch. 562; 65 L. T. 183; 39 W. R. 696.

And that a gift will be construed as an executory devise rather than a contingent remainder where a person whom the testator intended to let in would otherwise be excluded, see *Miles v. Jarvis*, 24 Ch. D. 633; *Re Lechmere and Lloyd*, 18 Ch. D. 524 (not following *Brackenbury v. Gibbons*, 2 Ch. D. 417); *Re Bourne, Rymer v. Harpley*, 56 L. J. Ch. 566; *Dean v. D.*, 60 L. J. Ch. 853; 65 L. T. 65; 39 W. R. 568; *Blackman v. Fysh*, (1892) 3 Ch. 209, C. A.; and see *Symes v. S.*, (1896) 1 Ch. 272, distinguishing *Re Lechmere and Lloyd, sup.*

As to the preservation of contingent remainders by reason of the legal estate being outstanding in a mortgagee, see *Astley v. Mickethwaite*, 15 Ch. D. 59.

CONDITIONAL GIFTS—RESTRAINT ON ALIENATION.

Where a testator made the acceptance of rules to be made by himself a condition of a gift to a charity, and left no such rules, the gift was still valid: *Yates v. Univ. Coll., Lond.*, L. R., 7 H. L. 438.

In general, ignorance of a condition annexed to a gift is no excuse for not performing it: *Porter v. Fry*, 1 Vent. 199; *Re Hodges*, 16 Eq. 92; *Astley v.*

E. Essex, 18 Eq. 290; but where claims in writing within a given time were required from pecuniary legatees, an admonition by a residuary legatee was sufficient claim: *Tollner v. Marriott*, 4 Sim. 19; 9 L. J. Ch. 14; and see *Shelf. R. P. St.* 124.

But a condition requiring legatees to establish their claims is not satisfied within a specified time by an order directing a class inquiry: *Re Hartley, Stedman v. Dunster*, 34 Ch. D. 742.

As to what is a sufficient compliance with a condition requiring the consent of trustees or guardians to the marriage of a beneficiary, see *Re Smith, Keeling v. S.*, 44 Ch. D. 654; *Daley v. Desbouverie*, 2 Atk. 261; *Re Brown's Will*, 18 Ch. D. 61, C. A.; *Wms. Ex.* 9th ed. 1143.

Where a father became lunatic, so that his consent to a marriage could not be given, a condition precedent having thus become incapable of fulfilment by the act of God, an appointment subject to it failed: *Re Harris, Fitzroy v. H.*, W. N. (91) 76.

As to the effect of a gift to a servant, providing she remains in the testator's service until his death, see *Re Hartley's Trusts*, 47 L. J. Ch. 610; 26 W. R. 590.

As to what will amount to compliance with a condition requiring residence, see *Re Moir, Warner v. M.*, 25 Ch. D. 605; or the carrying on of a business: *Re Sax, Barned v. S.*, 62 L. J. Ch. 688.

A gift of residue to one, if then able to discharge the office of exor, if not, over, was good, though to an infant, as he could give a discharge by the aid of the Court: *Ledward v. Hassells*, 2 K. & J. 370; and as to conditional legacies, see *Wms. Exors.* 1122 *et seq.*; 2 Jarm. W. 841 *et seq.*

Where a gift refers to the death of a legatee, coupled with a contingency, as "without leaving issue," that *prima facie* means death at any time, but the context may show that death before a particular period was intended: *Re Luddy, Peard v. Morton*, 25 Ch. D. 394; *O'Mahoney v. Burdett*; *Ingram v. Soutten*, L. R. 7 H. L. 388, 408; *Re Schnadhorst*, (1901) 2 Ch. 338.

As to the effect of a direction that a share of residue shall fall into the residue, see *Humble v. Shore*, 7 Ha. 247; *Re Ballance, B. v. Lanphier*, 42 Ch. D. 62; *Re Barker's Estate, Hetherington v. Longrigg*, 15 Ch. D. 635; *Re Rhoades, Lane v. R.*, 29 Ch. D. 142; *Re Palmer, P. v. Answorth*, (1893) 3 Ch. 369.

A legacy given with a restriction against marrying a person of another religion is not against public policy: *Hodgson v. Hatford*, 11 Ch. D. 959.

A condition that a life estate given to a devisee should be forfeited in the event of his marrying a domestic servant is a valid condition: *Jenner v. Turner*, 16 Ch. D. 188.

Conditions against alienation are valid if they do not substantially take away the whole power of alienation. Thus a condition that devised land should not be sold out of the family was valid: *Re Macleay*, 20 Eq. 186; and see *Gardiner v. Young*, 34 L. T. 348; but a condition in absolute restraint of alienation is void, even though its operation is limited to a particular time: *Re Rosher, R. v. R.*, 26 Ch. D. 801.

Mere directions in restraint of alienation after an absolute gift are void: *Bradley v. Peizoto*, 3 Ves. 324; *Ware v. Cann*, 10 B. & C. 433; *Re Macleay*, 20 Eq. 186; *Re Trustees of Hollis's Hospital and Hague*, (1899) 2 Ch. 540; *Re Thompson, Griffith v. T.*, 44 W. R. 582; *e.g.*, an absolute gift of land with a direction that, if the devisee sells, certain sums as legacies are to be paid by him: *Re Elliot, Kelly v. E.*, (1896) 2 Ch. 353; or a proviso determining the estate on bankruptcy, and not taking effect by way of conditional limitation: *Re Machu*, 21 Ch. D. 838; and see *Re Dugdale, D. v. D.*, 38 Ch. D. 176; except, of course, as to married women: *v. sup.* Chap. XXXVII. p. 909; and do not prevent an annuitant from taking the value of his or her annuity: *Roper v. R.*, 3 Ch. D. 721; although there is a gift over: *Day v. D.*, 1 Drew. 569; *Hunt-Foulston v. Furber*, 3 Ch. D. 285. But see *Power v. Hayne*, 8 Eq. 262; *Hatton v. May*, 3 Ch. D. 148, and *Roper v. R.*, 3 Ch. D. 721.

As to provisos for cesser of a life interest, or an annuity on alienation, &c., see same cases; and that no gift over is necessary, *Dommett v. Bedford*, 6 T. R. 684; *Rochford v. Hackman*, 9 Ha. 481; *Joel v. Mills*, 3 K. & J. 458; *Hatton v. May*, 3 Ch. D. 148; *Dixon v. Rowe*, 35 L. T. 548, *et v. inf.* p. 1636.

A gift over on death at any time without leaving issue to the then heir of the donee is repugnant and void: *Re Parry and Daggs*, 31 Ch. D. 130, C. A.

And that a condition attached to a gift by way of defeasance must be definite in ascertainment of its operation, as well as in its terms, see *Re Viscount Exmouth, E. v. Praed*, 23 Ch. D. 158.

A gift of a fund over in the event of marriage or death of a tenant for life, though void as in restraint of marriage, will take effect in the event of death: *Morley v. Rennoldson*, (1895) 1 Ch. 449, C. A.

A gift upon condition will not be construed so as to enable the donee by non-compliance to alter the course of admon: *Re Kirk, K. v. K.*, 21 Ch. D. 431, C. A.

As to the effect of charging a life interest which is liable to forfeiture, see *Samuel v. S.*, 12 Ch. D. 152.

REMOTENESS OF LIMITATIONS.

A gift to a class is void if it may include any members as to whom the gift would be void for remoteness: *Leake v. Robinson*, 2 Mer. 363; *Seaman v. Woods*, 22 Beav. 595, Form 14, *sup.* p. 1597; *Smith v. S.*, 5 Ch. 342; *Stuart v. Cockerell*, 5 Ch. 713, Form 16, *sup.* p. 1598; *Hale v. H.*, 3 Ch. D. 643, and cases there cited: *Blight v. Hartnoll*, 19 Ch. D. 294; not following *Evans v. Walker*, 3 Ch. D. 211.

And in ascertaining whether a gift is void for remoteness, the words of the testator must first be taken and their meaning determined, and it is then to be considered whether that meaning brings them within the operation of the rule: *Pearks v. Moseley*, 5 App. Cas. 714; *Re Whitten, King v. W.*, W. N. (90) 45; 62 L. T. 391; *Re Beavan's Trusts*, 34 Ch. D. 716; *Re Hancock, Watson v. W.*, (1901) 1 Ch. 482, C. A.

But alternative gifts may admit of being construed divisibly, so that the remoteness of one alternative may not affect the other: *Watson v. Young*, 28 Ch. D. 436; *Re Harvey, Peek v. Savory*, 39 Ch. D. 289, C. A.; *Miles v. Harford*, 12 Ch. D. 691; but see *Re Hancock, sup.*; *Re Bence, Smith v. B.*, (1891) 3 Ch. 242, C. A., explaining *Evers v. Challis*, 7 H. L. C. 531.

Where the original gift is distinct from the gift over, the remoteness of the latter will not affect the former: *Goodier v. Johnson*, 18 Ch. D. 441, C. A.; and limitations over in default of appointment under a preceding power, which is void for remoteness, may be upheld: *Re Abbott, Peacock v. Frigout*, (1893) 1 Ch. 54; citing *Webb v. Sadler*, 8 Ch. 419, 426; and *Wollaston v. King*, 8 Eq. 165.

Though a trust for sale of realty be too remote, and the intended conversion therefore fails, the gift in favour of the persons who were intended to take the proceeds may be good as to the unconverted realty: *Goodier v. Edmunds*, (1893) 3 Ch. 455; 62 L. J. Ch. 649; *Re Daveron, Bowen v. Churchill*, (1893) 3 Ch. 421.

For the purposes of the rule against perpetuities there is no difference between a trust for sale and a power of sale where the sale is to be completed by a conveyance of the legal estate to the purchaser: *Goodier v. Edmunds*, (1893) 3 Ch. 455.

A gift to a class who shall be living at the death of the survivor of a living person, and any person whom he or she may marry, is void for remoteness: *Re Frost, F. v. F.*, 43 Ch. D. 246.

Any covenant or stipulation which creates an estate or interest in the property may be obnoxious to the rule; *e.g.*, an unlimited option of repurchase: *L. & S. W. Ry. Co. v. Gomm*, 20 Ch. D. 562, C. A.; overruling *Birmingham Canal Co. v. Cartwright*, 11 Ch. D. 421; an unlimited power of re-entry in event of breach of covenant: *Dunn v. Flood*, 25 Ch. D. 629; *aeus*, a restrictive covenant, or contract not amounting to a limitation: *Mackenzie v. Childers*, 43 Ch. D. 265; or a limitation in a contract confirmed and made binding *inter partes* by Act of Parliament: *Sevenoaks, &c. Ry. Co. v. L. C. D. Ry. Co.*, 11 Ch. D. 625; *Kent Coast Ry. Co. v. L. C. D. Ry. Co.*, 3 Ch. 656; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, (1900) 2 Ch. 352; (1901) 2 Ch. 37, C. A.

Where the gift is to a class contingently on attaining twenty-five, a general direction for their maintenance out of the income will not confer vested interests so as to avoid the rule against perpetuities: *Re Mervin, M. v. Crossman*, (1891) 3 Ch. 197; *Re Parker, Barker v. B.*, 16 Ch. D. 44.

Secus, where the direction is for the application of the income of a

particular share for each child, or of the whole or any part of such income, at the discretion of the trustee: *Fox v. F.*, 19 Eq. 286; *Re Parker, sup.*; *Re Turney, T. v. T.*, (1899) 2 Ch. 739, C. A., approving *Fox v. F.*, and (seemingly) disapproving *Re Wittle, Tucker v. W.*, (1896) 2 Ch. 711; and see *Re Bunn, Isaacson v. Webster*, 16 Ch. D. 47.

A direction that on failure of a charitable purpose a fund should fall into residue, being only a direction that the fund should go as the law would carry it, is not void for remoteness: *Re Randell, R. v. Dixon*, 38 Ch. D. 213; and see *Re Bowen, Lloyd-Phillips v. Davis*, (1893) 2 Ch. 491.

The rule against perpetuities has no application to a gift over from one charity to another on failure to comply with a condition: *Re Tyler, T. v. T.*, (1891) 3 Ch. 252, C. A.; *Christ's Hospital v. Grainger*, 1 M. & G. 460; *secus*, where an immediate gift to individuals is followed by an executory gift in favour of charity, or an immediate gift in favour of charity is followed by an executory gift to individuals: *Re Bowen, Lloyd-Phillips v. Davis*, (1893) 2 Ch. 491, 494.

The rule, it seems, applies to common law conditions in defeasance of a freehold: *Re Trustees of Hollis's Hospital and Hague*, (1899) 2 Ch. 540 (dissenting from observations in *Challis* on R. P., 2nd ed. 174—177); but not to mere personal contracts: *Borland's Trustee v. Steel*, (1901) 1 Ch. 279; nor to covenants running with the land: *Muller v. Trafford*, (1901) 1 Ch. 54.

A trust for maintenance of horses and dogs so long as they shall live is not void as a perpetuity: *Re Dean, Cooper-Dean v. Stevens*, 41 Ch. D. 552; but a trust of proceeds of sale for persons living when the testator's gravel pits are worked out is bad: *Re Wood, Tullett v. Colville*, (1894) 3 Ch. 381, C. A.; (1894) 2 Ch. 310; and so is a gift of an annuity to a volunteer corps on the appointment of the next lieutenant-colonel: *Re Lord Stratheden and Campbell, Alt v. Lord S.*, (1894) 3 Ch. 265.

A gift for the lives of all persons in being and twenty-one years afterwards is void for uncertainty: *Re Moore, Prior v. M.*, (1901) 1 Ch. 936.

A restraint on anticipation, attached to a gift to a person not *in esse*, is necessarily bad: *Cooper v. Laroche*, 17 Ch. D. 368; *Re Ridley*, 11 Ch. D. 645; *Re Errington, W. N.* (87) 23; *Herbert v. Webster*, 15 Ch. D. 610; and evidence that a person is past child-bearing is not admissible for the purpose of giving validity to a gift which would otherwise be too remote: *Re Dawson, Johnston v. Hill*, 39 Ch. D. 155; *Jee v. Audley*, 1 Cox, 324; *Re Sayer's Trust*, 17 Ch. D. 368; *Re Hocking, Michell v. Loe*, (1898) 2 Ch. 567, C. A.

A forfeiture clause attached to the appointment of the share of a child not *in esse* will be bad: *Hodgson v. Halford*, 11 Ch. D. 959.

A gift in defeasance of a life interest to an unborn person on change of religion, the life interest being validly limited, was held not open to objection on the ground of perpetuity: *Wainwright v. Miller*, (1897) 2 Ch. 255; *sed qu.*; and see *Re Gage, Hill v. G.*, (1898) 1 Ch. 498, where a gift over in the event of marriage was held to be void for remoteness, as it could not be ascertained that the marriage would take place within the limit of time allowed by law.

A person taking by appointment is deemed to take directly under the instrument creating the power, and the question of remoteness must be considered with reference to the state of facts at the date of that instrument: *Re Brown and Sibley*, 3 Ch. D. 156; though the settlement is that of an infant confirmed at his majority: *Cooke v. C.*, 38 Ch. D. 202; but the power may be exercised so as not in fact to exceed the limit, and under a gift to A., with power to appoint to his children, an appointment in favour of each child that attains twenty-four is valid as to those who do so within twenty-one years after A.'s death, while an appointment in favour of those who attain twenty-four as a class would be bad: *Wilkinson v. Duncan*, 30 Beav. 111; *Watson*, Eq. 837.

But in the case of a general power, though exercisable by the will of a married woman, the period of perpetuities must be reckoned from the time of the appointment: *Re Flower, Edmonds v. F.*, 55 L. J. Ch. 200; *Rous v. Jackson*, 29 Ch. D. 521; *Stuart v. Babington*, 27 L. R. Ir. 551.

The rule applicable to legal limitations, that an estate cannot be limited to an unborn person for life, followed by any estate to any child of such unborn person, is an absolute rule, independent of the general rule against perpetuities: *Whitby v. Mitchell*, 42 Ch. D. 494; 44 Ch. D. 85, C. A.

And as to the rules against perpetuity and remoteness, see 1 Jarm. 264 *et seq.*; Theobald on Wills, 519 *et seq.*

SECTION XXII.—SPECIFIC AND DEMONSTRATIVE BEQUESTS AND DEVISES.

1. *Inquiries as to Specific Legacies—Contribution for Debts.*

ACCOUNTS of personalty, debts, funeral expenses, and legacies;—
 “And Declare, that in case the testator’s personal estate not specifically bequeathed shall not be sufficient for the payment of his debts, the several specific bequests in his will mentioned ought to contribute rateably to make good the deficiency according to the respective values thereof; And Let in that event the following further inquiries be made, that is to say:—9. An inquiry of what particulars the specific bequests given by the testator’s will consist” (consisted at the time of his death), “and by whom the same have been received, and what has become thereof. 10. An inquiry what values ought to be set upon such specific bequests respectively, and in what proportions the same ought respectively to contribute to the payment of the testator’s debts and funeral expenses.”—*Holroyd v. H.*, M. R., 12 Dec. 1874, A. 3184.

Where the personal estate consisted chiefly of debts due to the testator, the produce of which was bequeathed to the Plt’s, and had been received in part by the executrix, and an account had been directed of the personal estate “not specifically bequeathed,” on a motion to rectify the minutes the latter words were omitted: *Barnes v. Foster*, V.-C., 5 March, 1825, MSS.

2. *Deficiency to be raised by Sale or Mortgage out of specifically bequeathed Leaseholds.*

INQUIRE what leasehold estates the testator died possessed of, and to whom the same were respectively bequeathed.—Direction for taxation of costs.—“And it appearing by the Master’s certificate that the testator’s personal estate, not specifically bequeathed, will not be sufficient for the payment of his debts and funeral expenses, and the costs of this action, Declare that the several specific bequests in his will mentioned ought to contribute rateably to make good the same, according to the respective values thereof at the testator’s death;—Inquiries to ascertain the values and proportions to be contributed by each specific bequest [see Form 1]; And Let the same be raised by sale or mortgage thereof, with the approbation of the Judge” &c. [Form 19, p. 1457].—See *Parry v. P.*, M. R., 24 Jan. 1854.

For order declaring Plt’s leasehold estates specifically bequeathed liable to pay the Plt’s debt and costs, with directions to raise the same by sale or mortgage, see *Davies v. Nicolson*, L. JJ., 13 July, 1858, A. 1461; 2 D. & J. 702.

3. *Account of Specific Bequests, and Inquiry in what Proportion Specific Devises and Bequests should contribute.*

ACCOUNTS of personalty—If personalty not specifically bequeathed insufficient to pay debts and funeral expenses, Let the following &c.:

"An account of the testator's personal estate specifically bequeathed; An inquiry by whom such personal estate has been received, and how the same has been applied or disposed of."—Inquiries as to real estates.—"An inquiry in what proportion the testator's personal estate specifically bequeathed, and his several specifically devised real estates, ought respectively to contribute to the payment of so much of his debts and funeral expenses (and costs of this action) as his personal estate not specifically bequeathed shall be insufficient to satisfy, and for that purpose Let a value be set on such specific devises and specific bequests respectively."—Adjourn &c.—See *Oddy v. Dickenson*, V.-C. W., 10 Feb. 1855, B. 528; *Bottle v. Knockner*, V.-C. B., 17 Nov. 1876, A. 2068.

4. *Specific Devises and Specific Bequests to contribute.*

AND it appearing by the said affidavit of the Deft that the testator did not die seised or possessed of any real estate other than that specifically devised by his said will; Declare, that in case the testator's personal estate not specifically bequeathed shall be insufficient for the payment of his debts and funeral expenses and the costs of this action, the real estate specifically devised by the testator's will, and the specific bequests therein mentioned, ought to contribute rateably to make good such deficiency according to the respective values thereof; And Let, in that event, the following &c.—11. An inquiry of what particulars the specific bequests &c. [Form 1, p. 1609.]—"12. An inquiry what real estates the testator was seised of or entitled to at the time of his death, and to whom the same were respectively devised."—13. Inquiry as to incumbrances.—14. "An inquiry what values ought to be set upon the testator's real estates specifically devised, and upon such specific bequests, and in what proportions the specific devisees and specific legatees respectively ought to contribute to the payment of the testator's debts and funeral expenses and the costs of this action."—15. An inquiry in what manner such proportions ought to be raised; And Let the same be raised accordingly with the approbation of the Judge.—Adjourn &c.—*Pearce v. Powell*, V.-C. M., 16 June, 1875, B. 1031.

5. *Deficiency to be raised by Sale or Mortgage out of Devised Estates rateably.*

AND it appearing that the testator's personal estate, and the proceeds of his real estate at —, which descended to his heir-at-law, and the rents and profits thereof, will not be sufficient for the payment of his debts &c., Declare, that the deficiency ought, as between the Defts, the respective devisees of the testator's real estates, to be raised and paid out of the several specifically devised estates rateably, in proportion to the respective values thereof at the death of the testator; And Let such proportion be settled by the Judge; and for that purpose Let a value be set on the several estates respectively; And Let an

inquiry be made in what manner such proportions ought to be raised and paid [*or, And Let such proportions be raised by sale or mortgage of the said estates, or of a sufficient part thereof respectively, with the approbation of the Judge &c.*—Form 19, p. 1457].

6. *Specific Legatees and Devisees to pay into Court Contributions for Debts—Sales in Default.*

“AND it appearing by the Master’s said certificate that there is a balance of £36 15s. 11d. due to the Deft on taking the accounts of personal estate not specifically bequeathed, and that there is no part of the personal estate of the testator not specifically bequeathed outstanding or undisposed of; And the Judge being of opinion that for the purpose of providing for the payment of the testator’s debts and of the costs of this action the real estate specifically devised by the testator’s will and the specific bequests therein contained, and in the Master’s certificate respectively mentioned, ought to contribute to such payment in proportion to the value thereof respectively, and such contributions having been estimated at the following amounts, Let the persons hereinafter named be at liberty, on or before &c., to lodge in Court, as directed in the lodgment schedule hereto, the following sums, that is to say, (1) J. C., the devisee of the testator’s real estate, the sum of £50; (2) V., the assignee of C. C., the tenant for life of the leasehold house, No. 58, C. Street, the sum of £220; (3) A. B., as the guardian and on behalf of the said infants, E. C., W. C., and L. C., the sum of £450; (4) the Plt G. C. and C. C. the sum of £50; and upon such payments respectively being made, the persons making the same are to be let into possession of the premises devised or bequeathed to them respectively; And Let such sum of £220, if so lodged in Court by the said V., be” (deemed to have been) “advanced by him upon the security of and be a charge upon the said leasehold premises, No. 58, C. Street, with interest at the rate of 5 p. c. per ann. from the date of the death of the said C. C. until payment; And Let the Deft A. (exor) within fourteen days after such lodgment in Court of the said sum of £220, produce and leave in the Central Office the deeds and documents relating to the said leasehold house specified in the schedule of deeds and documents hereto;”—In default of such lodgment in Court by J. C. of the £50, Let the said testator’s real estate devised to J. C. be sold with the approbation of the Judge free from &c. (Form 4, p. 1467); And Let the money to arise by such sale be paid into Court to the credit of this action (C. v. A.) to an account to be entitled “Proceeds of sale of real estate devised to J. C.,” subject to further order.—Similar directions for sale of other specific gifts in default of payment.—“And Let the Deft A. get in the mortgage debt of £400 (*also specifically bequeathed*) in the said certificate mentioned, and within fourteen days from the time of receipt lodge the amount to be received by him for principal in Court, as directed in Lodgment Schedule II. hereto.”

LODGMET SCHEDULE I.

In the High Court of Justice,
Chancery Division.

Date of Order, 16th June 1877.

Chaplin v. Aishton, 1877. C. 1002.

Ledger Credit. As above.

Particulars of Funds to be lodged.	Persons to make the Lodgment.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Cash	J. C. of &co.	50 0 0	
Cash	V. of &co.	220 0 0	
Cash	A. B. of	450 0 0	
Cash	Plts G. C. and C. C.	50 0 0	

LODGMET SCHEDULE II.

In the High Court of Justice,
Chancery Division.

Date of Order, 16 June, 1877.

Chaplin v. Aishton, 1877. C. 1002.

Ledger Credit. As above. Mortgage debt bequeathed to T. for life, with remainders over.

Particulars of Funds to be lodged.	Persons to make the Lodgment.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Amount to be received in respect of principal due on mortgage debt of £400.	Deft A.		

Chaplin v. Aishton, V.-C. M. at Chambers, 16 June, 1877, A. 1780.

This Form has been redrawn to suit S. C. F. R.R.

7. Inquiry what comprised in Specific Bequest of Business.

"An inquiry what property is comprised under the specific bequest in the testator's will contained to the Deft P. of the testator's business of an engineer, and the stock, credits, assets, and effects thereof, and what were at the testator's death the liabilities thereof, and whether any and which of them have been paid, and if so, by whom and out of what funds."—*Peak v. Hilton*, M. R., 10 March, 1866, B. 596; and see Form 1, *sup.* p. 1609.

8. *Inquiry as to Specific Effects, distinguishing Domestic from Trade.*

"AN inquiry which of the particulars comprised in the specific bequest of all the testator's household goods, furniture, jewels, plate, books, linen, and apparel to M., the testator was possessed of at the time of his death, either for his own domestic or personal use, or in the way of trade, or as merchandise, distinguishing the same; And Declare, that such parts thereof as were for the testator's own domestic or personal use pass by the said bequest to M.; And Let the same be delivered to S., and M., his wife; And Declare, that the rest of the said household goods &c. belong to the residue of the testator's estate."—See *Le Farrant v. Spencer*, 1 Ves. 97; followed in *Manning v. Purcell*, L. JJ., 6 Feb. 1854, B. 491; 7 D. M. & G. 55.

9. *Inquiry as to a Specific Devise, and whether accepted.*

"AN inquiry of what particulars the property comprised in the specific devise in the testator's will contained to the Plt H. during his life consists, and whether such devise has been, or is, accepted by him."—*Green v. Britten*, V.-C. B., 21 Dec. 1872, A. 2510; *S.C.*, 42 L. J. Ch. 187; 27 L. T. 811.

10. *Inquiry as to Plate and Jewels.*

"AN inquiry what part of the testator's plate and jewels were at his house, called &c., at the time of his death; And Declare, that the Plt is entitled to such plate and jewels, except the paraphernalia of the testator's wife; An inquiry of what such paraphernalia consisted."—*Barton v. B.*, 6 March, 1773.

11. *Inquiry as to Plate—Any lost to be valued.*

"AN inquiry of what particulars the plate mentioned in the indenture of settlement, dated &c., consisted at the date of such settlement, and whether any articles thereof have been sold or lost; and if so, what would have been the value of any such articles at the death of the testator, if the same had not been so sold or lost."—*Cardigan v. Curzon-Howe*, M. R., 8 March, 1870, A. 639.

For declarations that a brougham did not pass as household furniture, see *Hawes v. Prior*, M. R., 8 Nov. 1875, A. 1713; *S. C.*, Form 26, *inf.* p. 1617; and that plate passed as household goods, *Lilliott v. Compton*, L. C., 28 June, 1709, B. 423.

12. *Inquiry as to Stock meant.*

"AN inquiry whether the testatrix had standing in her name in the books of the Bank of England at the time of making her will, and of

her death, £1,000 (£5 p. c.) anns; And in case she had not such anns standing in her name at the respective times aforesaid, then what anns or stock the testatrix had standing in her name in the said books at the time of the making of her will, and of her death; and what anns or stock were meant by the testatrix by the description in the will of £1,000 (£5 p. c.) stock."—*Fardy v. Musto*, V.-C., 17 June, 1823, A. 2268.

13. *Direction for Delivery of Specific Bequests.*

"AND Let the Plt and the Deft, the exors, deliver over to the respective legatees the specific legacies given by the said will, or the proceeds of such of them as have been sold, after deducting the legacy duty payable in respect thereof."—*Sellon v. Watts*, V.-C. K., 1861, B. 1875; *S. C.*, 9 W. R. 847; 28 Beav. 579.

14. *Executors to Assign specifically bequeathed Leaseholds.*

"DECLARE that the leasehold premises &c., in the statement of claim mentioned, are now vested in the Defts, or some of them, in trust for the Plt, as legatee under the will of the testator; And Let the Defts assign to the Plt the said leasehold premises for the residue of the term now subsisting, free from the mortgage in the pleadings mentioned."—Defts to pay costs.—*Rendall v. Gardner*, Fry, J., 30 May, 1877, B. 1042.

15. *Widow to have the Use of Effects.*

AND Let the Deft, the widow, have the use and benefit of the said household goods, furniture, and plate during her life.

16. *Inventory to be made of Specific Effects given to Widow for Life.*

"LET an inventory be made in duplicate of the household furniture, implements of &c., household plate, linen, and china, belonging to the testator at the time of his death, given by him to the Deft for her life, in case she should so long continue his widow; And Let one part thereof, to be signed by the Deft, be deposited with —; And Let the other part thereof, to be signed by the Plt, be deposited in the Central Office, for the benefit of the parties interested in the said effects; And in case of the death or marriage of the said Deft, liberty to any person interested therein to apply."—See *Waddington v. W.*, M. R., 7 March, 1799, B. 621.

For like direction, with previous inquiry as to what the effects consisted of, see *Portus v. Street*, V.-C. K., 24 Feb. 1855, B. 486; with inquiry what

effects were necessary for the use of the widow: *Rayment v. R.*, V.-C. W., 4 May, 1872, B. 1451.

In an intestacy where the next of kin were infants, both parts were signed by the admors, and one retained by them, and the other deposited: *Warde v. Aldam*, M. R. at Chambers, 13 March, 1875.

17. *Like Direction, and Security to be given.*

LET an inventory be made in duplicate of the &c. (*specific effects*), the use and enjoyment whereof are given to the Deft W. during her life; And Let one part thereof to be signed &c. [Form 16, *sup.*]; And Let the said Deft give security for the due preservation of the said specific effects, to be approved &c.; And on her death—Liberty to apply.—See *Flower v. Walker*, L. C., 2 July, 1811, A. 1188.

18. *Like Direction—Heirlooms.*

“AND Let an inventory be taken of the several specific things mentioned in the testator’s will, and thereby directed to go as heirlooms with his estate at W.; And Let two parts be made thereof, and be signed by the Deft T.; And Let one part thereof be kept by him, and the other part deposited in the Central Office, for the benefit of the persons interested therein; And Let the said specific things be considered as heirlooms, and be from time to time enjoyed by the person who shall be in possession of the testator’s estate at W., so far as the same may by the rules of Law and Equity be so limited.”—*Davies v. Topp*, M. R., 25 Feb. 1780, A. 228; 1 Bro. C. C. 525.

19. *Heirlooms—Gift of, declared Void for Uncertainty.*

UPON motion for judgment &c., Declare that so much of the will of A. B., whereby the chattels and things in the said will mentioned are bequeathed as heirlooms upon trust, so that no person shall acquire an absolute interest in the same till the expiration of twenty-one years after the decease of all such persons as shall be in existence at the time of his (the testator’s) death, and afterwards attain the title of “Exmouth,” is inoperative for uncertainty, and the Plt is absolutely entitled to the chattels and things bequeathed as heirlooms under the said will.—*Viscount Exmouth v. Praed*, Fry, J., 3 March, 1883, A. 346; S. C., 23 Ch. D. 158.

20. *Executory Trust of Jewels bequeathed as Heirlooms.*

“DECLARE that a good executory trust was created by the will of the testatrix of the jewels and jewellery therein respectively bequeathed as

heirlooms, and that such trust ought to have been executed by the late S., and that E., the executrix of the said S., is now bound to execute such trust; And Declare that under such trust the said S. was entitled to the enjoyment of such jewels and jewellery during his life, and that the Plt is entitled to them during his life, and that upon the death of the Plt such jewels and jewellery will be held in trust for the eldest son of the Plt, if living at the decease of the Plt, the same to become a vested interest in such son when he shall attain the age of twenty-one years; but if he shall die in the lifetime of the Plt, or after the decease of the Plt, under that age, leaving an eldest son born before the Plt's decease, then in trust for such last-mentioned son, to be a vested interest when he shall attain the age of twenty-one years, and in case the said jewels and jewellery shall not become absolutely vested in any person under the limitations aforesaid, then subject to the life interest of the Plt in trust for the said S. absolutely."—*Shelley v. S.*, V.-C. W., 29 Feb. 1868, B. 980; S. C., 6 Eq. 540.

21. *Legatee not entitled to accept Part only.*

"DECLARE that the Plt H. could not accept one portion of the bequest of &c., in the said certificate mentioned, without accepting the other portions.—Declaration that Plt is liable to pay £—, the amount expended by the trustees on the park, and that he is entitled to the rents."—*Green v. Britten*, V.-C. B., 21 Dec. 1872, A. 2510; S. C., 42 L. J. Ch. 187; 27 L. T. 811.

22. *Declaration that Legacy not being specific was not adeemed.*

"DECLARE that the legacy of £— by the will of &c., bequeathed in favour of the Plts for the respective interests therein in the said will mentioned was a demonstrative legacy, and was not adeemed; and that the same is payable out of the money laid out at interest, invested in the funds, or otherwise secured at her death."—*Mytton v. M.*, V.-C. M., 8 June, 1875, B. 1374; S. C., 19 Eq. 30.

23. *Legacy payable out of Specific Fund.*

DECLARE that, according to the true construction of the will of the testatrix T., the £600 bequeathed by her said will for the purpose of restoring the parish church of W., ought to be paid out of the proceeds of the sale of the testatrix's diamonds before the same fall into residue.—*Re Tunno, Raikes v. R.*, Chitty, J., 4 June, 1890, B. 1144; S. C., 45 Ch. D. 66.

24. *Demonstrative Legacies to be paid out of the Fund provided, and the Balance out of the General Estate—Abatement—A Gift to each of the “Eight Children” of A., held a Gift to each of Nine.*

“DECLARE that each of the nine children of the Plt S., named in &c., instead of only eight as mentioned in the testator’s will, is entitled to the legacy of £100 with interest thereon at the rate of £4 p. c. per ann. from the 28th Nov. 1860, being the end of one year from the testator’s decease, and also that the said Plt is entitled to the legacy of £500 with like interest out of the produce of such of the L. & Y. Ry. stock as shall remain after providing the aforesaid £2,500 stock for the purposes of the Deft W.’s settlement as aforesaid; And Let the said exors, after deducting legacy duty, pay the same thereout accordingly; And Let, in case such stock shall not be sufficient to pay the whole of the said legacies, the same be paid rateably thereout so far as the same will extend; And Let the balance, if any, of such legacies be paid rateably with the general (pecuniary) legacies hereinafter directed to be paid out of the testator’s general estate; And, it being admitted by all parties that the testator’s estate is not sufficient to enable payment to be made in full of the several legacies given by the testator, Let the balance or residue of the testator’s estate after such payment and transfer as aforesaid be applied rateably in payment of the legacies given by the testator’s will for which no specific fund has been appropriated, together with interest thereon at the rate and from the time aforesaid, and any balance of the aforesaid legacies for which the funds respectively appropriated are insufficient; And Let the said Plt and Deft, the exors, pay and deduct the legacy duty payable in respect of such legacies or the amounts apportioned in respect thereof respectively and pay the amounts thereof, and then, subject as hereinafter mentioned, pay or apply the amounts apportioned in respect of such legacies to or for the benefit of the persons respectively entitled thereto, amounts of dividends if any to be certified. But the exors are to retain any of such sums that shall be payable to legatees who are or appear to be indebted to the testator’s estate until further order.”—*Sellon v. Watts*, V.-C. K., 19 Aug. 1861, B. 1875; S. C., 28 Beav. 579; 9 W. R. 847.

25. *Donatio Mortis Causâ.*

DECLARE that the deposit note of the L. & W. Bank, dated &c., deposited with the said bank by the testator D., and the interest accrued thereon, were effectually given by the testator to the Deft N. as a *donatio mortis causâ*.—Defts to pay Plt’s costs.—*Re Dillon, Duffin v. Duffin*, Kekewich, J., 5 Dec. 1889, A. 1676; S. C., Court of Appeal, 14 Feb. 1890, 44 Ch. D. 76.

26. *Donatio Mortis Causâ—Secret Trust.*

“DECLARE that there was a valid and binding *donatio mortis causâ* by the testatrix of the £264 : 15s. 8d. cash, and of the three certificates

each for 1,000 gulden Dutch 2½ p. c. Government stock, and of the jewellery in the pleadings respectively mentioned, and that the same did not form part of the personal estate of the testatrix at the time of her death; And Let the Plts (*the exors*) pay the said cash and deliver up the said three certificates to the Deft S., so far as regards the said certificates, as trustees for the persons named on the envelopes mentioned in the answer of the Defts."—And the Plts by their counsel submitting to account.—Usual admon accounts.—*Hawes v. Prior*, M. R., 8 Nov. 1875, A. 1713.

NOTES.

SPECIFIC AND DEMONSTRATIVE BEQUESTS.

For a definition of a specific legacy, see *Robertson v. Broadbent*, 8 App. Ca. 812; *Wms. Exors.* 1019 *et seq.*

Though a legacy of a given sum of consols remains unsatisfied by reason of an admon suit, and consols rise, the amount must still be purchased: *Auther v. A.*, 13 Sim. 439; and in *Hyde v. Neate*, 15 Sim. 558, where a debtor claiming the debt as a legacy had to pay the amount into Court, and it was invested; afterwards, his claim having succeeded, he had to bear the loss from a fall; and see *Taylor v. Waters*, 1 My. & C. 266; *Re Smith*, 9 Beav. 342.

Stock ordered to be, but not purchased, did not pass under a bequest of all stock: *Thomas v. T.*, 27 Beav. 537; 29 L. J. Ch. 281.

A *feme covert's* debts were payable out of a fund she had power to appoint, before a specific legacy of separate savings: *Laing v. Cowan*, 24 Beav. 112.

As to the power of exors to transfer specific bequests of stock, see 8 & 9 V. c. 97.

Under a gift of "two houses in K. street," where the testator had three such houses, the legatee was entitled to elect which two he would take: *Tapley v. Eagleton*, 12 Ch. D. 683; and see *Re Cheadle, Bishop v. Holt*, (1900) 2 Ch. 620, C. A.

A devise of freehold houses will not carry a house subsequently sold and reconveyed to the testator by way of mortgage: *Re Clowes*, (1893) 1 Ch. 214, C. A.

A specific devise of two houses of which testatrix was in possession as mortgagee was held to pass the mortgage debt: *Re Carter, Dodds v. Pearson*, (1900) 1 Ch. 801.

Leaseholds specifically bequeathed vest absolutely upon the exor's assent without any deed of assignment: *Re Culverhouse*, (1896) 2 Ch. 251.

A gift of a testator's plate to trustees upon trust to permit his widow to have and appropriate absolutely to herself such parts thereof as she should signify in writing her desire to possess, was a gift of the whole of the plate: *Arthur v. Mackinnon*, 11 Ch. D. 385.

As to distribution of specific articles by exors under a discretionary direction, see *Davis v. D.*, 1 H. & M. 255.

As to renewing the term after a specific bequest of a lease, see 1 Jarm. W. 292.

Where it is impossible to ascertain which of several properties of the testator is intended to pass, the gift must fail for uncertainty: *Asten v. A.*, (1894) 3 Ch. 260; and see *Re Cheadle, Bishop v. Holt*, (1900) 2 Ch. 620, C. A.

A recital of indebtedness, though accompanied by a direction to pay, will not *per se* operate as a gift, but it may do so if aided by surrounding circumstances: *Re Rowe, Pike v. Hamlyn*, (1898) 1 Ch. 153, C. A.

A bequest of money to be laid out in planting trees on an estate of which the testator was tenant for life must be taken to be for the benefit of those entitled to the estate: *Re Bowes, E. Strathmore v. Vane*, (1896) 1 Ch. 507.

[*Gift cum onere.*].—Leaseholds given to *femes covert* and infants were sold as a *damnosa hæreditas*, and a tenant for life who had declined the property in

specie was nevertheless entitled to the income of the purchase-money: *Lonsdale v. Berchtoldt*, 3 K. & J. 185.

A legatee of a *damnose* leasehold and an annuity could not take the annuity and reject the lease: *Talbot v. E. Radnor*, 3 My. & K. 254; nor can one part of a bequest be taken without the other: *Green v. Britten*, 42 L. J. Ch. 187; 27 L. T. 811; Form 21, *sup.* p. 1616; *Guthrie v. Walrond*, 22 Ch. D. 573; *Re Hotchkys*, *Freke v. Calmady*, 32 Ch. D. 408, C. A.; and see *Messenger v. Andrews*, 4 Russ. 478; and a tenant for life of estates settled by will is bound to keep down interest on charges on the several parts of the estate out of the income of the whole: *Frewen v. Law Life Assurance Soc.*, (1896) 2 Ch. 511, observing upon *Syer v. Gladstone*, 30 Ch. D. 614. But in general a legatee may take one gift and reject another: 1 Jarm. W. 422; *Moffett v. Bates*, 3 Sm. & G. 468, *et sup.* p. 1528; *Re Hotchkys*, *sup.*; *Syer v. Gladstone*, 30 Ch. D. 614; and it is a question of intent on the whole will; *Warren v. Rudall*, 1 J. & H. 1, 10; 6 Jur. N. S. 395; and where successive interests are given with a condition imposed—*e.g.*, to repair—a devisee who accepts the estate comes under a personal liability capable of being enforced in equity: *Re Williams, Andrews v. W.*, 52 L. T. 41; 54 L. T. 105.

A trust for payment of "debts" does not operate to relieve the residuary legatee from a liability in respect of worthless leaseholds forming part of the residue: *Hawkins v. H.*, 13 Ch. D. 470, C. A.; but a legatee who accepts a bequest which is expressed to be "subject to the testator's debts, funeral and testamentary expenses," does not thereby become personally liable to pay the debts, &c.: *Re Cowley, Souch v. C.*, 53 L. T. 494.

An authority to exors to sell testator's business to A., on his giving his bond for the purchase-money, became, on A.'s election to take it, a specific bequest subject to the bond being given: *Fryer v. Ward*, 11 W. R. 104; 9 Jur. N. S. 164; 32 L. J. Ch. 433.

*Specific or Residuary (Gift).—*A residuary gift may contain a specific bequest as to part: *Mills v. Brown*, 21 Beav. 1; *Re Fleetwood, Sidgreaves v. Brewer*, 15 Ch. D. 594; but see *Re Tootal, Hunkin v. Kilburn*, 2 Ch. D. 628.

Sect. 24 of the Wills Act, providing that the will shall speak from the death, does not conclude any question as to whether particular property passes by a specific or residuary devise: *Re Portal and Lamb*, 30 Ch. D. 50, C. A.

A gift of the whole personalty, "together with" specified articles, is not specific: *Fairer v. Park*, 3 Ch. D. 309; nor is a gift of "all I have power over, namely," certain specified articles: *Re George, King v. G.*, 4 Ch. D. 435; 5 Ch. D. 627, C. A.

And a general gift of personal estate is not specific because certain property specifically described (*e.g.*, money, or securities for money) is excepted from it: *Robertson v. Broadbent*, 8 App. Ca. 812; *S. C.*, 20 Ch. D. 676, C. A. (nom. *Re Ovey, Broadbent v. Barrow*).

A gift with an exception of certain legacies is none the less residuary: *Blight v. Hurnall*, 23 Ch. D. 218, C. A.; *Robertson v. Broadbent*, 8 App. Ca. 812.

The expression "residuary legatee" will not, *proprio vigore*, extend to real estate: *Gethin v. Allen*, 23 L. R. Ir. 236.

The general residue has been held to pass under a gift of "the whole residue of money, except such things as after mentioned:" *In the goods of White*, 7 P. D. 68;

— "The money of which I am possessed:" *Re Cadogan, C. v. Palagi*, 25 Ch. D. 154;

— "All personal estate and effects," &c., "which should not consist of money, or securities for money:" *Robertson v. Broadbent*, 8 App. Ca. 812;

— *Secus*, "such money, stocks, funds, or other securities not hereafter specially devised, as I may die possessed of:" *In the goods of Aston*, 6 P. D. 203.

An erroneous recital that the testatrix has settled property on A. will not prevent it from passing to X. as residue: *Re Bagot, Paton v. Ormerod*, (1893) 3 Ch. 348, C. A.

For a case in which works of art specifically bequeathed to persons predeceasing the testator were held to pass as particular residue and not as general residue, see *McKay v. M.*, (1900) 1 I. R. 213.

A devise of all other freshholds is a good "residuary devise" within sect. 25 of the Wills Act (1 V. c. 26): *Re Mason, Ogden v. M.*, (1901) 1 Ch. 619, C. A.

Specific or Demonstrative Gift.—A gift of a specific sum, part of a larger sum, of consols, "or a sum equal thereto," was held specific, and was adeemed by the sale of the consols: *Oliver v. O.*, 11 Eq. 506; but see *Bumpus v. B.*, W. N. (74) 19; 29 L. T. 800. The rule is that a legacy of stock out of stock is specific, but a money legacy out of stock is demonstrative: *Mullins v. Smith*, 1 Dr. & S. 204; *Davies v. Fowler*, 43 L. J. Ch. 90; but see *Collyer v. Ashburner*, 2 D. & S. 404.

A gift of "the sum of £3,000 invested in," &c., is demonstrative: *Mytton v. M.*, 19 Eq. 30; Form 22, *sup.* p. 1616; but see *Re Pratt, P. v. P.*, (1894) 1 Ch. 491, where a legacy of "£800 invested in 2½ consols" was held specific and not demonstrative.

A pecuniary bequest to be paid out of a sum of which testatrix was only tenant for life, was demonstrative: *Cunliffe v. C.*, 23 W. R. 724.

Demonstrative legacies, if the fund fails, are payable from the general assets, and do not abate with general legacies if the assets are deficient: *Tempest v. T.*, 7 D. M. & G. 473; except as to the surplus after exhausting the special fund: *Sellon v. Watts*, 9 W. R. 847, Form 24, *sup.* p. 1617.

Property passing by Gift; Particular Expressions.—A direction to pay debts, including "£300 owing by me to my daughter," to whom only £150 was due, did not entitle her to more than the £150: *Wilson v. Morley*, 5 Ch. D. 776.

A gift of "the interest of £4,500 money in the funds" was a specific legacy of a sum of about £4,000 consols: *Page v. Young*, 19 Eq. 501. So, also, a gift of "all those my 7,000 dollars:" *Palin v. Brooks*, 48 L. J. Ch. 191; 26 W. R. 876.

The word "effects," aided by a special context, may carry real estate: *Hall v. H.*, (1891) 3 Ch. 389.

"All estates and effects" in Mauritius carried debts due from debtors in Mauritius: *Guthrie v. Walrond*, 22 Ch. D. 573.

As to "household effects," see *Re Bourne, B. v. Brandreth*, 58 L. T. 537; "furniture, goods, and chattels," *Manton v. Tabois*, 30 Ch. D. 92.

As to the meaning to be attributed to the expression "property not actually producing income," see *Re Hubbuck, Hart v. Stone*, (1896) 1 Ch. 754, C. A.

My "desk and its contents" passed promissory notes and other choses in action: but a key found in the desk did not confer any title on the legatee to the contents of the box to which the key belonged: *Re Robson, R. v. Hamilton*, (1891) 2 Ch. 559, explaining *Re Prater, Desinge v. Beare*, 37 Ch. D. 481, C. A.

"Real estates" did not pass leaseholds for years: *Butler v. B.*, 28 Ch. D. 66.

"Money" was held to pass all stocks and investments for money, but not general residue: *Hart v. Fernandez*, 52 L. T. 217; *secus*, "the money of which I am possessed:" *Re Cadogan, C. v. Palagi*, 25 Ch. D. 154; but see *Re Greaves' Settlement*, 23 Ch. D. 313; and see *Re Egan*, (1899) 1 Ch. 688, where "money which may be in my possession" was held to pass a reversionary interest in personality.

A gift of "securities for money" will not, in the absence of a clear context, carry shares: *McDonnell v. Morrow*, 23 L. R. Ir. 591; but included money due to a testator in respect of which he had a vendor's lien: *Callow v. C.*, 42 Ch. D. 550, doubting *Gould v. Teague*, 7 W. R. 84; 5 Jur. N. S. 116; and consols, promissory notes, and railway debenture stock: *Re Beavan, B. v. B.*, 53 L. T. 245; and a bequest of securities, except "real securities," carried mortgages of turnpike-road tolls and tolls with toll-houses: *Cavendish v. C.*, 30 Ch. D. 227, C. A.

"Shares" will not carry debenture stock: *Re Bodman, B. v. B.*, (1891) 3 Ch. 135; but a gift of shares in two specified railway cos. was held to pass debenture stock in each, the testatrix having no shares: *Re Weeding, Armstrong v. Wilkin*, (1896) 2 Ch. 364; and a gift of "debenture stock or shares" in a specified co. was held to pass debentures: *Re Nottage, Jones v. Palmer*, (1895) 2 Ch. 657, C. A. (and to be specific, there being a reference to the continuance of them in their present state of investment: *S. C.*); and a gift of testator's share in a partnership carried a debt due to him from the firm: *Re Beard, Simpson v. B.*, 57 L. J. Ch. 887.

As to the effect of a gift of "stock standing in my name," see *Re Parrott, P. v. P.*, 53 L. T. 12.

A gift of "farming stock" passed growing crops: *Re Roose, Evans v. Williamson*, 17 Ch. D. 696.

Under a devise of a freehold estate which was afterwards sold by the testator, who took a mortgage on it for part of the purchase-money, nothing passed to the devisee: *Re Clowes*, (1893) 1 Ch. 214.

A devise of lands in a particular county will not pass money which is liable to be laid out in land in any county: *Re Duke of Cleveland's Settled Estates*, (1893) 3 Ch. 244, C. A.

A gift of the lease of the house in which testator should be living at his death did not carry a freehold house subsequently acquired: *Re Knight, K. v. Burgess*, 34 Ch. D. 518; but see *Saxton v. S.*, 13 Ch. D. 359.

A gift of such part of testator's residuary estate as may by law be given to charity is not to be taken as confined to such part as may be so given at the date of the will: *Re Bridger, Brompton Hospital v. Lewis*, (1894) 1 Ch. 297, C. A.

For cases as to what passes under a bequest of goods, &c., "in and about" a house, &c., see *Wms. Exors. 1191*; *Rawlinson v. R.*, 3 Ch. D. 302; *Lane v. Sewell*, 43 L. J. Ch. 378; *Theobald*, 142, 143, 181.

As to after-acquired property passing under a devise of freeholds, see *Cave v. Harris*, 57 L. J. Ch. 62; 57 L. T. 768; 36 W. R. 182; *Re Portal and Lamb*, 30 Ch. D. 60, C. A.; *Re Champion, Dudley v. C.*, (1893) 1 Ch. 101.

*Dividends or Income passing by (gift).—*Specific legacies carry dividends from the death; general and demonstrative legacies bear interest from a year after the death: *Mullins v. Smith*, 1 Dr. & S. 204, *et sup.* p. 1510.

A specific legatee of shares is entitled to all dividends (*Wright v. Warren*, 4 D. & S. 367) and bonuses accruing after the death, although produced by payments made to the co. out of the general estate on account of defalcations of the testator: *Maclaren v. Stainton*, 3 D. F. & J. 202, reversing *S. C.*, 27 Beav. 460; but a bonus declared before the death went to the general estate: *Lock v. Venables*, 27 Beav. 598; and see *Clayton v. Gresham*, and other cases, *inf.* p. 1691.

The income of a specific bequest is, in general, apportionable under the Apportionment Act, 1870; *Pollock v. P.*, 18 Eq. 329, explaining *Whitehead v. W.*, 16 Eq. 528; *Constable v. C.*, 11 Ch. D. 681; and the Act applies also to specific devises: *Hasluck v. Pedley*, 19 Eq. 271; and to every will executed before and confirmed by a codicil after the passing: *Constable v. C.*, 11 Ch. D. 681; and to occasional, as well as periodical, payments of surplus profits: *Re Griffith, Carr v. G.*, 12 Ch. D. 655; *et v. inf.* pp. 1768, 1769.

But where the gift was to a tenant of rents "due and owing" from him at the testator's death, the Act did not apply so as to entitle the tenant to apportionment down to the day of the death: *Re Lucas, Parish v. Hudson*, 55 L. J. Ch. 101; 54 L. T. 30; and so where the "whole of the income derived" from shares was expressly given: *Re Meredith, W. N.* (98) 48; 67 L. J. Ch. 409; and where the testator declared that the shares should carry the dividend accruing thereon at his death: *Re Lysaght, L. v. L.*, (1898) 1 Ch. 115, C. A.

Incidence of Charges, &c.—A specific legatee of chattels is entitled to have any charges upon them, not being charges "incident to the property, as in the case of rent on leaseholds, or calls payable on railway shares," paid out of the general assets: *Bothamley v. Sherson*, 20 Eq. 304, 316; *Knight v. Davis*, 3 My. & K. 358; and, on the other hand, is liable to indemnify the exors and persons entitled to the residue against calls on shares, and other payments chargeable on his specific legacy: *Gribble v. Tucker*, Form 7, *sup.* p. 1527.

But though in *Blount v. Hipkins*, 7 Sim. 51, and *Wright v. Warren*, 4 D. & S. 367, specific legatees of railway shares were held entitled to have subsequent calls paid out of the general estate, according to *Armstrong v. Burnet*, 20 Beav. 424; *Day v. D.*, 1 Dr. & S. 261; 6 Jur. N. S. 365, and *Addams v. Ferick*, 26 Beav. 384, this only applies to calls made before the death; but any payments remaining to be made after the death to make the testator a complete shareholder must be paid out of the general estate: *Day v. D.*, *sup.*

Fines falling due after testator's death in respect of leases for lives were payable by the specific legatees, but not those due before his death: *Fitzwilliam v. Kelly*, 10 Ha. 266; and, as to head-rents, see *Barry v. Harding*, 1 J. & Lat. 475; and fines payable on renewal of leases which testator had

covenanted to renew and pay, came out of the general estate: *Trail v. Jackson*, 25 W. R. 802.

For notes as to what is such a specific gift as to entitle the tenant for life to the income in specie, *v. inf.* p. 1688 *et seq.*

For notes as to what is income and what is capital as between tenant for life and remainderman, see Chap. XLV., "SETTLEMENT," p. 1694.

As to estate duty in respect of leaseholds specifically bequeathed being payable out of the general personal estate, see *Re Culverhouse*, (1896) 2 Ch. 261, *sup.* p. 1408.

ADEEMPTION OF SPECIFIC BEQUESTS.

A specific legacy is adeemed if after the will the subject-matter of it is extinguished, altered, or disposed of, so as not to be the same in specie at the death, as where a debt which is bequeathed is paid, stock sold, or a gold chain made into a gold cup: see *Ashburner v. Macguire*, 2 Bro. C. C. 108; 1 L. C. Eq. 780; Wms. Exors. 1183.

Thus, a gift of debentures is adeemed by a subsequent conversion of them, under an option, into debenture stock: *Re Lane, Luard v. Lane*, 14 Ch. D. 856.

Or a gift of a specified mortgage belonging to the testator by payment off of the mortgage debt: *Re Bridle*, 4 C. P. D. 336; *Slade v. Walpole*, 61 L. T. 497.

And a gift of the testator's interest in an estate by a compulsory purchase of it by a public body: *Manton v. Tabois*, 30 Ch. D. 92.

But an appointment of a specified fund is not adeemed by a mere subsequent change of investment of the fund, though made with the concurrence of the appointor: *Re Johnstone's Settlement*, 14 Ch. D. 162; *Willett v. Finlay*, 29 L. R. Ir. 156; and *cf. Re Kenyon's Estate, Mann v. Knapp*, 56 L. T. 626; and see *Re Vickers, V. v. Mellor*, W. N. (99) 242. Nor a specific gift of shares in a co. by the amalgamation of the co. with another under a scheme preserving existing rights: *Re Loveman, Watson v. W.*, 48 L. J. Ch. 565.

The adeemption must be the act or with the privity of the testator himself, not, *e.g.*, by the act *suo motu* of a committee in lunacy: *Re Larking, L. v. L.*, 37 Ch. D. 310; and in general a specific gift will not be adeemed or increased by transfers under orders in lunacy, and in the admon of a lunatic's estate the Chancery Division will, so far as possible, provide for the preservation of the rights of legatees: *Re Wood, Anderson v. London City Mission*, (1894) 2 Ch. 577. But see *Re Freer, F. v. F.*, 22 Ch. D. 623, where conversion of the stock of a lunatic under an order in lunacy was held to adeem a specific gift of it contained in the lunatic's will.

Adeemption was rebutted by the mode of dealing with the funds: *Clarke v. Brown*, 2 Sm. & G. 524; *sed v. contra, Re Lane, Luard v. Lane*, 14 Ch. D. 856; *Harrison v. Jackson*, 7 Ch. D. 339.

A release by will of the interest on a debt is a specific bequest of it, and is adeemed by the debt being paid off, although at the death subsequent loans are due: *Sidney v. S.*, 17 Eq. 65; a release of debts did not include any subsequently contracted: *Everett v. E.*, 7 Ch. D. 428.

A specific bequest of leaseholds was adeemed by the testator's agreeing to sell them to a railway co. under a notice to treat, but the income from the death to the completion of the purchase went to the legatee: *Watts v. W.*, 17 Eq. 217; but an informal contract not binding on the testator does not work an adeemption: *Croue v. Menton*, 28 L. R. Ir. 519.

A devise of an Irish advowson was adeemed by the Irish Church Act, 1869 (32 & 33 V. c. 42): *Frewen v. F.*, 10 Ch. 610.

A gift of the property derived from A. is not adeemed by an alteration in its investment: *Morgan v. Thomas*, 25 W. R. 760.

A general gift of shares in a banking co., which was subsequently during the testator's lifetime reconstituted as respects the liability of the shareholders and the denomination and character of the shares, was held to fail for uncertainty: *Re Gray, Dresser v. G.*, 36 Ch. D. 205.

As to adeemption of appointed property by subsequent dealing therewith, see *Re Dowsett, D. v. Meakin*, (1901) 1 Ch. 398.

LAPSE.

Under a gift to a class and a named individual there was no lapse by the death of the individual before the testator, where the will showed an intention that the residuary legatees living at the testator's death should alone take: *Re Featherstone's Trusts*, 22 Ch. D. 111.

And where the gift was to named persons, and a class of persons "living at the date" of the will, but which class did not, in fact, exist, there was no lapse: *Re Spiller, S. v. Madge*, 18 Ch. D. 614.

If a share is given to a person on a contingency which does not happen, the fact that such share is settled by the will will not necessarily prevent lapse: *Re Roberts, Tarleton v. Bruton*, 30 Ch. D. 234, C. A.; *Re Whitmore*, W. N. (01) 146.

Where a father devised land to his son, and the son predeceased, having devised all his property to the father, it was held, under sect. 33 of the Wills Act, that the gift of the land in the will of the son failed by lapse, and his heir-at-law took: *Re Hensler, Jones v. H.*, 19 Ch. D. 612.

The section does not apply to an appointment under a special power: *Holyland v. Lewin*, 26 Ch. D. 266, C. A. (disapproving *Freme v. Clement*, 18 Ch. D. 499); nor a gift to a class: *Re Stansfield*, 15 Ch. D. 84; Wms. Exors. 9th ed. 1086; though in fact the class consists of a single individual: *Re Harvey, H. v. Gillow*, (1893) 1 Ch. 567; *Olney v. Bates*, 3 Drew. 319; *Browne v. Hammond*, Joh. 210.

APPLICATION OF SPECIFIC DEVISES AND BEQUESTS FOR PAYMENT OF DEBTS.

Specific bequests are liable to contribute rateably with specific and residuary devises to the payment of the testator's debts: *Lancaster v. Iggulden*, 10 Ch. 136, and other cases *inf.* p. 1673; and the respective values for the purpose of contribution are to be ascertained at the testator's death: *Id.*; *Fielding v. Iveston*, 1 D. & J. 438; *Long v. Short*, 1 P. Wms. 403, n.; *Re Saunders-Davies, S. v. S.*, 34 Ch. D. 482; *Re Bawden, National Provincial Bank of England v. Cresswell*, (1894) 1 Ch. 693.

Although no part of the estate can be exempted from payment of debts, the Court, in its ordinary judgments for the general admon of a testator's personal estate, directs at first only an account of the personal estate not specifically bequeathed: see *Clarke v. E. Ormond*, Jac. 115; *D. Devonshire v. Atkins*, 2 P. Wms. 382. In a creditor's suit, the judgment usually directs an account of the personal estate without any exception: Form 1, *sup.* p. 1390. A specific legacy was not discharged from its liability, though the general personalty was more than enough, and the specific legacy had been given by the exor to the legatee: *Davies v. Nicolson*, 2 D. & J. 702, *et sup.* p. 1609.

Where specific legacies have been possessed or retained by the legatees with the exor's consent, he will, on a deficiency of assets, be charged with the value and interest at £4 p. c.: *Spode v. Smith*, 3 Russ. 511; and contribution directed among specific legatees to pay debts and costs becoming deficient by the insolvency of some, a fresh contribution was directed among the solvent: *Conolly v. Farrell*, 10 Beav. 142; *Re Peerless*, W. N. (01) 151.

Specific bequests given expressly subject to the payment of debts were primarily liable: *Webb v. De Beauvoisin*, 31 Beav. 573.

Costs having been paid out of a specific legacy in the legatee's absence, leave was given to him to surcharge and falsify: *Waltrond v. W.*, 29 Beav. 586.

For notes as to the position of specific bequests in the order of admon of assets, *v. inf.* Sect. XXIX. p. 1673.

HEIRLOOMS.

Where goods were given for life only, the rule was, that the life tenant should give security that they should not be "imbeziled": *Bill v. Kinaston*, 2 Atk. 82; and see *Bracken v. Bentley*, 1 Ch. Rep. 59 [110].

The method now is, for an inventory to be signed by the tenant for life, and to be deposited in Court for the benefit of all parties: Forms 16 to 18, *sup.* pp. 1614, 1615; *Bill v. Kinaston, sup.*; and see *Leeke v. Bennett*, 1 Atk.

471; *Richards v. Baker*, 2 Atk. 321; *Foley v. Burnell*, 1 Bro. C. C. 279; *Temple v. Thring*, 56 L. J. Ch. 767.

Where the property is in danger, security will be required: *Foley v. Burnell*, *sup.*; *Conduitt v. Soane*, 1 Col. 235; *Ellis v. Maxwell*, 12 Beav. 104; *Temple v. Thring*, 56 L. J. Ch. 767; pending an appeal to the House of Lords, the chattels were to be given up to the person held by the L. C. to be entitled to them, on his undertaking not to sell or injure them: *Harrington v. H.*, 3 Ch. 575; or a receiver may be appointed: *E. Shaftesbury v. D. Marlborough*, *sup.* Vol. I. p. 768.

Where trustees allowed the tenant for life to retain heirlooms, and owing to his negligence they were taken in distress for rent, the trustees were entitled to retain the income until the loss to the estate was made good: *Re Hope, De Cetto v. H.*, W. N. (00) 76.

As to heirlooms annexed to a dignity, see *Rowland v. Morgan*, 6 Ha. 463.

A bequest of chattels to a peer and his successors, "to be enjoyed with and to go with a title," is not sufficient to create an executory trust, or an obligation binding on the legatee; *secus*, a gift to trustees, to be held and settled as heirlooms and to go with the title: *Re Johnston, Cockerell v. Essex*, 26 Ch. D. 538.

A mere request that chattels shall be left as "heirlooms" is not sufficient to create a precatory trust: *Hill v. H.*, (1897) 1 Q. B. 483, C. A.

And a bequest of a silver cup to "Lord S. and his heirs" lapses by the death of the existing Lord S. in the lifetime of the testator: *Re Whorwood, Ogle v. Lord Sherborne*, 34 Ch. D. 446, C. A.

As to giving or settling chattels as heirlooms, or to go with the realty, so far as the rules of law or equity admit, and under trusts executed or executory, and so as to vest absolutely only in the first tenant in tail in possession, and for the code of law, and a review of the cases, and the practice of conveyancers, see *Harrington v. H.*, L. R. 5 H. L. 87; *Re Johnson*, 2 Eq. 716; *Christie v. Gostling*, L. R. 1 H. L. 279; *Martelli v. Holloway*, L. R. 5 H. L. 532; *Montagu v. Inchiquin*, 23 W. R. 592; 32 L. T. 427; *Re Cresswell, Parkin v. C.*, 24 Ch. D. 402; and as to heirlooms settled with no real estate to guide the limitations, see *Shelley v. S.*, 6 Eq. 540, Form 20, *sup.* p. 1615; *L. Scarsdale v. Curzon*, 1 J. & H. 40; *Hogg v. Jones*, 32 Beav. 45; and that heirlooms to be enjoyed by the person entitled to the "actual possession" of the settled estate do not vest absolutely in a tenant in tail who predeceases the tenant for life: *Re Angerstein, A. v. A.*, (1895) 2 Ch. 883.

Where heirlooms are subject to a strict settlement, the Court has no jurisdiction to order a sale of them, though for the benefit of all parties: *D'Eyncourt v. Gregory*, 3 Ch. D. 635; unless for the payment of debts: *Fane v. F.*, 2 Ch. D. 711; but see *Lonsdale v. Berchtoldt*, 3 K. & J. 185, *et sup.* p. 1615.

Where a will showed a governing intention to unite chattels and money to a devised estate, a subsequent codicil altering the devolution of the estate, but not referring specifically to the chattels, was held not to vary such intention: *Re Towry's Settled Estate, Dallas v. T.*, 41 Ch. D. 64, C. A.

And see *inf.* p. 1724; *Peachey, Sett.* 119 *et seq.*; *Vaizey, Sett.* 1327 *et seq.*; *Wms. on Exors.* 633.

FIXTURES.

Tapestries affixed to walls of a house for purpose of ornament by the tenant for life are removable by his exor, but he must pay for damage done in the removal: *Re De Falbe*, (1901) 1 Ch. 523, C. A., distinguishing *Norton v. Dashwood*, (1896) 2 Ch. 497.

DONATIO MORTIS CAUSÂ.

As to *donatio mortis causâ*, and wherein it resembles and wherein differs from a legacy, see *Wms. on Exors.* 787; 9th ed. 681; *Roper on Legacies*, 1.

A *donatio mortis causâ* of the donor's cheque to bearer not presented in his lifetime appears to be invalid: *Rolls v. Pearce*, 5 Ch. D. 730; *secus*, a cheque to order: *S. C.*; but see *Re Dillon, Duffin v. D.*, 44 Ch. D. 76, C. A.; but cheques which the donor has received for value, though not indorsed, stand on the same footing as a promissory note or bill of exchange, and may be validly given *mortis causâ*: *Clement v. Cheesman*, 27 Ch. D. 631; *Veal v. V.*, 27 Beav. 303; *Re Mead, Austin v. M.*, 15 Ch. D. 651.

A banker's deposit note is a good subject of a *donatio mortis causâ*: *Re Dillon, Duffin v. D.*, *sup.*; *Cassidy v. Belfast Banking Co.*, 22 L. R. Ir. 68; *Re Farman, F. v. F.*, 57 L. J. Ch. 637; 58 L. T. 12; *Re Taylor, T. v. T.*, 56 L. J. Ch. 597; and see *Re Griffin*, (1899) 1 Ch. 408; but not if coupled

with an instrument of a testamentary character showing an intention to retain the dominion during life: *Re Dash*; *Treasury Solicitor v. Lewis*, (1900) 2 Ch. 812; 69 L. J. Ch. 833; and so where it was accompanied with a cheque to bearer for a part only of the money, and undorsed, so that there was no intention to give the note, but only the cheque, the gift was incomplete: *Re Mead, Austin v. M.*, 15 Ch. D. 651; *secus*, where the cheque was for the full amount: *Re Dillon, sup.*

An I O U cannot be the subject of a *donatio mortis causâ*: *Duckworth v. Lee* (1899), 1 Ir. R. 405, C. A.

A *donatio mortis causâ* may be established on the sole evidence of the donee, if that evidence appears trustworthy: *Re Farman, sup.*; *Re Dillon, sup.*; *Re Griffin, sup.*

An antecedent delivery *alio intuitu* to the donee is sufficient: *Cain v. Moon*, (1896) 2 Q. B. 283.

An imperfect testamentary instrument cannot be made effectual by treating it as a *donatio mortis causâ* or an immediate assignment: *Re W. Hughes*, W. N. (88) 167; 59 L. T. 586; 36 W. R. 821.

SECTION XXIII.—ANNUITIES AND RENT-CHARGES.

1. *Stock to be set apart to answer Annuity.*

LET the fund in Court be dealt with as directed in the Schedule hereto (the interest on the New Consols thereby directed to be carried over being sufficient to answer the annuity of £50 given to P. R. by the will of the testator): And upon the death of P. R. any persons interested in the said New Consols are to be at liberty to apply concerning the same as they may be advised.

[*Insert in Payment Schedule as under.*]

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Carry over New Consols	The account of P. R., the annuitant, <i>if so</i> , subject to duty.		
Out of interest on such New Consols—			
Pay, <i>if so</i> , subject to duty on the — day of — and the — day of — in every year during the life of payee or until further order, the first payment to be made on the — day of —, 1901.	P. R. of &c.		

For order providing for contingent annuity for life of future wife of the testator's son, see *Aaron v. A.*, 9 Ha. 821.

For declaration that annuity fund ought to be invested in consols, and inquiry what parts of the estate should be converted for that purpose, the trustees under the will having a discretion in that respect, but submitting to act under the direction of the Court, see *Prendergast v. Lushington*, 5 Ha. 176; and see *Jones v. J.*, *Ib.* 464.

2. *Appropriated Fund declared to sink into Residue.*

AND Declare that the funds so appropriated to answer the said several annuities will, on the deaths of the said respective annuitants, fall into and form part of the general residue of the testator's personal estate.

3. *Cash to be invested to meet Annuity.*

It is ordered that the funds in Court be dealt with as directed in the Schedule hereto (the interest on the New Consols thereby directed to be purchased being sufficient to answer the annuity of £50 given to P. R. by the will of the testator).

[Insert in Payment Schedule as under.]

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Invest in New Consols cash sufficient, at the bank average price on the — day of —, 1900, to purchase £— New Consols out of interest to accrue on such New Consols.	The account of P. R., the annuitant, if so, subject to duty.		
Pay &c. [follow Form 1 to end]	P. R. of &c.	25 0 0	

4. *Investing Legacy for Life.*

It is ordered that the funds in Court be dealt with as directed in the Schedule hereto [the sum of £— cash (part of the £— cash in Court to the credit mentioned in the said Schedule) being the sum the interest whereof is given by the testator's will to P. R. for life].

[*Insert in Payment Schedule as under.*]

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Invest Cash in New Consols	The life interest and account of P. R., <i>if</i> <i>so</i> , subject to duty.		
Pay interest as it accrues on such New Consols during life of payee or further order, <i>if so</i> , subject to duty.	P. R. of &c.		

5. *Value to be set on Annuity.*

AND it is ordered that the fund in Court be dealt with as directed by the Schedule hereto, and in case P. R., the annuitant, shall come in and consent to have a value set on the annuity of £—, given to him by the will of the testator ; It is ordered that a value be set thereon, and that the fact of the said P. R. having come in and consented, or not, as the case may be, and (if the former case) the value of such annuity, be certified.

[*Insert in Payment Schedule as under.*]

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
In case P. R., the annuitant in the order mentioned, shall come in and consent as in the order mentioned (the fact to be certified).		.	.
Out of cash pay, <i>if so</i> subject to duty, the amount to be certified to be the value of the annuity of £— in the order mentioned, or in case the said P. R. shall not come in and consent as above (the fact to be certified).	P. R. of &c.		
Invest sufficient cash in New Consols as at the Bank average price on the — day of —, 1900, will purchase £— New Consols.	The account of P. R., the annuitant, <i>if so</i> , subject to duty.		
Out of interest on such New Consols—			
Pay on the — day of — and the — day of —, the first of such payments to be made on the — day of —, 1901, during life of payee, or until further order, <i>if so</i> , subject to duty.	P. R. of &c.		

6. *Annuity Fund deficient—Sale from time to time.*

It is ordered that the funds in Court be dealt with as directed in the Schedule hereto.

[Insert in Payment Schedule as under.]

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Out of interest to accrue on New Consols—			
Pay (less income tax) on the — day of —, the — day of —, the — day of —, and the — day of —, in every year, during life of payee, or until further order (the first payment to be made on the — day of —, 1901); and, in case such interest shall at any time be insufficient, sell on each of the days aforesaid sufficient New Consols or sufficient residue thereof for the time being, with interest to accrue thereon, to raise £25 (less tax on such interest).	P. R. of &c.	25 0 0	
Pay proceeds and interest, and in case the residue of the said New Consols, with such interest, shall at any time be insufficient, sell the whole of such residue.	The same.		
Pay proceeds of such sale and interest	The same, on account of the annuity of £100.		

For similar orders before the S. C. F. R.B., see *Norcott v. Gordon*, V.-C. E., 27 July, 1844; 14 Sim. 258; *Swallow v. S.*, cited in *Hodge v. Lewin*, 1 Beavan, 432, n.; *Lambie v. L.*, 9 Ha. lxxxiv.; Seton, 4th edit. p. 957, Form 8.

7. *Annuity declared to be payable during Widowhood.*

DECLARE, that according to the true construction of the will of &c., and the codicil thereto, dated &c., the annuity of £100 mentioned in the said codicil is payable to the testator's widow, B. M. R., during such part of her life as she shall continue the widow of the testator, and no longer; And Let the fund in Court be dealt with as directed in the schedule hereto; And Declare, that on the death or marriage of the said B. M. R. the said annuities will be distributable as part of the residuary estate of the testator; And on the death or marriage of the said B. M. R., Liberty to apply &c.

[*Insert in Payment Schedule as under.*]

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Out of interest to accrue on New Consols—			
Pay on the—day of — and the — day of — in every year during widow- hood of payee [or so long as payee shall continue the testator's widow (<i>following words of instrument</i>)], or until further order, the first payment to be made on the—day of —, 1901.	B. M. R. of &c., widow.		

For similar order before S. C. F. B., see *Pontey v. Tucker*, M. R., 27 April, 1859, B. 1561; Seton, 4th ed. p. 957, Form 6.

8. *Annuity declared to be payable (notwithstanding resumption of Cohabitation).*

THE claim made by the Plt F. R. to the annuity given to her under the deed of covenant executed by the above-named testator on the — day of —, which, upon hearing the solrs for the applicant and the Deft H. F. D. [*the admor of the testator's will*], and A. C. G. A. and H. A. having liberty to attend the proceedings in Chambers, was adjourned to be heard in Court &c., Allow the applicant as a creditor upon the estate of the testator for the amount due under the said deed of covenant, dated &c.—See *Re Abdy, Rabbeth v. Donaldson*, North, J., 21 Dec. 1894, A. 01025; S. C., C. A. 20 Feb. 1895, A. 680; (1895) 1 Ch. 455, C. A.

9. *Government Annuity to be purchased by Transfer of Stock.*

LET the Plts — enter into a contract with the Commrs for the Reduction of the National Debt for the purchase, in the names of the Plts, of a government annuity of £—, or as near to, but not less than [or, but not exceeding], that sum as such contract can be entered into, for the lives of E., and F. his wife, and the life of the survivor of them, by a transfer of New Consols to the said Commrs; And Let the funds in Court be dealt with as directed in the schedule hereto.

[Insert in Payment Schedule as under.]

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£. s. d.	£. s. d.
Transfer so much New Consols as shall be the amount at which the Plts shall contract for the purchase of a government annuity of £—, or as near as may be to but not less than that sum, on the lives of P. R., and B. M. R. his wife, and the life of the survivor of them.	The Commrs for the Reduction of the National Debt.		

For similar orders before S. C. F. R., see *Morgan v. Gronow*, 8 June, 1876, B. 1895; *Lewin v. L.*, 1834, B. 1102; Seton, 4th ed. p. 958, Form 9.

10. *Purchase with given Sum of Stock in Name of Trustee for a Lunatic.*

LET A. enter into a contract with the Commrs &c. [Form 9] for the purchase in his own name, and on the life of B., a person of unsound mind, of such a government annuity as can be purchased by a transfer to the said Commrs of £2,000 New Consols; And Let the funds in Court be dealt with as directed in the schedule hereto; And Let the said A. apply the same annuity towards the maintenance of the said B., until further order.

[Insert in Payment Schedule as under.]

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£. s. d.	£. s. d.
Transfer New Consols	The Commrs for the Reduction of the National Debt.		2,000 0 0

For similar order before S. C. F. R., see *Re Salt*, V.-C. K., 7 July, 1854, B. 1460; Seton, 4th ed. p. 958, Form 10.

N.B.—Fractional parts of a pound cannot be transferred. The order in this case would now be made in Lunacy.

The form above (Form 10) does not follow that given in *Davies v. D.*, 2 D. M. & G. 54; *Re Dodsworth*, 10 Ha. 16, 17, on which, in a subsequent case, the Bank declined to act.

11. Like Order, in the Names of Trustees for a Feme Covert, out of Stock set apart—Residue to be paid to Remainderman.

LET the Plt A. R. enter into a contract with the Commrs &c. for the purchase in the names of W. and L. (*trustees*) of a government annuity on the life of the Deft B. M. R., the wife of the Deft P. R. of £32: 1s., being the amount of the annual interest on £— New Consols, or as near thereto (but not less than [or but not exceeding] that sum) as such contract can be entered into; And Let the said W. and L. pay the said annuity when purchased to the said B. M. R. on her separate receipt; And it is ordered that the funds in Court be dealt with as directed in the Schedule hereto.

[Insert in Payment Schedule as under.]

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Subject to duty, transfer so much New Consols as shall be the amount at which the Plts shall contract for the purchase of a government annuity of £32: 1s. 0d., or as near as possible to but not less than that sum, on the life of the Deft B. M. R., the wife of the Deft P. R.	The Commrs for the Reduction of the National Debt.		
Sell residue of New Consols.			
Pay proceeds of sale	Plt A. R. (<i>Remainderman</i>).		

For like order before S. C. F. R., see *Gompertz v. G.*, V.-C. S., 1 May 1854, A. 1417; Seton, 4th edit. p. 958, Form 11.

12. Government annuities to be purchased and paid conditionally.

LET the Plt (*the trustee*) enter into a contract with the Commrs &c. for the purchase in his name of a government annuity on the life of the Deft G.; And Let what shall be received by the Plt (*the trustee*) in respect of such annuity be by him paid from time to time to the Deft G., on her separate receipt, upon the Plt being satisfied by her affidavit of her having resided in England and used a carriage, for the respective periods in the testator's will mentioned.—And in case the said G. shall not comply with the terms of the bequest, Liberty to persons interested to apply; And it is ordered that the funds in Court be dealt with as directed in the Schedule hereto.—[Add Payment Schedule directing transfer to Commrs, mutatis mutandis, similar to Schedule to Form 11, sup.]—*Wordsworth v. Darrell*, V.-C. K., 19 July, 1855, B. 1558.

For declaration that the Deft was entitled to have a government annuity of 100*l.* for her life purchased in the names of the trustees of the testator's will, to be paid to her until she should sell, alien, assign, transfer, incur, or in anywise dispose of or anticipate the same or any part thereof, see *Hatton v. May*, V.-C. M., 16 May, 1876, A. 923; S. C., 3 Ch. D. 148.

13. *Annuities declared only for Life, and from the end of the Period for Accumulation—Plaintiff to be let into Possession from that Time.*

"DECLARE, that according to the true construction of the will of the testator, the annuities or annual sums of £400 and £100, directed by the said will to be paid and allowed by the Plt R. to his next brother, and to each and every of his brothers and sisters, were annuities for the lives only of such annuitants, and were not perpetual, and that the same were charged on the real estates devised by the said will, and the estates purchased with the personal estate of the testator, and the income of the accumulations thereof, and that such annuities respectively commenced only on and from the — day of —, the day of the expiration of the term of fifteen years mentioned in the clause of accumulation contained in the said will, and that such accumulation extended to and comprised the rents and profits of the lands and hereditaments devised by the said will, and that the Plt R. became entitled to such rents and profits only from the said — day of —; And Let the Plt be let into possession and receipt of the rents, profits, and income of the lands and hereditaments devised by the will of the testator, of the estates purchased under the accumulation clause therein contained, and of the remaining uninvested personal estate of the testator and accumulations, as from the — day of —, the day of the expiration of the said term of fifteen years."—Directions as to costs. —"And Let the Plt R., out of such rents and profits and income, pay until further order the following annuities, that is to say, £400 to the Deft W., and £100 to the Deft L. &c."—*Pearse v. P.*, V.-C. E., 1 June, 1850, B. 953.

For decree declaring an annuity, or clear yearly rent-charge perpetual, with inquiry what were the lands charged therewith, and the particulars thereof, annuity to be sold, costs to be paid out of the estate, one set only to the parties interested in the annuity, and their extra costs out of their own fund, see *Manergh v. Campbell*, M. R., 10 June, 1858, B. 1249; *S. C.*, 3 D. & J. 232, *et inf.* p. 1634.

14. *Judgment to secure Annuity charged on Realty—Account of Arrears and Interest.*

The bill was brought for the arrears of an annuity secured by a bond given by the Plt's father (the testator) on her marriage, and to be paid to the Plt, her husband and children, during the lives of her father and mother and the survivor.

"LET an account be taken of what is due to the Plt for the arrears of the annuity of £30 secured by the bond dated &c.; (And for interest on each respective half-yearly payment (in arrear) from the end of six months after the same respectively became due, at the rate of £4 p. c. per ann.); And the Deft having by her answer admitted that the personal and real estate of the testator &c. together is more than sufficient to answer the said annuity, Let the Deft pay to the Plt what shall be

certified to be due for the arrears of the said annuity (and interest) within such time as shall for that purpose be mentioned in the (Master's certificate), and continue to pay to the Plt the growing payments of the said annuity as they shall become due, half-yearly; And in case the Deft shall not pay what shall be certified to be due for the arrears of the said annuity (and interest) as aforesaid, then the Plt is to be at liberty to apply to this Court (in Chambers) for a sale of a sufficient part of the real estate in question; And Let a sufficient part of the said real estate be set apart for securing the growing payments of the said annuity to the Plt during her mother's life; And Let the Deft execute to the Plt a proper conveyance of the estate, or grant thereout, for securing the growing payments of the said annuity to be settled by the " (Judge) &c.—Deft to pay the Plt's costs to this time, to be taxed.—Reserve subsequent costs.—Liberty to apply.—*Newman v. Ayling*, L. C., 9 Nov. 1747, B. 46; S. C., 3 Atk. 579; *sub nom. Newman v. Auling, et inf.* p. 1638.

Interest on arrears is not in general allowed, see note, *inf.* pp. 1637, 1638.

15. *Annuities charged on Realty to be made good out of Corpus.*

ACCOUNTS of personalty—If not sufficient—"Declare that the deficiency ought to be made good out of the testator's real estate, subjected by his will and codicil to the payment of his debts, legacies, and anns; And Let a sufficient part of the testator's real estate directed by his codicil to be sold in the first instance for the payment thereof, or if necessary the whole of the said real estate, be sold &c."—Debts to be paid, and in the next place, what remains due to the legatees and to the annuitants for arrears, to be paid out of the proceeds, and out of the rents and profits of the residue of the estates unsold;—"But in case the proceeds of the testator's said estate shall not be sufficient to pay the debts, legacies, and the arrears of the annuities, or in case the rents and profits of such parts of the estates as remain unsold shall not be sufficient to make good the growing payments of the said annuities to the several annuitants, Declare that the deficiency ought to be made good out of the testator's real estate subjected by his will and codicil to the payment thereof;" And in case of such deficiency, Adjourn &c.—See *Hunt v. Newman*, M. R., 23 Nov. 1772, A. 115.

16. *Annuity granted by Testator raised out of Estate—Tenant for Life and Remainderman.*

DECLARE that with respect to the annuity of £180 per ann. granted to G. B. B. and E. M. B., his wife, and to the survivor, by an indenture &c., the sum of £744 : 13s. 9d., by the chief clerk's certificates, dated &c., certified to have been paid to the said G. B. B. out of income

of the estate of the testator in respect of the said annuity, and all future payments of such annuity to the said G. B. B. and E. M. B. and the survivor of them, or the sum necessary to purchase an annuity in lieu of the said annuity ought to be raised or provided for by sale or mortgage of a sufficient part of the testator's estate. Tax costs. Let the following &c.:—16. An account of what further sums have been received by the Plts in respect of debts due to the testator at the date of his death, since the chief clerk's certificate, dated &c. 17. An account of what further sums have been paid by the Plts out of the income of the testator's estate in respect of debts due from the testator at the time of his death since the 21st of March, 1888. Let the Plts forthwith raise, with the approbation of the Judge, by sale or mortgage (or partly in either mode) of the freehold or leasehold property of the testator, the amount of the said costs when taxed, and also the said £744 : 13s. 9d., and such sum as may be necessary for the purpose of securing the future payments of the said annuity of £180 per ann.; And Let the Plts be at liberty to apply the sums so to be raised respectively by sale or mortgage as aforesaid in payment of the said costs when taxed, and in recouping to the income of the testator's estate the said £744 : 13s. 9d., and in the purchase of an annuity or otherwise securing the further payments of the said annuity of £180.—Adjourn further consideration.—Liberty to apply.—*In re Muffett, Jones v. Mason, Chitty, J.*, 1 Aug. 1888, A. 1168; *S. C.*, 39 Ch. D. 534.

NOTES.

DURATION OF ANNUITY.

An annuity given by a will is payable from the testator's decease: *Gibson v. Bott*, 7 Ves. 96, 97; *Fearn v. Young*, 9 Ves. 553; *Houghton v. Franklin*, 1 S. & S. 390; unless a contrary intention appears: *S. C.*; and see *Storey v. Prestage*, 3 Mad. 167; *In re Williams, W. v. W.*, W. N. (95) 36; and for variations in accordance with the will, and declarations thereon, see *Irvin v. Ironmonger*, 2 Russ. & M. 531, 537, 540; but a legacy for life carries interest only from the year: *Re Whittaker, W. v. W.*, 21 Ch. D. 657; *Street v. Robinson*, 12 Ves. 461.

An annuity given to an exor for his trouble did not cease by the institution of an admon suit: *Baker v. Martin*, 8 Sim. 25. But an annuity to a trustee so long as he should continue to execute the office ceases on payment of the whole fund to a person absolutely entitled: *Hull v. Christian*, 17 Eq. 546.

To make an annuity perpetual the intention must be clearly shown: *Lett v. Randall*, 6 Jur. N. S. 1359; 3 Sm. & G. 83; 2 De G. F. & J. 388; 9 W. R. 130; *Re Stratheden, Cowper v. S.*, W. N. (93) 90; *Re Morgan, M. v. M.*, (1893) 3 Ch. 222, C. A.; *Blight v. Hartnoll*, 19 Ch. D. 294; *Re Taber, Arnold v. Kayess*, 51 L. J. Ch. 721; 46 L. T. 805; 30 W. R. 833; but words of limitation are not necessary: *Mansergh v. Campbell*, 3 D. & J. 232, *et sup.* p. 1632; and see *Stokes v. Heron*, 12 Cl. & F. 292; *Blewitt v. Roberts*, Cr. & Ph. 274, 283, n.; *Evans v. Walker*, 3 Ch. D. 211; Wms. Exors. 1060; and the mere fact that the first of two successive annuities is expressed to be for life, while the deferred annuity is not so expressed, does not show that the latter is perpetual: *Blight v. Hartnoll*, 19 Ch. D. 294.

A gift of an annuity to "A. or his descendants" is *primâ facie* an annuity

to A. for life, with a substitutionary gift to the descendants of A. if he does not survive the testator: *Re Morgan, M. v. M.*, (1893) 3 Ch. 222, C. A.

As to an annuity payable till mortgages and debts were paid off, see *Clifford v. Arundell*, 27 Beav. 209; 1 D. F. & J. 307.

An annuity limited to the annuitant conditionally on his pursuing or abstaining from a course of conduct will be determined by his refusal to comply with the conditions: *Re Saunders, Master v. S.*, W. N. (83) 123; citing *Dommett v. Bedford*, 6 T. R. 61; *Rockford v. Packman*, 9 Ha. 475; *Joel v. Mills*, 3 K. & J. 658; and distinguishing *Clavering v. Ellison*, 7 H. L. C. 707; 3 Drew. 451.

A gift of an annuity to the testator's wife, so long as she should continue his widow "and unmarried," became ineffectual by reason of her having obtained a declaration of nullity of marriage: *Re Boddington, B. v. Clairat*, 25 Ch. D. 685, C. A.; 22 Ch. D. 597.

An annuity to a woman, to be continued on her death to her children for their "maintenance and education," was not confined to the minorities of the children, but continued until the death of the last survivor: *Wilkins v. Jodrell*, 13 Ch. D. 564; and under a gift to the testator's wife for life "for her use and benefit and for the maintenance and education of my children," the trust is not limited to children under twenty-one or unmarried: *Re Booth, B. v. B.*, (1894) 2 Ch. 282; and a like annuity to be applied for children's maintenance does not cease on the widow's death: *Re Yates*, (1901) 2 Ch. 438.

RIGHTS OF ANNUITANT GENERALLY.

Where an annuity was given to trustees on trusts for the maintenance of the testator's horses and dogs, the trustees did not take beneficially: *Re Dean, Cooper-Dean v. Stevens*, 41 Ch. D. 552.

A covenant in partnership articles for payment of an annuity for the benefit of the widow of a partner was held to create a trust in favour of the widow: *Re Flavell, Murray v. F.*, 25 Ch. D. 89, C. A.; and see *Re Davies, D. v. D.*, (1892) 3 Ch. 63.

As the gift of an annuity *ex vi termini* implies personal enjoyment, the principle whereby in the case of a gift over on death without "leaving" children, "leaving" is read "having," so as not to take away an interest previously vested, will not readily be applied: *Re Hemingway, James v. Dawson*, 45 Ch. D. 463.

In general an annuity is included in the expression "legacies" in the will (*Ward v. Grey*, 26 Beav. 485, 491, 492), unless a contrary intention is shown: *Gaskin v. Rogers*, 2 Eq. 284.

A gift of a sum of money to purchase an annuity for A. (though a woman), or a gift of an annuity to be purchased, is a gift of the purchase-money to A.: *Woodmeston v. Walker*, 2 Russ. & M. 197.

As to what words carry the fund producing the annuity, see *Bent v. Cullen*, 6 Ch. 235; *Evans v. Walker*, 3 Ch. D. 211.

An annuity was held not merged in a life estate in the property on which it was charged: *Byam v. Sutton*, 19 Beav. 556; and as to the effect of Jud. Act, 1873, s. 25, sub-s. 4, see *Snow v. Boycott*, (1892) 3 Ch. 110.

A perpetual annuity not charged on land devolves as personalty: *Aubin v. Daly*, 4 B. & Ald. 59; and even though charged on land: *Parsons v. P.*, 8 Eq. 260; unless limited to the heirs, &c., which makes it realty: *Turner v. T.*, 2 Amb. 766; 1 Bro. C. C. 316; *Stafford v. Buckley*, 2 Vez. 179; and an annuity for a specified term, or *pur autre vie*, devolves on the pers. represve of the annuitant: *Re Ord, Dickinson v. D.*, 12 Ch. D. 22, C. A.

An annuity given in succession in strict settlement fell into the residue on failure of issue: *Turner v. T.*, *sup.*

VALUE OF ANNUITY—RIGHT TO RECEIVE.

If the estate is insufficient, or the property subject to the annuity has to be realized, the annuitant is entitled to have the value of his annuity ascertained, and the amount of the valuation, or the amount properly apportioned in respect of such value, paid to him at once: *Wroughton v. Colquhoun*, 1 D. & S. 557; but, in the absence of special circumstances, the Court will not commute an annuity.

The amount of the cash payment to be made in lieu of a perpetual annuity is such a sum as, at the price of the day, will purchase $2\frac{1}{2}$ p. c. government stock sufficient to produce the annuity, excluding any charge for brokerage: *Hicks v. Ross*, (1891) 3 Ch. 499.

A *feme sole* was entitled to a fund given in trust to purchase her a life annuity, with powers to the trustees as to applying it on her illness or incapacity: *Re Browne*, 27 Beav. 324; and a *feme covert* was allowed to take the value of an annuity given to her separate use, though the will directed she should not: *Stokes v. Cheek*, 28 Beav. 620; and cases cited in *Drakeford v. D.*, 33 Beav. 47; and see *Saunders v. Vautier*, 4 Beav. 115, *et sup.* p. 1606.

But an annuity, subject to forfeiture, charged on *corpus*, was made good from it, and not allowed to be valued: *Gratrix v. Chambers*, 2 Giff. 321, 324; *Hutton v. May*, 3 Ch. D. 148; and other cases, *sup.* p. 1606; and see *Bouker v. B.*, *inf.* p. 1645.

The owner of an annuity to which the estate was liable, but which was not given by the will, was not entitled to have its value in a gross sum: *Yates v. Y.*, 28 Beav. 637.

Where trustees were empowered to sell land and purchase government annuities with the proceeds, the represes of an annuitant for life, who died after the contract of sale, but before completion, were not entitled to receive the value of her annuity from the trustees; *secus*, in the case of an annuitant who died after completion: *Re Mabbett, Pitman v. Holborrow*, (1891) 1 Ch. 707.

Where an annuity secured by deed is determinable on alienation, and the estate of the covenantor being insufficient, a fund is set apart to answer *pro tanto* the value of the annuity, the annuitant is entitled to have the whole fund paid to him: *Re Sinclair, Allen v. S.*, (1897) 1 Ch. 921; not following *Curr v. Ingleby*, 1 De G. & Sm. 362; and so where in the final distribution of an insufficient estate, a fund representing the dividend on the capital value of an annuity bequeathed to a married woman with restraint on anticipation, was ordered to be laid out in the purchase of an annuity for her, and she died before the purchase was effected, the fund belonged to her estate: *Re Ross, Ashton v. R.*, (1906) 1 Ch. 162.

PURCHASE OF ANNUITY FOR LUNATIC.

In *Dodd v. Wake*, 5 D. & S. 228, a government annuity for a lunatic was ordered to be purchased in the Accountant-General's name, but on his objection the order was not so drawn up. In *Davies v. D.*, 2 D. M. & G. 54, *et sup.* p. 1630, it was purchased in the lunatic's name, to be paid to a third person. In a subsequent case the Comms objected to act on an order in this form; and the proper course is to purchase the annuity in the names of trustees, as in Form 10, *sup.* p. 1630.

An annuity was ordered to be purchased for a lunatic not so found, and dividends to be paid to her nearest relations: *Re Ward*, 6 Jur. N. S. 717; and see *Re Burke, Ib.*, 2 D. F. & J. 124, *et sup.* p. 1193.

LEGACY DUTY.

A "clear annuity of" (*Haynes v. H.*, 3 D. M. & G. 590; *Re Robins, Nelson v. R.*, 58 L. T. 382; W. N. (88) 41), or "a clear sum of £100 a year," is free of legacy duty: *Re Coles*, 8 Eq. 271; *Re Currie, Birkman v. Ld. Kimberley*, 57 L. J. Ch. 745; 59 L. T. 200; 36 W. R. 752; and see *Re Saunders, S. v. Gore*, (1898) 1 Ch. 17, C. A. (where an appointee under a special appointment of a reversionary interest in so much of a fund as "shall be sufficient to raise a net" sum took free from succession duty), questioning *Banks v. Braithwaite*, 32 L. J. Ch. 35; but a bequest of an annual sum to trustees while carrying on the testator's business is liable to legacy duty: *Re Thorley, T. v. Massam*, (1891) 2 Ch. 613, C. A.

INCOME TAX.

An annuity given free from legacy duty and other deductions had to pay income tax: *Sadler v. Richards*, 4 K. & J. 302; 6 W. R. 532; *Abadam v. A.*,

33 Beav. 475; and so an annuity settled in 1807, free of all taxes, then or to be imposed: *A. G. v. Shield*, 28 L. J. Ex. 49; and a gift of a "clear yearly" annuity, to be paid "free from all deductions and abatements whatsoever": *Gleadow v. Leatham*, 22 Ch. D. 269; *secus*, where the gift was "free from all deductions in respect of any present or future taxes," &c.: *Re Bannerman, B. v. Young*, 21 Ch. D. 105; *sed quære*, see *Pearth v. Marriott*, 22 Ch. D. 182, C. A.; *Gleadow v. Leatham*, *sup.*; or where it clearly appeared by a comparison of will and codicil that "deductions" in the mind of the testator included income tax: *Re Buckle, Williams v. Marson*, (1894) 1 Ch. 286; and as to the effect of similar words with regard to the incidence of the estate duty, see *Re Parker-Jervis, Salt v. Locker*, (1898) 2 Ch. 643, *et v. sup.* p. 1404.

But a rent-charge may be given by will free of income tax: Income Tax Act, 1842 (5 & 6 V. c. 35), s. 108; *Festing v. Taylor*, 5 B. & S. 217.

ARREARS—STATUTE OF LIMITATIONS.

A mere personal annuity not charged on land is not within the Real Property Limitation Act, 1833 (3 & 4 W. IV. c. 27), s. 42: *Rock v. Callen*, 6 Ha. 531; and the statute could only be set up on the pleadings: *S. C.*; and arrears were paid out of the residue after thirty-seven years, but without interest: *Re Ashwell*, Joh. 112; and as to the effect of that Act, when the annuity was paid for twenty years, while the grantor was in possession without having made an acknowledgment of title, see *Searle v. Colt*, 1 Y. & C. C. 36.

There being a trust to pay an annuity, more than six years' arrears were payable: *Playfair v. Cooper*, 17 Beav. 187, *et v. sup.* p. 1436.

An annuity fund falling in forty years after testator's decease, the statute was held to run against pecuniary legacies payable at the death, but not against the residuary legatee: *Bright v. Larcher*, 27 Beav. 130.

By the Real Property Limitation Act, 1874 (37 & 38 V. c. 57), s. 10, after 31st December, 1879, no action shall be brought to recover any money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or interest in respect of any sum of money or legacy so charged or payable, and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust. Under this section, where an annuity secured by an express trust had been unpaid for twenty-five years without any claim being made, no arrears accrued before a claim was made could be recovered, but the section did not affect the right to future payments of the annuity: *Hughes v. Coles*, 27 Ch. D. 231; see Lewin, 1077.

GROWING PAYMENTS.

At law, the judgment on a writ of annuity was for the recovery of the annuity, and the arrears, as well before the bringing of the action as afterwards, up to the time of the judgment; and under this judgment subsequent arrears might be recovered.

So in equity the decree extended to future payments: Form 14, *sup.* p. 1632; and see *Cooke v. Wiggins*, 10 Ves. 191.

INTEREST ON ARREARS OF ANNUITY.

As a general rule no interest is allowed on the arrears of an annuity: *Martyn v. Blake*, 3 D. & War. 125; *E. Mansfield v. Ogle*, 4 D. & J. 38; *Blogg v. Johnson*, 2 Ch. 225; *Torre v. Broune*, 5 H. L. C. 577.

But it may be given by the Court under special circumstances in its discretion: *Morris v. Dillingham*, 2 Vez. 170.

It has been allowed where the annuity was secured by a bond with a penalty: Form 14, *sup.* p. 1632; but not always: *Lainson v. L.*, 18 Beav. 7; and not beyond the penalty of the bond: *Mackworth v. Thomas*, 5 Ves. 329; *Crosse v. Beddingfield*, 12 Sim. 35, 40.

It has been allowed where the bond was given for maintenance of a wife or child: *S. C.*; *Litton v. L.*, 1 P. Wms. 541; *Drapers' Co. v. Davis*, 2 Atk.

211; *Ferrers v. F.*, Cas. t. Talb. 2; *Robinson v. Cumming*, 2 Atk. 411; *Newman v. Auling*, 3 Atk. 579, Form 14, *sup.* p. 1362; not upon sums allowed by the Court for past maintenance: *Mellish v. M.*, 14 Ves. 516; but may where there has been obstinate delay of payment: *Batten v. Eurnley*, 2 P. Wms. 163; *Stapleton v. Conway*, 1 Vez. 428; *Martyn v. Blake*, 3 D. & War. 125, *et inf.*; or where the annuitant had been compelled by the delay to borrow at interest: *Anon.*, 2 Vez. 661; *Signall v. Brereton*, 1 Dick. 278; or where the grantor was obliged to come into equity: *Robinson v. Cumming*, *sup.*; *Ferrers v. F.*, Cas. t. Talb. 2; and where the grantee had been restrained by injunction from enforcing his legal remedies: *O'Donel v. Brown*, 1 Ba. & B. 262; *Morgan v. M.*, 2 Dick. 643 (but see *Martyn v. Blake*, 3 D. & War. 139); or where there has been a breach of trust: *Parnell v. Hingston*, 3 Sm. & G. 337; or where payment was prevented by gross misconduct and opposition to the Court, and perception of the arrears was prevented by incumbrances against which the party liable to the annuity had covenanted to indemnify the annuitant: *Martyn v. Blake*, 3 D. & War. 125.

Interest has been given from the day the payment became due: *Litton v. L.*, 1 P. Wms. 641; or from the day when the next subsequent payment became due: *Drapers' Co. v. Davis*, 2 Atk. 211.

The question is not affected by the Civil Procedure Act, 1833 (3 & 4 W. IV. c. 42), s. 28: *Re Powell's Trust*, 10 Ha. 134; *E. Mansfield v. Ogle*, 4 D. & J. 38; *Spartali v. Constantidini*, 20 W. R. 823; 21 W. R. 116; but see *Hyde v. Price*, 8 Sim. 578; *Willcocks v. Butcher*, 16 Sim. 366, in which interest was allowed.

In the following cases, there being no special circumstances, interest was refused: *D. of Bedford v. Coke*, 2 Vez. 117; *Tew v. E. Winterton*, 1 Ves. jun. 451 (though the annuity was in lieu of dower); *Creuze v. Hunter*, 2 Ves. jun. 157; *Anderson v. Dwyer*, 1 Sc. & L. 301; *Booth v. Leycester*, 3 My. & C. 459 (though the fund was bearing income); *Jenkins v. Bryant*, 16 Sim. 272; *Re Powell*, 10 Ha. 134; *Torr v. Browne*, 5 H. L. C. 577; *Booth v. Coulton*, 2 Gif. 514; *Beamish v. Farmer*, Ir. Rep. 1 Eq. 466 (though declared due by the decree in an annuity suit); *Taylor v. T.*, 8 Ha. 120.

NATURE OF THE CHARGE.

Annuities by way of security for loans are a charge on the *corpus*; and a tenant for life, as between him and the remainderman, is only bound to keep down the interest on their value: *Bulwer v. Astley*, 1 Ph. 422; *Re Muffet, Jones v. Mason*, 39 Ch. D. 534.

And where a testator who had covenanted to pay an annuity devised his real estate separately to three tenants for life with remainders over, and his personal estate was insufficient, the annuity being treated as a debt was apportioned between the three devised estates according to their values, and each tenant for life on paying his proportion of the annuity was entitled in respect of each payment to a charge upon the *corpus*, but had to keep down the interest on the amount so charged: *Re Harrison, Townson v. H.*, 43 Ch. D. 55; but as to this case, and as to form of order, see *Re Bacon, Grissel v. Leathes*, 62 L. J. Ch. 445.

A mere direction to set apart a fund for the annuity does not exonerate the *corpus*: *Re Taylor, Illsley v. Randall*, 53 L. J. Ch. 1161; 50 L. T. 717; 33 W. R. 13; *Re Mason, M. v. Robinson*, 8 Ch. D. 411; *Miles v. Rowland*, W. N. (81) 26; *Re Tucker, T. v. T.*, (1893) 2 Ch. 323.

Where a tenant for life charged lands with an annuity, but did not covenant for payment, the annuitant nevertheless ranked as a specialty creditor against the estate of the tenant for life: *Crawford v. Annaly*, 23 L. R. Ir. 113.

And as to registering annuities, see the Judgments Act, 1855 (18 & 19 V. c. 15), s. 12.

As to the right of an annuitant or grantee of a rent-charge to have the arrears raised by sale, see *Hall v. Hurt*, 2 J. & H. 76; *White v. James*, 26 Beav. 191; *Todd v. Beilby*, 27 Beav. 354, n.; *Re Bacon, Grissel v. Leathes*, 62 L. J. Ch. 445; *Re Tucker, T. v. T.*, (1893) 2 Ch. 323; *Hambro v. H.*, (1894) 2 Ch. 564; and *inf.* p. 1640, and Vol. III., p. 2120.

An indefinite charge on the rents and profits charges the *corpus*: *Phillips v. Gutteridge*, 3 D. J. & S. 332; and see *Carter v. Salt*, Ir. R. 1 Eq. 97; and as to debts, *Re Green, Baldock v. G.*, 40 Ch. D. 610.

For cases in which it has been held that the annuity was charged on the income only, and not the *corpus*, see *Baker v. B.*, 6 H. L. C. 616; 4 Jur. N. S. 491; *Foster v. Smith*, 1 Ph. 629; *Tarbottom v. Earl*, 11 W. R. 680; *Salom v. Weston*, 14 W. R. 757; *Clifford v. Arundell*, 27 Beav. 209; 1 D. F. & J. 307; *Booth v. Coulton*, 5 Ch. 684; *Re Taylor, T. v. T.*, 17 Eq. 324; *Michell v. Wilton*, 20 Eq. 270.

For cases in which the *corpus* was held to be charged, see *Carmichael v. Gee*, 5 App. Ca. 588; *S. C.*, 11 Ch. D. 891, C. A.; *nom. Gee v. Mahood* (where the distinction was drawn between the gift of an annuity and a gift of the income or part of the income of a sum of money set apart); *Haynes v. H.*, 3 D. M. & G. 590; *Wroughton v. Colquhoun*, 1 D. & S. 36; *Phillips v. Gutteridge*, 3 D. J. & S. 332; *Birch v. Sherratt*, 2 Ch. 644; *Percy v. P.*, 35 Beav. 295; *Neville v. Andrews*, W. N. (66) 256; *Re Webb, Leedham v. Patchett*, 63 L. T. 545.

Where there was a gift of the remainder of the rents and profits, which, however, were insufficient to pay the annuity, the annuitant was not entitled to a continuing charge: *Wormald v. Muzeen*, 50 L. J. Ch. 776; 29 W. R. 795; reversing *S. C.*, 17 Ch. D. 167.

Where a life annuity was charged on two specific real estates, with powers of distress and entry, this being a legal limitation of a rent-charge, the personal estate was relieved from payment of the annuity: *Patching v. Barnett*, 51 L. J. Ch. 74; reversing *S. C.*, 49 L. J. Ch. 665.

And where annuities are charged upon real estate, the income of which is insufficient to provide for them, a portion of the *corpus* must be sold to make up the annuities, and the interest of a tenant for life is in suspense until some of them fall in: *Re Grant, Walker v. Martineau*, 31 W. R. 703; 52 L. J. Ch. 552; 48 L. T. 937.

An annuity being a charge on the *corpus*, the income being deficient, the tenant for life was only bound to keep down the interest on the arrears: *Playfair v. Cooper*, 17 Beav. 187.

And for order to make good dividends from *corpus*, see Form 15, *sup.* p. 1633.

The fund set apart being reduced, the deficiency of income was made good out of the *corpus*: *May v. Bennett*, 1 Russ. 370; *Mills v. Drewitt*, 20 Beav. 632.

As to the mode of apportionment between annuities where the estate is insufficient to pay them, *v. inf.* p. 1645.

Annuity holders whose annuities are secured by consols are not entitled to be secured against the chances of conversion: *Re Meacock, M. v. M.*, W. N. (89) 9; but their security under an express direction in the will in that behalf will not be affected: *Pack v. Darby*, W. N. (95) 123.

A perpetual rent-charge redeemable by a transfer to the trustees of a specified amount of £3 per cent. annuities may, by virtue of s. 25 (2) of the National Debt (Conversion) Act, 1888 (51 & 52 V. c. 2), be redeemed by a transfer to them of the specified amount of 2½ per Cent. Stock: *Northumberland (D. of) v. Percy*, (1893) 1 Ch. 298.

SECURITY—SALE OF PROPERTY CHARGED.

In suit by a grantee against assets, future payments will be directed to be secured, Form 14, p. 1632; but not in a suit against the grantor: *Cooke v. Wiggins*, 10 Ves. 191. A bill would lie for arrears of an annuity, even where Plt had no right to have it secured: *Clifford v. Turrell*, 1 Y. & C. C. 138.

Where an annuity is secured by covenant and warrant of attorney, and the arrears are paid up, the Court does not enjoin exors from paying simple contract debts till a fund is set apart for the annuity, unless a case is made of past or probable misapplication of assets: *Read v. Blunt*, 5 Sim. 567.

In a suit by annuitant, before his annuity was in arrear to secure it, the personalty being exhausted, the trustees were not ordered to sell realty and leaseholds, the sale of which they had power to postpone, but the annuity was declared a charge, and Plt had to pay the costs: *Burrell v. Delevante*, 80

Beav. 550; *Norman v. Johnson*, 29 Beav. 77; and see *Fane v. F.*, 13 Ch. D. 228; the legatee of an annuity charged on residue is entitled to judgment for admon of the estate: *Wollaston v. W.*, 7 Ch. D. 58.

Semble, an annuitant may, on establishing his right in an admon suit, at once apply to have a fund set apart: *Taylor v. T.*, 8 Ha. 120, 129; but not until it has been shown that the assets are sufficient: *Martyn v. Blake*, 3 D. & War. 138, 139.

Where an annuity is payable out of the clear residuary estate of a testator the Court has jurisdiction to set apart a sufficient sum to answer the annuity, and to pay the residue to the residuary legatees notwithstanding the opposition of the annuitant; the annuitant (per Lindley, L. J.) having, nevertheless, the right to resort, if it becomes necessary, to the *corpus* of the fund set apart: *Harbin v. Masterman*, (1896) 1 Ch. 351, C. A.

An annuitant is not necessarily entitled to have the residuary estate out of which the annuity is payable converted, and a sum sufficient to answer the annuity set apart in consols or other approved securities: *Re Parry, Scott v. Leak*, 42 Ch. D. 570; *Re Potter, P. v. P.*, 50 L. T. 8; but is entitled to have the annuity sufficiently secured, *e.g.*, by a mortgage of real estate: *Re Parry, sup.*

Land subject to an annuity or chief rent may be ordered to be sold to pay arrears: *Cupit v. Jackson*, M'Clel. 495; 13 Pri. 721; *Horton v. Hall*, 17 Eq. 437; *Re Bacon, Grissel v. Leathes*, 62 L. J. Ch. 443; though settled, if the Court in its discretion thinks fit so to order: *Re Tucker, T. v. T.*, (1893) 2 Ch. 323; observing on *Taylor v. T.*, 17 Eq. 324; and so where a jointure rent-charge issues out of the rents and profits of the land, even though there is no express charge on the land: *Hambro v. H.*, (1894) 2 Ch. 564; where there is sufficient distress: *Kelsey v. K.*, 17 Eq. 495; but (*semble*) where a term is limited to secure the rent-charge the owner must in general resort to the term: *Blackburne v. Hope Edwards*, (1901) 1 Ch. 419; following *Hale v. Hurt*, 2 Jo. & H. 76.

In *Greaves v. Hicks*, 11 Sim. 551, the Court would not, under the circumstances, order an estate charged with an annuity to be mortgaged or sold to pay it, though the rent was inadequate, and the annuity in arrear; but see *Cupit v. Jackson*, M'Clel. 495; 13 Pri. 721, 554; and in *Picard v. Mitchell* (14 Beav. 103) realty (including a reversion) charged with annuities being deficient, was sold to make them good.

Where the estate was sufficient, a suit for a sale and receiver was dismissed with costs: *Kelsey v. K.*, 17 Eq. 495.

Lands charged with an annuity being taken under a Railway Act, and the money paid into Court, portions of the *corpus* were ordered to be sold from time to time to meet the growing payments: *Exp. Wilkinson*, 3 D. & S. 633; or arrears: *Re Tinkler*, 5 D. & S. 722; *Miner v. Baldwin*, 1 Sm. & G. 522.

In *Prendergast v. Lushington*, 5 Ha. 171, the Court would not appropriate foreign funds to meet an annuity, though the trustees might have done so; trustees declining to exercise a discretion, the Court pursues its own rules: *S. C.*, *Jones v. J.*, *Ib.* 464, *et sup.* p. 1626.

As to the fund being paid out of Court on presumption of the annuitant's death, *v. inf.* pp. 1656, 1656.

SECTION XXIV.—ABATEMENT AND APPORTIONMENT OF LEGACIES AND ANNUITIES.

1. *Apportionment, in case of Deficiency, among Legatees—Legacy Duty.*

AND Let the residue of the funds in Court, after the payment of the said costs as directed in the Payment Schedule hereto, be apportioned amongst the legatees named in the first schedule to the Master's certificate dated &c. in proportion to the amounts thereby certified to be

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees, or separate Accounts.	Amounts.	
		Money.	Securities,
		£ s. d.	£. s. d.
Pay duty.			
Pay £[200] [amount certified due in respect of legacy to A.] less duty (if any) [the last words provide for the case of duty-free legacies] on such legacy.			
Interest on £. [principal of legacy] at 4 p. o. per ann. from the — day of —, less income tax. [Repeat these directions in the case of each other legatee named in the Master's certificate.]	A. [named in the Master's certificate].		
Divide ultimate residue into equal thirds.			
Out of one-third pay duty on share of Deft M. M.			
Pay balance of one-third	The Deft M. M.		
Out of one-third pay duty on share of Deft C. de B.			
Pay balance of one-third	The Deft C. de B.		
Invest one-third in New Consols	Account of the legal personal repre- sentatives of E. D., deceased, when constituted, sub- ject to duty.		
If the residue of the funds in Court and interest after payment of costs shall be insufficient to pay the duty and the sums specified above.			
Pay total of the duties to be certified under this order.			
Pay balances to be certified under this order to the persons to whom such balances shall be certified to be pay- able.			

For similar orders before S. C. F. R., see *Moneypenny v. M.*, V.-C. W., 16 April, 1858, B. 1092; *Cattell v. Davis*, M. R., 23 May, 1871, A. 1618; Seton, 4th edit. p. 965, Form 2.

3. Legacies to abate, having regard to Payments on Account.

AND it appearing by the said (certificate) that the testator's personal estate, after payment of his debts, will not be sufficient for payment of the legacies given by his will, Declare that the testator's pecuniary legacies ought to abate in proportion to the respective amounts

thereof, regard being had to what has been already paid to any of the legatees on account of their several legacies.—See *Gardner v. Lawrence*, M. R., 19 July, 1776, A, 703; and see *Ackroyd v. A.*, 18 Eq. 313, *et sup.* p. 1512.

4. *Legacies not entitled to priority over Annuities, and both to abate —Annuities free of Duty.*

“**DECLARE** that the other legacies bequeathed by the testatrix are not entitled to any preference over the annuities bequeathed by her, and that such other legacies and the said annuities ought to abate proportionately, and for the purpose of such proportionate abatement, Let the value of the said annuities respectively, as at the death of the testatrix, be ascertained (and in so doing, regard is to be had to the circumstances that the said annuities are given free from legacy duty); And Let interest be computed at the rate of 4 p. c. per ann., on such estimated value of the said annuities respectively, from the death of the testatrix down to the time to which interest shall be computed on the legacies.”—*Long v. Hughes*, M. R., 26 Feb. 1829, B. 1028; 1 De G. & Sm. 364.

For declaration as to priorities of legacies and anns, and as to legacy duty being charged on the *corpus*, and not on income, see *Haynes v. H.*, 3 D. M. & G. 599.

5. *The like, having regard to Payments.*

1. “**AND** it appearing that the personal estate of the testatrix is insufficient to pay the several legacies mentioned in the schedule to the Master’s certificate, dated &c., and the several annuities given by the testatrix’s will, to the full amount thereof (in full), Declare that the said legacies and annuities ought to abate proportionately, and also the legacy of £1,000 given to the Plt;”—Tax costs; And it is ordered that the funds in Court be dealt with as directed in the Payment Schedule hereto—“**And** Let the amount of the legacy duty payable in respect of the said legacies and annuities be ascertained, assessed, and certified, distinguishing how much is payable in respect of each legacy and annuity; 2. **And** Let the residue of the funds in Court after payment of costs as directed in the Payment Schedule hereto be apportioned among the several legatees and annuitants of the testatrix named in the said Schedule to the said certificate, in proportion to their legacies and annuities respectively, regard being had in such apportionment to all sums of money which such legatees and annuitants respectively have received on account of their said legacies and annuities; And for the purpose of making such apportionment, Let the value of the said annuities respectively be ascertained as at the death of the testatrix; **And** Let interest, at the rate of 4 p. c. per ann., be computed on

such values, from the death of the testatrix down to the time at which interest shall be computed on such legacies ;"—Compute subsequent interest [Form 1, *sup.* p. 1443] ;—And Let the amount due for principal and interest in respect of each legacy and annuity, and the name of each legatee or annuitant be certified ; 3. And Let the sum which, in case the principal sum to be apportioned in respect of the said annuity of £— had been laid out upon the testatrix's death in the purchase of a Government annuity for the life of G., would have become payable in respect of such annuity be ascertained ; And Let the amount received by the said G. on account of her said annuity be deducted from such sum, and the balance thereof be certified ; And Let such balance be paid to the said G. out of the amount to be apportioned in respect of the principal and interest of the said annuity of £— as directed in the said Payment Schedule ; And Let the residue of the amount so to be apportioned in respect thereof be also certified.—Directions for Plt to purchase therewith a Government annuity on life of G. [Form 11, p. 1631], and for payment to her [Form 11, *sup.* p. 1631].—Liberty for the several persons named in the accounts mentioned in the Payment Schedule to apply.

[Insert in Payment Schedule, as under.]

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Pay sums to be apportioned to legatees and annuitants by the Master's cer- tificate.	The persons to whom they shall be cer- tified to be payable.		

For similar order before S. C. F. R., see *Wordsworth v. Darrell*, V.-C. K., 19 July, 1855, B. 1558.

6. Legacies to Abate—Declaration as to Gifts to Widow.

DECLARE, that according to the true construction of the will of the testator C., having regard to the fact of the testator's estate being insufficient to pay in full the legacies and annuities given by his will, all the pecuniary legacies and annuities given by his will, including the legacy of £1,000 to the testator's widow, ought to abate equally ; and that the testator's widow, A., is entitled to elect to live at the testator's dwelling-house, known as &c., and that the amount to be provided out of the estate of the testator for rent, rates and taxes, in respect of such house is not liable to abate, and that the rent, rates and taxes in respect of such house during the residence of the said A.

are to be paid out of the estate of the testator.—*Re Cazenove, C. v. C.*, Stirling, J., 7 June, 1889, A. 892; *S. C.*, 61 L. T. 115.

For order where the *corpus* was insufficient to pay the arrears of the annuities, some annuitants being dead, directing valuation of annuities, and that sums received be accounted for, see *Potts v. Smith*, V.-C. J., 31 July, 1869, B. 2371; *S. C.*, 8 Eq. 683; Seton, 4th edit. p. 967, Form 6; and for a like order where the annuities were by consent valued on the Government tables, see *Todd v. Beilby*, M. R., 30 July, 1859, B. 2751; *S. C.*, 27 Beav. 353; Seton, 4th edit. p. 968, Form 7.

For order for apportionment of legacies and annuities, for valuing and paying annuity, and for setting apart funds to provide for annuities, which were not to be alienated, see *Bowker v. B.*, M. R., 23 March, 1829, A. 1059; and see *Gratrix v. Chambers*, 2 Gif. 321.

For order for apportionment between legatees and annuitants, having regard to previous payments, and distinguishing interest and arrears, see *Ross v. R.*, M. R., 5 May, 1806, B. 593.

For order for apportionment among residuary legatees, subject to advances, with inquiry as to receipts, see *Sherwood v. Rivers*, V.-C. K. B., 18 March, 1848, B. 1111; *et v. sup.* pp. 1489 *et seq.*

For order declaring moneys from time to time received on account of a legacy applicable rateably between income and capital, see *Re Tinkler*, 20 Eq. 456.

NOTES.

In *Re Tinkler*, 20 Eq. 456, *et sup.*, where the estate was insufficient to pay legacies, including a trust legacy, sums of money from time to time received were each to be apportioned as regarded capital and income, so as to attribute to income 4 p. c. from the testator's death on the amount attributed to capital: and see *Ackroyd v. A.*, 18 Eq. 313, *sup.* p. 1512.

Where assets are deficient, an annuity should be valued and abate proportionately, and the apportionment belongs to the annuitant absolutely: *Wroughton v. Colquhoun*, 1 D. & S. 357; *Innes v. Mitchell*, 1 Ph. 710; although the annuity is determinable on alienation: *Re Sinclair*, *Allen v. S.*, (1897) 1 Ch. 921, not following *Carr v. Ingleby*, 1 De G. & Sm. 362; and see *Re Ross*, *Ashton v. R.*, (1900) 1 Ch. 162, *sup.* p. 1636; and so specific legacies must abate according to their respective values at the testator's death: *Halse v. Rumford*, 47 L. J. Ch. 559.

A legatee of residue, "including the fund set apart" for the annuities, can take nothing when they cease until they have all been paid in full: *Re Tootal*, *Hankin v. Kilburn*, 2 Ch. D. 628, C. A.; unless the testator provided that they should abate if the estate were insufficient: *Farmer v. Mills*, 4 Russ. 86; and see *Eales v. Drake*, 1 Ch. D. 217.

A legacy to a testator's widow, to be paid immediately after his death for her immediate wants, is liable to abatement along with others: *Cazenove v. C.*, 61 L. T. 115; *Re Schweder's Estate*, *Oppenheim v. S.*, (1891) 3 Ch. 44; dissenting from *Re Hardy*, *Wells v. Borwick*, 17 Ch. D. 798.

Where an insufficient fund is bequeathed to answer two legacies, one of which fails, the other is not liable to abatement in favour of the residuary legatee: *Re Tunno*, *Raikes v. R.*, 45 Ch. D. 66.

Where an annuity was given to three persons and the survivors, and the *corpus* to the last survivor, the *corpus*, being lost and partially recovered, was apportioned amongst their representatives according to the amount of arrears of the annuity due to the two who died first, and the whole arrears as well as *corpus* due to the survivor: *Innes v. Mitchell*, 2 Ph. 346, reversing 1 Ph. 710.

As to the abatement of legacies, see *Ashburner v. Macguire*, 2 L. C. Eq. 306.

In *Todd v. Beilby*, 27 Beav. 353, *sup.*, followed in *Potts v. Smith*, 8 Eq. 683, it was held, that if the *corpus* will not pay arrears it is to be divided in proportion to the value of the annuities taken—if all the annuitants are living at the testator's death: *Re Wilkins*, *W. v. Rotherham*, 27 Ch. D. 703; *Delves v. Newington*, 52 L. T. 512 (and see *Heath v. Nugent*, 29 Beav. 226); if all,

or some are dead, to the amount of arrears; and as to any living, to the amount of their arrears, added to the prospective value.

And as to the mode of apportionment between two annuities, one of which is free from duty, see *Re Wilkins*, *sup.*

As to priorities between annuities and legacies, see *Haynes v. H.*, 3 D. M. & G. 590; annuities charged on the land, with power of entry and distress, have no priority over legacies charged on the land: *Roper v. R.*, 3 Ch. D. 714, *et sup.* p. 1602.

As to costs where legacies abate, see *Wroughton v. Colquhoun*, 1 D. & S. 357; *Re Jarman*, 1 Eq. 71, *et sup.* p. 1513.

SECTION XXV.—LAPSING TO THE CROWN.

1. Crown declared entitled to bona vacantia.

It appearing by the Master's certificate, dated &c., that the intestate A. died without any next of kin, Declare that H. M. the King, in right of His Crown [*or, by virtue of His Royal Prerogative*], is entitled to the funds in Court, being the personal estate of the said intestate A., as *bona vacantia*; Let the funds in Court be dealt with as directed in the Payment Schedule hereto.

[Insert in Payment Schedule as under.]

Particulars of Payments, Transfers, or other operations ordered.	Payees, Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Transfer New Consols..	The Treasury Solr and the Assistant Paymaster-General, per Act 39 & 40 V. c. 18, "The Crown's Nominee Se- curities Account."	..	3,000 0 0
Pay cash	H. M.'s Paymaster - General, "Cash Account."	50 0 0	
Pay interest on New Consols.	The same.		

2. Another Form.

DECLARE that H. M. the King, by virtue of His Royal Prerogative, is entitled to the funds, the subject-matter of this action, as *bona vacantia*, and the Deft H. M.'s A. G. is to be at liberty to apply to the Court as he may be advised.—*Cunnack v. Edwards*, C. A., 3 Aug. 1896, A. 4077; (1896) 2 Ch. 679, C. A.

3. *The like—Life Interest.*

DECLARE that during the life of S., H. M. the King, in right of His Crown [or by virtue of His Royal Prerogative], is entitled to the interest to accrue on the New Consols in the Payment Schedule mentioned; And it is ordered that the funds in Court be dealt with as directed in the said Payment Schedule.

[Insert in Payment Schedule as under.]

Particulars of Payments, Transfers, or other operations ordered.	Payees, Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Pay interest as it accrues on New Consols during life of S., or until further order.	H. M.'s Paymaster-General, "Cash Account."		

4. *The like—Failure of Heirs—Proceeds of Sale under Settled Land Act, 1882—Trustees to retain Costs.*

DECLARE that H. M. the King in right of His Crown [or, by virtue of His Royal Prerogative], is entitled to the capital moneys arising from the sale under the Settled Land Act, 1882, of the portions of real estate of the testator G. W. C. B., sold under the said Act as *bona vacantia*; And tax as between solr and client the costs of the Plts and Deft of this action, including any charges and expenses properly incurred by the Plts as trustees of the will of the testator; And Let the surviving Plt J. P. retain and pay the amount of such costs when taxed out of the said capital moneys and transfer and pay the residue thereof with any interest accrued and to accrue thereon to the Crown account, or as the [Commrs of His Majesty's] Treasury shall direct.—Liberty to apply.—See *Re Bond, Panes v. A. G.*, Kekewich, J., 15 May, 1900, A. 2166; (1901) 1 Ch. 15.

5. *Testator intestate as to impure Personalty—Crown entitled.*

"DECLARE that the debts, funeral and testamentary expenses, and legacies already paid and the costs of suit are payable out of impure personalty and pure personalty according to their respective values at the time of the testator's death; And Declare that the testator died intestate as to such part of his personal estate as is connected with an interest in real estate."—Tax costs.—Let the funds in Court be dealt

with as directed in the Payment Schedule hereto.—Directions to apportion residue of funds in Court, after payment of costs, between the pure and the impure personalty, having regard to the preceding declarations.

[Insert in Payment Schedule as under.]

Particulars of Payments, Transfers, or other operations ordered.	Payees, Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Sell New Consols.....	2.000 0 0
Out of proceeds—			
Pay costs.			
Pay sum to be apportioned in respect of impure personalty by the Master's certificate.	H. M.'s Paymaster-General, "Cash Account."		
Pay sum to be apportioned in respect of pure personalty by the same certificate.	A., B., and C., as trustees of the [name] Charity [or, if so ordered, any two of them], or to the trustees of the said Charity for the time being, or any two of them [or where trustees numerous], or to the attorney of any two or more of them.		

—See *Trail v. Jackson*, V.-O. H., 18 July, 1877, B. 2656; S. C., 25 W. R. 802; 46 L. J. Ch. 684.

6. *Marriage declared void, and Property vested in the Crown.*

"DECLARE that the marriage between the testator and E., the sister of his deceased wife, whether celebrated in the kingdom of Denmark or elsewhere, was not a valid marriage, but is null and void to all intents and purposes whatsoever, and that the real and personal estate of the testator has become vested in H. M. the King, in right of His Royal Prerogative."—*Brook v. B.*, V.-C. S., 17 April, 1858, A. 1093; S. C., 3 Sm. & G. 481; 9 H. L. C. 193; 9 W. R. 461; *et inf.* p. 1651.

7. *Account in Suit by Next of Kin against Solicitor to the Treasury, who had administered.*

"LET an account be taken of the personal estate of K., the intestate &c., come to the hands of the Deft R., or of M., deceased" [*late Treasury solr*], "or of any other person &c.; And Let what shall

appear to have been received by the Deft R., or by the said M., deceased, be answered by the Deft R.”—Adjourn &c.—*Kane v. Reynolds*, V.-O. S., 11 Feb. 1854, A. 475.

8. *Accumulation beyond Legal Limits—Undisposed-of Surplus divided between the Widow and the Crown, there being no Next of Kin.*

“DECLARE, that as between the persons entitled to the residuary real and personal estate of the testator, the annuity given by his will to his widow, the Deft F. T., is payable rateably out of the income of the said real and the income of the said personal estate; And Declare that the trusts for the accumulation directed by the said will of the surplus income of the testator's real and personal estate ceased upon the 16th day of April, 1873, being the expiration of twenty-one years from the death of the testator, and that the surplus income of the testator's residuary real and personal estate from the 16th day of April, 1873, down to the decease of the testator's widow, the Deft F. T., are not effectually disposed of by his said will, and that the Deft F. T., the widow of the testator, is entitled to one equal moiety of such part of the said surplus income so undisposed of as has arisen, or shall arise, from personal estate; and that H. M. the Queen, in right of her royal prerogative, is entitled to the other equal moiety of such part of the said surplus income so undisposed of as has arisen, or shall arise, from personal estate, and to the entirety of such part of the said surplus income so undisposed of as has arisen, or shall arise, from the rents, issues, and profits of real estate.—Tax the costs of all parties as between solr and client; And Let the Plt, the trustee of the said will, out of the rents and profits of the residuary real estate of the testator which shall accrue during the life of the Deft F. T., pay to the Deft F. T., for her separate use during her life, or until further order, so much of the said annuity of £500 as shall be the apportioned part thereof payable out of such rents, having regard to the declaration first hereinbefore contained, such apportioned part to be certified; and upon the requisition &c. pay the residue of the said rents during the life of the Deft, or until further order, to the P. G. ‘cash account’ at the Bank.”—Liberty to Deft F. T. to apply, in Chambers, half-yearly during her life, to have the amount of her annuity for the time being payable out of the income of the personal estate, having regard to the declaration first hereinbefore contained, ascertained; And it is ordered that the funds in Court be dealt with as directed in the Schedule hereto (the £— New Consols directed to be transferred to J. T., representing one moiety of the income of the personal estate from the 16th April, 1873, and the £— New Consols directed to be transferred to the Treasury representing the other moiety of the said income, and also the accumulation of rents and profits of the real estate since the same

date.—See *Weatherall v. Thornburgh*, V.-C. H., 29 May, 1877, B. 2436.

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Sell sufficient New Consols to raise costs to be taxed under this order.			
Out of proceeds—pay such costs.			
Transfer New Consols	Deft F. T., the wife of J. T.		(Insert amount.)
Transfer New Consols	The Treasury Solr and the Assistant Paymaster - General, per Act 39 & 40 V. c. 18, "The Crown's Nominee Securities Ac- count."		(Insert amount.)
Out of interest to accrue on residue of New Consols during life of payee— Pay so much of the annu- ity of £500 as shall be from time to time certified to be payable out of the income of the personal estate.	Deft F. T., wife of J. T., on her separate receipt.		
Divide residue of such inter- est into moieties.			
Pay one moiety	The same, on her separate receipt.		
Pay one moiety	H. M.'s Paymaster-Gen- eral, "cash account."		

This Form has been redrawn to suit S. C. F. R.

NOTES.

By the Treasury Solicitor Act, 1876 (39 & 40 V. c. 18), s. 1, the Treasury solr is constituted a corporation sole. By sect. 2, where letters of admon are granted to the Treasury solr as her Majesty's nominee, they may be granted to him and his successors, or, if the warrant so provide, to some person nominated in that behalf by him. The warrant may make the nomination with limitations, and the Treasury solr is to be bound without executing an admon bond as if he had done so.

By sect. 3, an assistant solr to the Treasury may act.

By sect. 4, the disposal of money and property received under admon or forfeiture and of unclaimed grants is provided for.

By sect. 6, the Act is to apply, so far as circumstances admit, in the case of personal estate and property to which the Crown has become entitled before the passing of the Act, and of warrants given, grants made, and acts done under previous Acts.

By sect. 9, the 15 & 16 V. c. 3, is repealed, except that all acts done, rights and liabilities and proceedings under it are not to be affected; and sect. 2 is re-enacted.

As to petitions of right, *v.* Vol. I., pp. 396, *et seq.*, Chap. XXV., "PETITION OF RIGHT."

As to the right of the nominee of the Crown to costs when sued by parties claiming both wrongfully and rightfully to be next of kin, see *Kane v. Reynolds*, 4 D. M. & G. 365; 2 Sm. & G. 331; and as to payment of costs by the Crown, see the Crown Suits Act, 1855 (18 & 19 V. c. 90); *et sup.* pp. 1290, 1306.

Property devolving on a corp. which has been dissolved passes to the Crown as *bona vacantia*: *Re Higginson and Dean, Exp. A. G.*, (1899) 1 Q. B. 325; and see *Cunnack v. Edwards*, (1896) 2 Ch. 679, C. A., *sup.* Form 2; Lewin, 159; and if a c. q. t. of chattels real or personal dies intestate without leaving any next of kin, the beneficial interest, like all other *bona vacantia*, vests in the Crown by the prerogative: Lewin, 307.

When, no next of kin appearing, the Crown had received the residue, on Plts proving their right, the Crown was liable to refund: *Re Dewell, Edgar v. Reynolds*, 4 Drew. 269; but not with interest where no letters of admon had been taken out: *Re Gosman*, 17 Ch. D. 771, C. A.; 15 Ch. D. 67.

Where an owner in fee simple who died without heirs devised land to one for life with no gift over, and the land was afterwards sold under the Settled Land Act, 1882, proceeds of sale remaining, after the death of the tenant for life, in the hands of trustees appointed for the purposes of the Act vested in the Crown as *bona vacantia*: *Re Bond, Panes v. A. G.*, (1901) 1 Ch. 15, Form 4, *sup.* p. 1647.

On failure of heirs, though named, of special occupant, dying intestate, of lease for lives, the Crown was entitled on taking out admon: *Reynolds v. Wright*, 2 D. F. & J. 590; and where a charitable legacy or a trust fails, and there are no next of kin, the exor is trustee for the Crown: *Dacre v. Patricson*, 1 Dr. & S. 182; *Powell v. Merrett*, 1 Sm. & G. 381; as to next of kin, *v. sup.* p. 1575.

Under the Intestates' Estates Act, 1884 (47 & 48 V. c. 71), ss. 4, 7, the title of the Crown by escheat prevails over that of exors as to proceeds of sale of land not disposed of by the will of a testator who dies without an heir: *Re Wood, A. G. v. Anderson*, (1896) 2 Ch. 596.

Where an intestate left a widow and no next of kin, she and the Crown shared the personalty equally: *Cave v. Roberts*, 8 Sim. 214; and see *Weatherall v. Thornburgh*, Form 8, *sup.* p. 1649. Now, under the Intestates' Estates Act, 1890 (53 & 54 V. c. 29), if the net value of the real and personal estates of any man who dies intestate after 1st Sept. 1890, leaving a widow but no issue, does not exceed £500, the real and personal estates belong to the widow absolutely (s. 1); and where the net value exceeds £500 the widow is entitled to £500 part thereof absolutely and exclusively, and is to have a charge upon the whole for £500 with interest at 4 p. c. per ann. from the date of the death (s. 2), and this provision for her is in addition to her interest in the residue remaining after payment of the £500 (s. 3). This Act, however, does not apply to cases of partial intestacy: *Re Twigg*, (1892) 1 Ch. 579.

As to the illegality, both in England and Scotland, of marriage with a deceased wife's sister, see *Fenton v. Livingstone*, 3 Macq. 497; 5 Jur. N. S. 1183; though celebrated abroad: *Brook v. B.*, 9 H. L. C. 193; 7 Jur. N. S. 422, Form 6, *sup.* p. 1647; and see *Ayerst v. Jenkins*, 16 Eq. 275; *Pawson v. Brown*, 13 Ch. D. 202; and as to marriage of Jew with his niece, *v. Re De Wilton*, (1900) 2 Ch. 401, *sup.* p. 1586.

As to the marriages of Quakers, see the Marriage (Society of Friends) Acts, 1847, 1860 (10 & 11 V. c. 58; 23 & 24 V. c. 18); as to Scotch marriages, the Marriage (Scotland) Act, 1856 (19 & 20 V. c. 96); and as to validity of marriages contracted according to colonial law, the Colonial Marriages Act, 1865 (28 & 29 V. c. 64).

As to the validity of a marriage duly solemnized under the Consular Marriage Act, 1849 (12 & 13 V. c. 68, repealed and virtually re-enacted by the Foreign Marriage Act, 1892, 55 & 56 V. c. 23), in France between a Frenchman and Englishwoman, although such marriage has been declared invalid in form by a French Court, see *Hay v. Northcote*, (1900) 2 Ch. 262, following *Simonin v. Mallac*, 2 Sw. & Tr. 67.

As to the rule determining the validity of marriages by the *lex loci*, except where contrary to fundamental principles of the law of the domicile, see *Brook v. B.*, *Fenton v. Livingstone, sup.*; *Sottomayor v. De Barros*, 5 P. D. 94; *Re*

Bethell, B. v. Hildyard, 38 Ch. D. 220; *Brinkley v. A. G.*, 15 P. D. 76, *sup.* p. 1586.

As to penalties under the Marriage Act, 1823 (4 G. IV. c. 76), *v. sup.* p. 1063.

By the Forfeiture Act, 1870 (33 & 34 V. c. 23), s. 1, forfeiture and escheat for treason or felony (but not outlawry) are abolished; but by sect. 2 treason or felony disqualifies from any public office; and by sect. 3 convicts may be condemned in costs; and by sect. 4 compensation may be made to persons defrauded or injured; and by sect. 8 convicts, as defined by sects. 6, 7, are disabled from suing for or alienating property; and by sect. 9 the Crown may appoint admors in whom, by sect. 10, all the property of convicts (except what they acquire while lawfully at large, sect. 30) is to vest, with (sects. 11, 17) full power to let, mortgage, sell, convey, or transfer, and decide priorities, and (sects. 13—16) to pay costs, debts, make compensation to persons injured, and allowances to the convict's family, subject to which the property is, by sect. 18, to revert to the convict, or his represves, on his death or pardon, or the completion of his sentence. By sects. 19, 20, admors are to be liable only for what they receive, and to receive solr and client costs; sects. 21—26 provide for the appointment of interim curator where there is no admor; by sect. 27 the execution of judgments against the convict is provided for; by sects. 28, 29, the admor, or interim curator, is accountable during sentence to any person who would be entitled if the convict were dead, and after sentence completed to the convict himself. For form of summons under sect. 28, see D. C. F. 1180.

SECTION XXVI.—SET-OFF BETWEEN DEBT AND LEGACY.

Sum found due to one of the Next of Kin in respect of his Share set off against Debt due to the Administrator personally.

DECLARATION, that the total amount due by the Deft (*admor and one of the next of kin*) to the Plt (*the other next of kin*) was £3,894.—“An inquiry whether any, and if any what, amount is due from the Plt to the Deft for moneys lent or advanced by the Deft out of his own moneys; And the Deft is to be at liberty to set off what, if anything, shall be certified to be so due from the Plt from the said sum of £3,894 and subsequent interest, hereinbefore declared to be owing by him to the Plt, and the balance due by the Deft to the Plt is to be certified.”—Direction for payment within one month after the date of the certificate; but if it shall be certified that nothing is due from the Deft, then to dismiss action without costs; and in the event of any balance being certified to be owing from the Deft to the Plt.—Adjourn &c.—*Taylor v. T.*, M. R., 4 May, 1875, B. 898; S. C., 20 Eq. 159.

For directions to retain legacy and interest from judgment debt due from legatee to testator, and to ascertain what was due on the judgment, by computing interest on it to the amount of the penalty of the bond on which it was obtained, see *Campbell v. Graham*, 1 Russ. & M. 466.

For direction to exors to retain any sums payable to legatees, who were, or appeared to be, indebted to the estate, see *Sellon v. Watts*, Form 24, *sup.* p. 1617.

For a declaration that Plt, as admor of the obligee, was entitled to an

account of principal and interest due on five bonds without being limited to the penalties of the bonds, the obligor having vexatiously delayed him in recovering, and direction to take an account of what was due, crediting a payment in reduction first of interest and then of principal, and declaration that what was due for principal and interest of Deft's legacy ought to be set off, with account of what was due in respect of it, and direction for set-off, and the balance to be certified and paid, see *Grant v. G.*, V.-C. E., 20 March, 1840, A. 1401; 3 Sim. 366.

NOTES.

An exor may in general set off a debt due to him against an interest in the testator's estate, or may, in other words, pay the legacy by releasing the debt: see Wms. Exors. 8th ed. 1309 *et seq.*

A debt due from a husband could be set off against a legacy to his wife, subject to her equity to a settlement: *Lee v. Egremont*, 5 Dr. & S. 348, 368; *Re Briant, Poulter v. Shackel*, 39 Ch. D. 471; and to her assignments for value: *Re Batchelor, Sloper v. Oliver*, 16 Eq. 481; and see Lewin on Trusts, 854.

An exor or admor may set off a legacy, or the share of a next of kin indebted to the testator, against the debt, though statute-barred: *Courtenay v. Williams*, 3 Ha. 539; affirmed, 15 L. J. Ch. 204; *Coates v. C.*, 33 Beav. 249; *Gee v. Liddell*, 33 Beav. 629; *Re Cordwell, White v. C.*, 20 Eq. 644; 23 W. R. 826; 44 L. J. Ch. 746; *Re Milnes, M. v. Sherwin*, 53 L. T. 534; 33 W. R. 927; *Re Akerman, A. v. A.*, (1891) 3 Ch. 212; but not against a debt proved under an insolvency: *Bell v. B.*, 17 Sim. 127; or a debt due from an undischarged debtor within three years from the close of a liquidation under the Bankruptcy Act, 1869: *Re Rees, R. v. R.*, 60 L. T. 260; nor can damages for non-repair of buildings recoverable from a deceased tenant for life by the reversioner be set off by the exors of the tenant for life against a statute-barred debt due from the reversioner to her: *Dingle v. Coppen*, (1899) 1 Ch. 726.

And exors who are also trustees of residuary real and personal estate can set off a statute-barred debt due from a beneficiary as against his share of the proceeds of the real as well as of the personal estate: *Re Akerman, sup.*; *accus*, as regards freeholds and leaseholds specifically given: *S. C.*

But a debt due from the heir-at-law cannot be set off against a share of the proceeds of the realty which has devolved on him by reason of lapse: *Re Milnes, M. v. Sherwin, sup.*

Sums paid by the testator on behalf of a legatee under a contract of suretyship may be retained as against the trustee under the bankruptcy of the legatee, occurring subsequently to the death, at all events if the principal creditors have not proved in the bankruptcy: *Re Watson, Turner v. W.*, (1896) 1 Ch. 925; but there cannot, it seems, be any such retainer where the suretyship liability has not ripened into a debt, and the principal creditors have proved in the bankruptcy for the whole amount of the debt: *Re Binns, Lee v. B.*, (1896) 2 Ch. 584.

Where a suit by a legatee to recall probate was pending at the time of assignment of his legacy, but afterwards failed, with costs to be paid by him, the exor was allowed to set off the costs against the legacy notwithstanding the assignment: *Re Knapman, K. v. Wreford*, 18 Ch. D. 300; and see *Re Jones, Christmas v. J.*, (1897) 2 Ch. 190.

When exors have set apart and appropriated assets to meet a legacy they cannot retain or impound any part of such assets to meet a debt due from the legatee to the testator: *Ballard v. Marsden*, 14 Ch. D. 374.

Where debts owing from the legatee were discharged by a bankruptcy and composition, the Court refused to infer that one of them, being for money lent more than six years before the bankruptcy, was not provable in the bankruptcy, and so could be set off: *Re Orpen's Estate, Benwick v. O.*, 16 Ch. D. 202.

When sued by a next of kin, an admor may set off advances made to Plt against his share: *Taylor v. T.*, 20 Eq. 159, Form *sup.* p. 1652; *Re Jones, Christmas v. J.*, (1897) 2 Ch. 190; but see *Smee v. Baines*, 7 Jur. N. S. 902;

29 Beav. 661; and by proving in the debtor's bankruptcy the exor loses his right of set-off: *Stammers v. Elliott*, 3 Ch. 195.

An exor when sued for a legacy could not set off rent due from Plt or occupying a house of which Plt was tenant in common under the will: *M'Mahon v. Burchell*, 2 Ph. 127; but the exor of A. can set off against a share of residue a debt to the estate of B., whose residuary legatee A. was: *Bousfield v. Lawford*, 1 D. J. & S. 459; and as against the specific legatee of the profits of a business the exors may retain moneys representing such profits to answer a debt due from him to the estate: *Re Taylor, T. v. Wade*, (1894) 1 Ch. 671.

The exor of A., the owner of a charge on realty which was settled on a tenant for life, to whom A. gave a legacy out of the sum charged, could not set off the legacy against arrears of interest on the charge: *Re Morley, M. v. Saunders*, 8 Eq. 594.

The testator's heir suing his widow's legal pers. reprieve for rents received by her under a mistake was not entitled to set them off against payments made by her as executrix: *Monypenny v. Bristow*, 2 Russ. & M. 117.

An exor and trustee of a legacy who was also a residuary legatee, and had become a creditor of the admor of the legatee, was not, in the absence of special agreement, allowed to set off his debt against the legacy: *Freeman v. Lomas*, 9 Ha. 109.

As to set-off generally, *v. sup.* pp. 1363 *et seq.*

SECTION XXVII.—PAYMENT ON SECURITY TO REFUND, IF TITLE DISPLACED.

1. *Payment on giving Security to refund, if other Next of Kin.*

LET, upon the Plt F. entering into a recognizance, to be approved (settled) by the Judge, to refund, as the Court [or Judge] shall direct, any part of the money hereinafter directed to be paid to her, in case it shall hereafter appear that at the death of the intestate any other of his next of kin were living and entitled to distributive shares of the clear residue of his personal estate, the Deft D. pay the other moiety of the said money &c. to the Plt F.—See *Milward v. Devon*, M. R., 8 Feb. 1806, B. 291.

2. *The Like, in case of future Children.*

“AND it appearing that under the testator's will the Defts F. P., W. P. &c., as the seven children of the Deft A. P., were entitled to the £—New Consols in Court, to the credit of &c., ‘The account of the Deft A. P. and his children and issue,’ subject to the life interest therein of the Deft A. P., and subject to [being divested in part in the event of] his dying without having any other child or children, and it appearing that the Deft A. P. is now a widower of the age of seventy years and upwards, Let the Deft F. P. enter into a recognizance with J., as his surety, in the penal sum of £3,000, to be approved by the Judge, to replace the £1,500 New Consols hereinafter mentioned, in the event of there being any child of the Deft A. P. hereafter born; And it is

ordered that, upon the due execution of the said recognizance by the said Deft F. P. being certified, the funds in Court be dealt with as directed in the Schedule hereto.

[*Insert in Payment Schedule as under.*]

Particulars of Payments, Transfers, or other operations ordered.	Payees, Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Upon the due execution of the recognizance in the order mentioned by the Deft F. P. being certified—			
Sell New Consols	1,500 0 0
Pay proceeds of sale	Deft F. P.		

—See *Parkin v. Proudfoot*, V.-C. H. at Chambers, 15 July, 1876, B. 2264.

This form has been re-drawn to suit S. C. F. R. For like orders under former practice, see *Stokes v. Smith*, 13 Feb. 1824, A. 449; *Whitaker v. W.*, M. R., 26 July, 1803, B. 633; and *Payne v. Long*, M. R., 19 July, 1806, B. 874.

3. *Person deemed to be Dead—Payment on giving Security.*

DECLARE, that under the circumstances mentioned in the (certificate), dated &c., it is to be presumed that the said D. was dead at the death of the testator.—Let Plt enter into a recognizance &c. [*as in Form 2*] in case it should hereafter be proved that the said D. was living at the death of the testator.—[*Add Payment Schedule, as in last form.*].—See *Dowley v. Winsfield*, V.-C. E., 9 Nov. 1844, A. 349; 14 Sim. 277.

The above three forms relate to special cases where the Court was not satisfied that the absent persons, if any, who might be entitled should be cut out. The present practice, however, is for the Court, if not satisfied, to refuse the application to pay out, or, if satisfied, to presume the death and pay out fund. For the more usual form where death, &c. presumed, and no security to refund ordered, see *Greenwood v. G.*, V.-O. S., 16 Nov. 1857, A. 743, Form 19, p. 1600; and see notes, *inf.*

For order for transfer out on giving security to refund on contingent liabilities being established, see *Waller v. Berrett*, M. R., 24 Nov. 1857, B. 408; S. C., 24 Beav. 413.

For declaration that “it appearing that E., the wife of A., is now fifty-seven years of age,” funds given equally among all the children of E. were divisible, see *Kennedy v. Sedgwick*, 3 K. & J. 542.

For case in which the whole of the dividends of their prospective shares were paid to two adult children of a woman aged forty-two, on their undertaking that the fund should remain until further order as security for the benefit of possible after-born children, see *Pilkington v. P.*, 29 L. R. Ir. 370.

NOTES.

Where the contingency is very remote, no recognizance is required: see *Mills v. Knight*, 12 Jur. 686.

In *Dowley v. Winsfield*, 14 Sim. 277, *et sup.* Form 3, a share of the father's

residue given to A. was, on the presumption of A.'s decease, paid out of Court to his brother, as his sole next of kin at their father's death, upon giving security to refund; and as to payment of a fund, subject to an annuity to a person not heard of for many years, see *Cuthbert v. Purrier*, 2 Ph. 199.

The presumption is that a man who has not been heard of for seven years is dead; but there is no presumption of his having been dead at any particular time during the seven years: *Doe d. Knight v. Nepean*, 5 B. & Ad. 86, 94; affirmed, 2 M. & W. 895, 914; *Re Rhodes, R. v. R.*, 36 Ch. D. 586; *Reg. v. Tolson*, 23 Q. B. D. 168, 183; nor of his having been alive at any particular time during the seven years: *Re Phene*, 5 Ch. 139; *Re Lewes*, 6 Ch. 356; 11 Eq. 236 (overruling *Lambe v. Orton*, 8 W. R. 111; 6 Jur. N. S. 61; *Dunn v. Snowden, Thomas v. T.*, 2 Dr. & S. 201, 298; and *Re Benham*, 4 Eq. 416, which was appealed and compromised: see 5 Ch. 141, n.; 37 L. J. Ch. 265); *Reg. v. Lumley*, L. R. 1 C. C. 196. A case depending on his having been dead or alive at any precise time in the period of seven years must be proved affirmatively: *S. C.C.*; *Re Nichols*, L. R. 2 P. & M. 461; 21 W. R. 161; *Re Smith*, 31 L. J. P. & M. 181; *Re Rhodes, sup.*; but see *Re Walker*, 7 Ch. 120; *Re Westbrook*, W. N. (73) 167.

Death will not be presumed if it appears that further evidence can be obtained: *Re Rhodes, Fraser v. Renton*, 28 L. T. 392; and the Court will direct advertisements though the seven years have expired: *Re Allin*, 15 W. R. 1164, Form 9, *sup.* p. 1570; *Re Atkinson*, Ir. Rep. 5 Eq. 219.

Where a trust is declared by deed in favour of a named person, it must be taken that he was alive at the date of the deed, and the onus of proving his death before that date will lie on the represes of the settlor claiming under a resulting trust: *Re Corbishley's Trusts*, 14 Ch. D. 846.

Where the property of a person whose death the Court was asked to presume consisted in part of a policy of insurance, notice of the application was to be given to the insurance co.: *In the goods of Barber*, 11 P. D. 78.

The presumption is that an unmarried man who has not been heard of for seven years died without issue (*Re Hanby*, 25 W. R. 427; *Re Webb*, Ir. Rep. 5 Eq. 235), and left no widow: *Re Westbrook*, W. N. (73) 167.

Where a convict had not been heard of for fourteen years after transportation for seven years, only the dividends were paid out on security to refund: *Re Mileham*, 15 Beav. 507; and the presumption does not arise where it is improbable there would have been any communication with home: *Bowden v. Henderson*, 2 Sm. & G. 360; and see *Re Smith*, 31 L. J. P. & M. 182; *M'Mahon v. M'Elroy*, Ir. Rep. 5 Eq. 1, 12; and as to evidence sufficient to rebut the presumption, see *Prudential Ass. Co. v. Edmonds*, 2 App. Ca. 487.

Death before the lapse of seven years was held established where a person had sailed in a vessel not since heard of: *Sillick v. Booth*, 1 Y. & C. C. 117; *Watson v. King*, 1 Stark. 121; 4 Camp. 272; *Re Hutton*, 1 Curt. 595; *Re Norris*, 1 Sw. & T. 7; 6 W. R. 261; *Re Main, Ib.* 262; *Re Cooke*, Ir. Rep. 5 Eq. 240; or had ceased to apply for dividends on which he depended: *Re Beasney*, 7 Eq. 498; or an annuity: *Hickman v. Upsall*, 20 Eq. 136; so also where a sailor left his vessel intending to return, but never came back: *Lakin v. L.*, 34 Beav. 443; *secus*, if he intended to desert: *S. C.*; and see *Re Tindall*, 30 Beav. 151.

The age and state of health at time of disappearance are to be regarded: see *Danby v. D.*, 5 Jur. N. S. 54; *R. v. Harborne*, 2 A. & E. 544; *Re Beasney*, 7 Eq. 498.

It was held to have been shown that a person who sailed with Sir J. Franklin in 1845 was alive in 1860: *Ommaney v. Stilwell*, 23 Beav. 328.

In *De Martana v. De M.*, 24 W. R. 200; 33 L. T. 685, a resettlement was sanctioned on the assumption of the husband's death.

Where several persons perish by one calamity the question of survivorship is matter of evidence and not of presumption: *Underwood v. Wing*, 4 D. M. & G. 633, 652, 658; 3 W. R. 226; 19 Beav. 459; *Wing v. Angrave*, 8 H. L. C. 183; *Scrutton v. Pathillo*, 19 Eq. 369; but see *Sillick v. Booth*, 1 Y. & C. C.

117; nor is there any presumption that all died at the same time: *Wing v. Angrave, sup.*

Where husband and wife were drowned at the same time, leaving no children, the funds settled by each on their marriage went to his or her legal pers. represes: *Wollaston v. Berkeley*, 2 Ch. D. 213. See *Hitchcock v. Beardsley*, West. t. Hardw. 445.

As to evidence of a child having been born alive, see *Broch v. Kellock*, 3 Giff. 58; 7 Jur. N. S. 436, 789; 9 W. R. 939.

Funds are paid out on the presumption of females being past child-bearing: *Edwards v. Tuck*, 23 Beav. 268, 272, n. (age 57). For instances, see *Leng v. Hodges*, Jac. 585; *Fraser v. F.*, Jac. 586, n. (age 55); *Haynes v. H.*, 14 W. R. 361 (age 53); *Re Widdow*, 11 Eq. 408 (age 53½); *Re Millner*, 14 Eq. 245 (age 49 and 9 months, long married and no children); *Browne v. Warnock*, 7 L. R. Ir. 3 (age 63, title forced on purchaser); *Re Summer*, 22 W. R. 639; 30 L. T. 377 (age 47, regard being had to the state of health); *Conduitt v. Soane*, 19 W. R. 817; *Re Belt*, 25 W. R. 669 (age 52, upon medical evidence as to health); *Davidson v. Kimpton*, 18 Ch. D. 213 (age 54); *Re Taylor's Settlement Trusts*, 29 W. R. 350; 43 L. T. 795 (being 52 years of age, and having been 25 years a widow); *Re Allason*, 36 L. T. 653 (age 52, married fifteen years, without having had children); *secus, Re Warren's Settlement*, 52 L. J. Ch. 928 (age 50, having husband aged 53, and married to him for 28 years); *Croxton v. May*, 9 Ch. D. 388, C. A. (age 54 and 6 months, but only married three years); *Re White, W. v. Edmond*, (1901) 1 Ch. 570 (widow aged 56, with only child aged 34).

According to *Groves v. G.*, 12 W. R. 45; 9 L. T. 533, and *Re Overhill*, 22 L. J. Ch. 485; 17 Jur. 342; 1 W. R. 208, the age must be 50 at least.

For other instances, see *Brown v. Pringle*, 4 Ha. 124; 8 Jur. 1113; *Davis v. Bush*, 8 Jur. 1114, n.; *Kennedy v. Sedgwick*, 3 K. & J. 540 (age 57); *Re Ryan*, 9 W. R. 137 (age 58).

But evidence that a person is past child-bearing will not be admitted for the purpose of giving effect to a gift which is too remote: *Jee v. Audley*, 1 Cox, 324; *Re Dawson*, 39 Ch. D. 155. *sup.* p. 1608; nor for the purpose of depriving one person of the chance of becoming entitled to property in the event of another having a child: *Re Hocking, Michell v. Loe*, (1898) 2 Ch. 567, C. A.; explaining and distinguishing *Re Lowman*, (1895) 2 Ch. 348.

SECTION XXVIII.—REFUNDING LEGACIES.

1. *Distributed Assets made liable for Debts—Accounts of Personalty and Realty—Inquiries as to Executor's Debt and Testator's Liability and Distributed Assets—Realty declared liable if Personalty not recoverable.*

1. Account of what due to Plts and all other creditors of S., the testator; 2. Funeral expenses; 3. Personal estate come to the hands of Defts W., N., and C., the exors; 4, 5, 6. Inquiries as to outstanding personalty and exor's debt [see Form 2, p. 1525]; 7. What parts of the realty charged with debts, and what sold or incumbered by the exors; 8. Account of the moneys so raised by Defts W., N., and C.; 9. Account of rents and profits of realty charged with debts.—Liberty to Plts to prove in C.'s bankruptcy for sums received by him, and his assignees to pay any dividend into Court;—"And Let what on taking the said accounts shall be certified to be respectively due from the

Defts W. and N. be answered by them personally; 10. And Let an inquiry be made whether what on taking the said accounts shall be certified to be respectively due from the Defts W. and N. is now recoverable from the said Defts respectively; And Declare, that so far as it may be necessary for payment of the debts and funeral expenses of the testator, the Defts T. &c., the several residuary legatees of the testator's estate, are liable to refund the moneys received by them respectively in respect of their shares and interests of and in the residue of the testator's estate; And if necessary for the purposes aforesaid, Let the following, &c.; 11. An account of the moneys received by the said Defts T. &c., the residuary legatees respectively, in respect of their shares and interests of and in the residue of the testator's estate, and when the same were so respectively received; 12. An inquiry whether the moneys so received by the said Defts, the residuary legatees respectively, can be recovered; And Declare that the estates and interests of the Defts W. and C., and of the Defts D. and his wife, the devisees, in the real estates devised by the will of the testator, and not charged with the payment of his debts, are subject to the payment of the debts and funeral expenses of the testator, and ought to be applied in payment thereof, so far as what shall be recovered from the Defts W. and N., and the estate of the Deft C., the bankrupt, as such exors and trustees as aforesaid, and from the Defts, the residuary legatees, shall be insufficient for that purpose; And in case of such deficiency, Let the following additional inquiry be made; 13. An inquiry of what such estates and interests respectively consist, and whether the same, or any and which of them, or any and what parts thereof respectively, have been aliened, sold, mortgaged, or otherwise incumbered by the Defts W., C., and D. and wife, the devisees, or any and which of them, and when and to whom, and for what consideration or considerations, and under what circumstances."—Reserve all questions as to interest on the moneys received by the residuary legatees respectively in respect of their shares and interests of and in the residue of the testator's estate.—Adjourn &c.—*Fordham v. Wallis*, V.-C. T., 8 Jan. 1853, A. 403; 10 Ha. 217, 232.

For directions to apportion Plt's debt rateably on legatees, parties or not, their legacies having been paid, and as to costs, see *Hall v. Palmer*, 3 Ha. 538.

For order on petition, allowing a foreign prince to prove a debt against an estate administered by the Court and all distributed, except the share of an infant retained in Court, see *Greig v. Somerville*, 1 Russ. & M. 346; and see *Gillespie v. Alexander*, 3 Russ. 139.

As to excluding creditors after distribution in or out of Court, see *Ib.*

For orders giving leave to prove, or allowing claims by creditors against the estate though sent in after the proper time, *v. sup.* pp. 1429, 1430; and as to time for proving, p. 1434.

2. *Administratrix who had, after Notice of Calls, distributed the Estate, to pay the Calls, and in default Administration Accounts.*

LET the Deft W. N., the administratrix of the intestate, on or before &c., she by her answer admitting assets of the intestate for that pur-

pose pay to the Plts P. and Y. the joint official liquidators of the A. Insurance Co. in the pleadings mentioned, the sum of £—, being the amount of the call of £11 per share in respect of 117 shares in the said co. held by the intestate, with interest &c.; And Let, if such sum of £— and interest shall not be paid by the Deft W. N. to the Plts on or before the said &c.,—Usual admon of personalty in creditors' suit, Deft to pay Plts' costs up to hearing. In case of non-payment adjourn &c.—*Price v. Mayo*, V.-C. H., 3 March, 1874, B. 628; *S. C.*, 22 W. R. 401, *et inf.* p. 1660.

3. *Executors who had by mistake divided the Estate between five Beneficiaries instead of six liable to pay the sixth his Share.*

"Tax as between solr and client the cost of the Plt and the Defts of the action, including in the costs of the Defts F. and B. (*represves*) any charges &c., and also the costs of the Plt and the Deft H. as between party and party, and certify the difference between the costs of the Plt and the Deft H. as taxed between solr and client, and as taxed between party and party; Defts F. and B. to pay the costs of the Plt and the Deft H. as between party and party; Declare, that the costs of the Plt and the Deft H., to be paid by the Defts F. and B. as aforesaid, and the costs, charges, and expenses of the Defts F. and B. when taxed, are payable out of the general residuary estate of the testator; Let the Defts F. and B. out of the balance of £— certified to be due from them on account of the testator's personal estate, retain the costs so to be paid by them, and their own costs, charges, and expenses when taxed; And Let the Defts F. and B. forthwith take such proceedings as may be necessary to obtain from the Commrs of Inland Revenue a return of overpaid (stamp) duty &c., and give credit for what they shall so recover; And Declare, that what shall be so recovered will form part of the general residuary estate of the testator."—Let the fund in Court be dealt with as directed in the schedule hereto.—Let the following &c., 1. "An inquiry what will be the amount required to make up, with the value of the annuities and cash directed to be carried over to the two accounts in the schedule mentioned (the annuities to be taken at the Bank average price of such annuities on the 20 Nov. 1876, the date of this decree), the value of two-sixth shares of the entire residuary estate of the testator remaining after payment of the costs, as before directed; And Let the Defts F. and B., within fifteen days after the date of the Master's certificate, lodge in Court to the credit of &c., 'Share of the infant Plt H.,' as directed in the schedule hereto, the amount which shall be certified to be required to make up his one-sixth share."—Like direction as to share of infant Deft H. and direction to invest.—2. "An inquiry what would be due from the Defts F. and B., the trustees, to each of them, the infant Plt H. and the infant Deft H., on an account stated on the footing of charging

the said trustees with all interest received by them since 12 October, 1871, on the £750 advanced by them on mortgage &c., and with interest at the rate of £4 p. c. per ann. on the difference between the said sum of £750 and the value of two-sixths shares of the entire residuary estate of the testator, to be ascertained as hereinbefore directed, and crediting the said trustees with all sums paid by them, or by them and the late Deft G., deceased, for the maintenance and education of the said infants respectively.”—“Declare, that the amount which shall be certified by the taxing master to be the difference between the costs of the Plt as taxed between solr and client, and as taxed between party and party, is payable out of any anns which may be standing to his said account.”—Liberty to apply at Chambers for payment.—The like declaration as to the like costs of the infant Deft H.—Liberty to apply.—[*Add Payment Schedule, directing carrying over of a moiety of fund to the account of each infant, and Lodgment Schedule, directing exors to lodge in Court the amount certified to be due to each infant.*].—See *Hilliard v. Fulford*, M. R., 20 Nov. 1876, A. 3490; S. C., 4 Ch. D. 389.

In this case the executors had retained one of the five shares into which they had divided the estate.

It should be observed that in cases of this kind relief from the consequences of the mistake or other breach of trust may sometimes be obtained from the Court under the provisions of sect. 3 of the Judicial Trustees Act, 1896 (59 & 60 V. c. 35), *v. sup.* pp. 1153, 1154.

For form of order where two of several residuary legatees had been overpaid, see *Re Dixon, Byram v. Tull*, North, J., 3 July, 1889, A. 1655.

NOTES.

REFUNDING IN FAVOUR OF CREDITORS—EXECUTORS' LIABILITY.

A creditor may follow assets in the hands of legatees to whom they have been delivered in ignorance of his demand: *March v. Russell*, 3 My. & C. 31; or after notice of it: *Price v. Mayo*, 22 W. R. 401; 43 L. J. Ch. 402; Form 2, *sup.* p. 1658; or as against the purchaser of a reversionary interest in a fund remaining in Court in an admon action (*Hooper v. Smart*, 1 Ch. D. 90), but not from purchasers for value, *e.g.*, beneficiaries under a marriage settlement: *Dilkes v. Broadmead*, 2 Giff. 113; 2 D. F. & J. 566.

After the estate has been distributed creditors may, due regard being had to costs, bring another action to establish a debt not brought in under the judgment: *Good v. Blewitt*, 19 Ves. 339; *Hooper v. Smart*, 1 Ch. D. 90; *Creswell v. Dewell*, 12 W. R. 123; 4 Giff. 460; 10 Jur. N. S. 357; or disallowed: *Davis v. Combermere*, 15 Sim. 394; *Teed v. Beere*, 7 W. R. 394; 5 Jur. N. S. 381; 28 L. J. Ch. 782; or arising since: *Jervis v. Wolferstan*, 18 Eq. 18; *Thomas v. Griffith*, 2 D. F. & J. 555; but not where the claim is *res judicata*: *Ib.* 562, 563.

As the right of creditors is equitable only, it may be refused on equitable considerations, and mortgagees resting on their security for a long time, or who have assented to the distribution among the residuary legatees, may be precluded from compelling them to refund: *Blake v. Gale*, 32 Ch. D. 571, 573, C. A.; 31 Ch. D. 196; *Ridgway v. Newstead*, 3 D. F. & J. 474; but see *Greig v. Somerville*, 1 Russ. & M. 338; and creditors have no right to follow into the hands of the exor assets retained by him in discharge of his own debt of lower degree, where the estate has been fully administered *bonâ fide* without notice of the higher claim, and without undue haste: *Re Fludyer, Wingfield v. Erskine*, (1898) 2 Ch. 562.

After admon out of Court surviving legatees and represes, and legatees of those deceased, were held liable to refund for breach of trust by their testator,

and, under the circumstances, without an inquiry as to Plt's acquiescence: *March v. Russell*, 3 My. & C. 31; *Creswell v. Dewell*, 12 W. R. 123.

Where all the estate had been distributed, except an infant's share, such share was liable only for its proper proportion of a debt subsequently established: *Greig v. Somerville*, 1 Russ. & M. 338; *Gillespie v. Alexander*, 3 Russ. 139; but see *Hooper v. Smart*, 1 Ch. D. 90.

The admor having paid three of four next of kin, in a suit by the fourth, his share was only liable for one-fourth of the costs: *Holgate v. Haworth*, 17 Beav. 259.

Payment of a legacy by the exor without notice and *bond fide* to a bankrupt legatee after adjudication and before the trustee in the bankruptcy has intervened is good: *Re Ball* (1899), 2 I. R. 313, C. A.; and as to the protection of a purchaser for value of an equitable asset from the exor without notice of debts, see *Graham v. Drummond*, (1896) 1 Ch. 968.

The exors should be parties to an action to make a distributed estate liable for debts (*Hooper v. Smart*, 1 Ch. D. 90), unless it was distributed under the protection of the Court (*Thomas v. Griffith*, 2 D. F. & J. 555, 557; *March v. Russell*, 3 My. & C. 31), or after advertisements under the Law of Property Amendment Act, 1859 (22 & 23 V. c. 35): *Clegg v. Rowland*, 3 Eq. 368; *Hunter v. Young*, 4 Ex. D. 256, C. A.; in which case the exor, having had to pay the debt, may sue the legatees to refund, to the extent of the capital only, without intermediate income, though when he distributed the estate he knew there was a liability which might become a claim: *Jervis v. Wolferstan*, 18 Eq. 18; *Re Kershaw*, *Whitaker v. K.*, 43 Ch. D. 321; but exors cannot be made parties to any further proceedings after parting with the assets with the full knowledge of the parties: *Clegg v. Rowland*, 3 Eq. 368.

By the Land Transfer Act, 1897 (60 & 61 V. c. 65), s. 2, sub-s. 2 (*v. sup.* p. 1398), the protection afforded by 22 & 23 V. c. 35 would appear to be extended to the distribution of real estate: see *Brickdale*, 267; *Re Cary and Lott*, 70 L. J. Ch. 653; 84 L. T. 859; and the Act confers no right on creditors to follow real assets: *S. C.*

And where the residuary estate had been duly assigned by the surviving exor to the residuary legatees, it was held that a creditor might proceed against them without making the exor a party: *Hunter v. Young*, 4 Ex. D. 256, C. A.; and see *Re Frewen*, *F. v. F.*, 60 L. T. 952; *W. N.* (89) 109; but (*semble*) a creditor cannot call upon a legatee to refund a legacy which has been paid to him by the exor *de bonis propriis*: *Re Brogden*, *Billing v. Brogden*, 38 Ch. D. 546, C. A.

Exors distributing without the Court's authority remain liable though they had no notice of the claim: *Knatchbull v. Fearnhead*, 3 My. & C. 126; *Noble v. Brett*, 24 Beav. 499; and are liable to pay to a creditor the amount of a legacy paid, though when it was paid there was a release of the debt not questioned until some years afterwards: *Jefferys v. J.*, 19 W. R. 464; 24 L. T. 177; to make good to legatees the effect of a mistaken distribution, *inf.* p. 1662; and to refund legacies paid away without providing for a contingent liability in respect of their testator's shares retained unsold: *Taylor v. T.*, 10 Eq. 477. Nor are they protected by payment of legacies in an action in which they admitted assets and the accounts were not taken: *Newcastle Bank v. Hymers*, 22 Beav. 372; and in *Price v. Mayo*, 22 W. R. 401, *Form*, 2, *sup.* p. 1658, an order for payment of overdue calls and interest was made against an administratrix who had distributed with notice of a liability, and in default of payment for admor of the estate.

After exors have distributed the estate under the judgment of the Court they cannot be made liable at the suit of a creditor if they have acted fairly and kept back nothing: *Dean v. Allen*, 20 Beav. 1; *Waller v. Barrett*, 24 Beav. 413; *Smith v. S.*, *Dodson v. Sammell*, 1 Dr. & S. 384, 575; *Bennett v. Lytton*, 2 J. & H. 155; *Micklethwait v. Winstanley*, 13 W. R. 210; *Williams v. Headland*, 4 Giff. 505; except where they continue under some legal liability, as by shares being in their names, when they are entitled to indemnity: *Jervis v. Wolferstan*, 18 Eq. 18; *Hobbs v. Wayet*, 36 Ch. D. 256. And they cannot of their own authority take possession of property in the hands of the devisees to provide for a fresh claim: *Underwood v. Hatton*, 5 Beav. 36; nor are they entitled to retain part of the property as an indemnity against possible claims: *Williams v. Headland*, 4 Giff. 505; nor against liability on account of covenants actually broken, but for the breach of which no claim has been made: *Ross v. Tatham*, 17 W. R. 960.

But legatees remain liable as to their beneficial interests after admon by the Court: *Underwood v. Hatton*, 5 Beav. 36.

By the Law of Property Amendment Act, 1859 (22 & 23 V. c. 35), s. 29, an exor or admor may, after giving such notices as the Court would have given in an admon action, distribute the assets, or any part thereof, among the parties entitled, having regard only to and being liable only for the claims of which he "has then notice," without prejudice to a creditor's right to follow assets. As to advertisements, see O. LV, 44, 57. As to real estate, v. Land Transfer Act, 1897, sec. 2, sub-sect. 2, *sup.* p. 1661.

The exor is protected as fully as by an admon judgment against future claims: *Clegg v. Rowland*, 3 Eq. 368; *Hunter v. Young*, 4 Ex. D. 256, C. A.; but not against claims of which he has in fact notice: *Re Land Credit Co. of Ireland*, W. N. (72) 210; and an exor with notice is not discharged by no claim being sent in: *Wood v. W.*, *Markwell's case*, 21 W. R. 135; *Price v. Mayo*, *sup.* pp. 1659, 1660; nor unless the advertisements are sufficient: *Wood v. Weightman*, 13 Eq. 434; *Re Bracken*, *Doughty v. Townson*, 43 Ch. D. 1, C. A.

Where exors have been compelled to discharge a liability after distributing the estate, persons taking a share of residue given in satisfaction of covenant by the testator, and trustees of the settlement of a share, must refund: *Jervis v. Wolferstan*, 18 Eq. 18.

As to the right of exors to appropriate assets to particular legacies or to particular shares without making any corresponding appropriation to other legacies or shares, v. *sup.* p. 1486.

REFUNDING IN FAVOUR OF LEGATEES AND NEXT OF KIN.

Though the estate has been distributed among those found to be next of kin, they are liable in general to refund to the real next of kin, though the latter are bound by the accounts: *David v. Frowd*, 1 My. & K. 200; *Mohan v. Broughton*, (1900) P. 56, C. A.; and an action may be brought by such real next of kin for that purpose: *S. C.*; unless they have lain by with full notice of the proceedings: *Sawyer v. Birchmore*, 1 Keen, 391; and such action may be for the benefit of all equally next of kin with the Plts: *S. C.*, 2 My. & C. 611; for inquiry as to those parties, and if they had notice of the previous proceedings, see *Ib.* 612, and *S. C.*, 3 My. & K. 572; but where legacies have been severed and set apart in separate investments, the exors or trustees cannot come on one fund in respect of a liability incurred as regards the other fund: *Fraser v. Murdoch*, 6 App. Cas. 855.

On next of kin proving their title, the Crown was liable to refund: *Re Dewell*, *Edgar v. Reynolds*, 4 Drew. 269; *A. G. v. Kohler*, 9 H. L. Cas. 654; 5 L. T. 35; 9 W. R. 933; but without interest, where admon had not been taken out: *Re Gosman*, 17 Ch. D. 771, C. A.

But one residuary legatee, or next of kin, cannot make another refund payments, properly made to him at the time, merely because the assets have been since lost, and must show that the wasting took place before the share was paid over: *Fenwick v. Clarke*, 4 D. F. & J. 240; 10 W. R. 636, *et sup.* p. 1131; *Peterson v. P.*, 3 Eq. 111; *Re Winslow*, *Frere v. W.*, 45 Ch. D. 249; *Re Bacon's Settlement*, 42 Ch. D. 559; Lewin, 401, 402.

A legatee in trust under the will of a defaulting trustee being called upon to refund, cannot deduct his costs out of the fund before it was paid into Court: *Re Knott*, *Baz v. Palmer*, 56 L. J. Ch. 318; 35 W. R. 302; 56 L. T. 1611.

An action cannot be maintained by A. against B., who by an innocent mistake, has induced the Court to distribute a fund amongst a class, excluding A., who was a member of it: *Laing v. Harle*, 24 W. R. 728; 34 L. T. 728, where the action was dismissed with costs, to be set off against the sums actually received by B. in excess of her share.

An exor who has distributed the estate under a mistaken construction of the will is liable to those who are injured: *Hilliard v. Fulford*, 4 Ch. D. 389, Form 3, *sup.* p. 1659; and may have to pay costs, though he acted on counsel's opinion: *Boulton v. Beard*, 3 D. M. & G. 608; and see *Doyle v. Blake*, 2 Sch. & L. 243; Lewin, 391; but would have a lien on the sums wrongly paid: *Dibbs v. Goren*, 11 Beav. 483.

A Plt residuary legatee may, in order to pay pecuniary legatees not parties,

be made to refund sums paid him by the exor before the action: *Prowse v. Spurgin*, 5 Eq. 99: and after the judgment for admon and certificate of legacies due, the Plt could not set up the Statutes of Limitations against the legatees: *S. C.*

A *c. q. t.* who has received part of the funds to which he is not entitled must refund at the suit of other *cs. q. t.*, and their claim is not barred by the statute: *Harris v. H.* (No. 2), 29 Beav. 110.

Where the estate has been distributed, after notices under the Law of Property Amendment Act, 1859 (22 & 23 V. c. 35), the exor is protected from claims by beneficiaries as well as creditors: *Newton v. Sherry*, 1 C. P. D. 246.

SECTION XXIX.—MARSHALLING ASSETS.

1. *Estates devised in Trust to pay Debts, marshalled in favour of Pecuniary Legatees and Annuitants.*

“**DECLARE**, that, as between the devisees of the freehold and leasehold estates under the will of the testator M., on the one hand, and the pecuniary legatees and annuitants mentioned in the said will on the other hand, the pecuniary legatees and annuitants are entitled to stand in the place of the mortgagees, and specialty and simple contract creditors, in respect of the produce of the freehold and leasehold estates devised in trust for sale &c., for payment of debts, to the extent that such mortgagees and creditors shall exhaust, or have exhausted, the general personal estate; And the Defts by their counsel admitting that the produce of the said freehold and leasehold estates is, having regard to the declaration hereby made, sufficient for the payment of the pecuniary legatees and annuitants.”—Directions for distribution.—*Paterson v. Scott*, L. JJ., 13 July, 1852, B. 1090; *S. C.*, 1 D. M. & G. 531.

2. *Assets to be applied in their proper Order to pay Debts—Residuary Personalty—Descended Realty—Rents and Profits—Realty charged with Debts—Legal and Equitable Assets apportioned.*

USUAL accounts of debts and personal estate in creditor's action [Form 1, *sup.* p. 1390].—Personal estate not specifically bequeathed to be applied in a due course of admon.—“But in case the personal estate of the testator shall not be sufficient for payment of his debts, Declare that the deficiency remaining due to the Deft P., the mortgagee, and the other creditors, ought to be raised by sale or mortgage of the testator's real estate descended on the Defts L. and P. his heirs-at-law; And Let such deficiency be raised by sale or mortgage of the

said estate, or a sufficient part thereof, with the approbation, &c.; And Let the money to arise by such sale or mortgage be applied in making good such deficiency accordingly; And in case of such deficiency, and the same shall be raised by sale of the said estate or any part thereof, and more shall be raised than shall be sufficient for the purposes aforesaid, Let the surplus be paid into Court to the credit of this action, *Davies v. Topp*, 'Proceeds of sale of &c.,' subject to further order."—Liberty to apply.—"But in case such personal estate and the money to arise by sale of the said estate descended shall not be sufficient for the purposes aforesaid, Declare that the rents and profits of the said estate ought in the next place to be applied to make good such deficiency in manner aforesaid."—Account of rents and profits.—"And Let what shall be coming on the account of rents and profits be applied in making good such deficiency accordingly; And in case the Deft P. (the mortgagee), or the other creditors of the testator, shall have exhausted any part of his personal estate, the legatees are to stand in the place of such creditors, and receive a satisfaction *pro tanto* out of the said real estate descended. But in case the funds aforesaid shall not be sufficient for payment of the testator's debts (and legacies) under and according to the directions aforesaid; Declare that such deficiency ought to be made good out of the testator's real estates devised by his will charged with the payment of his debts (and legacies); And Let such deficiency be raised thereout by sale or mortgage of the said estates, or a sufficient part thereof, with the approbation &c., the Deft P. (the mortgagee) by his counsel consenting to a sale of that part of the said estates comprised in his mortgages in case it shall be necessary or proper to sell the same; And Let the money to arise by such sale or mortgage be applied in the first place in payment of what shall be remaining due to the Deft P. (the mortgagee), under and by virtue of his said mortgages, not exceeding the value of the estates comprised in his said mortgages, and in the next place in payment of what shall be remaining due to the Plt and all others the creditors of the testator *pari passu*; but such of the said creditors who shall have received anything out of the said personal estate and the said estate descended are not to receive anything out of the money to arise by sale or mortgage of the said estate devised by his will charged &c., till the other creditors are paid up equal with them (and in the next place the several legatees are to be thereout paid their respective legacies, or what may be remaining due to them for their said legacies, equally and in proportion to their said legacies respectively); and in case the said last-mentioned deficiency shall be raised by mortgage, the Deft T., the tenant for life of the said estates, is to keep down the interest of such mortgage out of the rents and profits of the said devised estate, and in case the same shall be raised by sale, and more shall be raised than shall be sufficient for the purposes aforesaid, Let the surplus be paid into Court to the credit of the said action, 'Proceeds of sale &c.,' subject to further order."—All parties, except the mortgagee, whose costs are before

provided for, to be paid their costs of action to be taxed out of testator's estate, and so far as not paid out of his personal estate to be raised out of his real estates, in order and manner before directed with respect to the deficiency of the personal estate for payment of debts.—Liberty to apply.—See *Davies v. Topp*, M. R., 25 Feb. 1780, A. 228; 1 Bro. C. C. 525.

For the like order that debts, &c. should be paid out of, first, the general personalty not specifically bequeathed; secondly, realty charged with debts; thirdly, the rents and profits thereof since the testator's death; fourthly, specific bequests and devises, and that creditors who had received anything out of the personalty should not receive anything further out of the real estates (which must mean real estates charged with debts) till the other creditors were paid up equal with them, reserving consideration how any deficiency still remaining should be made good, see *Silk v. Pryme*, 2 Col. 509.

3. *Application of Assets—Realty devised to pay Debts—Realty devised not charged—Realty appointed.*

DIRECTIONS as to costs, sale of furniture, and getting in outstanding estate—Election by the Deft W. [Form 9, *sup.* p. 1591]—“And Let the estate and interest of the testator of and in the mansion-house of S., with the lands, gardens, and appurtenances, and of and in the mill, miller's house, and salmon pool near the same, and all the freehold, copyhold, and leasehold estates of the testator which are by his will devised to his trustees for sale and payment of his debts, be sold with the approbation of the Judge &c.; And Let the Deft T. be at liberty to make proposals for the purchase of the same estates or any part thereof; and in case the testator's personal estate, with the money to arise by the sale of his estates devised for sale as aforesaid, shall be insufficient for payment of his debts, Let all other the freehold and copyhold estates of the testator to which he was absolutely entitled at the time of his decease be sold in like manner; And in case after such last-mentioned sale the said testator's personal estate, and the money to arise from the said sale of his estates devised for sale, and other his freehold and copyhold estates, after making the payment hereinbefore directed, shall be insufficient for the payment of the testator's debts and of the subsequent costs of all parties to these suits, and the subsequent costs, charges, and expenses of the Plt and the Deft W. B. B. (*the exors*), such subsequent costs &c. to be taxed as aforesaid; Let the deficiency be raised by sale, with the approbation &c., of the estates and hereditaments over which the testator had a power of appointment under the indenture of settlement of &c., and particularly described in the schedule to the said indenture, or a sufficient part of the last-mentioned estates and hereditaments.”—Liberty to Deft T., and failing him to the Deft W., to make proposals for purchase.—Proceeds to be paid into Court to the credit of this action &c.,

subject to further order.—Accounts of personalty to be continued.—Adjourn &c.—Liberty to apply.—See *Fleming v. Buchanan*, L. JJ., 7 May, 1853, A. 1206; S. C., 3 D. M. & G. 976.

4. *Application of Assets—Pecuniary Legacies—Realty charged—Specific and Residuary Devises.*

"It appearing by &c. that all the debts of F., the testator &c., other than the principal sum of £10,000 secured by the indenture of settlement dated the 26th of April, 1852, in &c. mentioned, and therein mentioned to be due with interest at the rate of 4 p. c. per ann. from &c., have been paid out of the testator's personal estate, and the proceeds of sale of the testator's real estate at M. in the first codicil to his will mentioned, and thereby charged with debts, and that the testator's personal estate not specifically bequeathed now outstanding or undisposed of is insufficient to pay the said last-mentioned debt and interest, and to satisfy the contingent liability of the testator under the marriage articles, dated the 9th October, 1837, and it also appearing by &c. that the legacies and annuities given by the will of the testator remain unpaid; Declare, that the several devised estates at R., Y., D., and E., the particulars whereof are set forth in parts 1, 2, 3, and 4 of the 4th schedule of the Master's certificate, dated &c., are respectively liable to contribute to the debts of the said F., the testator &c., which his general personal estate, and the proceeds of sale of the said estate at M., are insufficient to satisfy *pro rata*, according to the respective values of the said several estates at the death of the testator."—Directions as to costs.—"And Let the following &c.—1. An inquiry whether any and what sum ought to be set apart to answer the testator's liability under the said marriage articles of &c. 2. An inquiry what is the amount of the deficiency of the testator's general personal estate, and of the proceeds of sale of the said estate at M., to answer the testator's debts, and the sum, if any, to be set apart to provide for the testator's liability under the said marriage articles. 3. An inquiry what were the relative values on &c., the day of the testator's death, of the several devised estates at R., Y., D., and E., the particulars &c. to each other, and in what proportions the said several estates ought to contribute to make good such deficiency as aforesaid."—Compute subsequent interest.—Sufficient sum to pay what shall be due in respect of the £10,000, and to provide for the sum, if any, to be so set apart to be raised by mortgage or sale of the testator's devised estates at R., Y., D., and E. [Forms 18 and 19, *sup.* pp. 1456, 1457.]—Liberty to apply as to payment of amounts, and generally. And Let the fund in Court be dealt with as directed in the schedule hereto.

PAYMENT SCHEDULE.

In the High Court of Justice,
Chancery Division.

Date of Order, —, 18—.

Farquharson v. Floyer.

Ledger Credit as above. Proceeds of sale of the estate at M.
Funds in Court. New Consols, £—.

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Sell New Consols	[Insert amount.]
Out of proceeds—			
Pay costs to be taxed under this order.			
Pay	Defts C. and D. [exors].	[Insert amount.]	
Pay	Plt E. F.	[Insert amount.]	
Pay residue of funds in Court.	A., B., and C., trus- tees of settlement of 26th April, 1862, on account of the sum of £10,000.		

See *Farquharson v. Floyer*, V.-C. H., 25 April, 1876, A. 1178;
S. C., 3 Ch. D. 109.

This form has been redrawn to suit S. C. F. R.

5. *The like—Residuary Personalty, including Lapsed Specific
Bequests—Descended Realty—Pecuniary Legacies.*

DECLARE, that the testator's debts, funeral and testamentary ex-
penses, and the pecuniary legacies given by his will, and not thereby
made payable out of any particular estate or fund, and also the costs of
this action, and the charges and expenses properly incurred by the Plts
as exors and trustees of the testator's will, ought to be paid and con-
sidered as paid in the first place out of his personal estate not speci-
fically bequeathed, including such shares of the proceeds of the sale
of the leaseholds specifically bequeathed as lapsed; And in the event
of the same being deficient, then, that as between the pecuniary lega-
tees and the testator's heir-at-law the amount of the deficiency of such
general personal estate to answer the testator's debts, and the costs of
this action and the charges and expenses of the trustees hereinbefore
provided for, ought to be borne and made good by the proceeds of the

descended shares of the real estate devised to the Plts in trust for sale, so far as the same may be sufficient for that purpose.—*Morley v. Tunstall*, M. R., 19 April, 1859; S. C., 7 Eq. 416, n.

6. *Residuary Realty and Specific Devises and Bequests liable
pari passu.*

DECLARE, that the residuary real estate of the testator is liable to the payment of his debts and funeral and testamentary expenses *pari passu* with the real and personal estate specifically devised or bequeathed by his said will.—*Lancefield v. Iggulden*, L. C. and L. JJ., 17 Dec. 1874, B. 3528; S. C., 10 Ch. 136; reversing, 17 Eq. 556, V.-C. B.

For similar declaration, with consequent directions, see *Tombs v. Roche*, V.-C. K. B., 8 May, 1846, B. 1197; 2 Col. 509.

7. *Estates devised, charged with Debts and Annuity, marshalled for
Legatees and Annuitants—Abatement.*

REALTY declared devised charged with debts &c., but not with legacies, or any of the annuities, except an annuity of £100 charged upon the testator's farm at M.—“And Declare, that the personal estate of the testator having been insufficient for the payment of the legacies and annuities by his will and codicil given and bequeathed, exclusive of the said annuities of £100, the legatees and annuitants in the said will and codicil respectively named became entitled to stand in the place of the creditors of the testator against the real estates devised by his will, to the extent to which the testator's personal estate was exhausted in the payment of his funeral expenses and debts; And it appearing by &c. that the sum of £8,521 was paid by the Deft. D. out of his own proper money, in discharge of the testator's funeral expenses, debts, legacies, and annuities, beyond the amount of the testator's personal estate, and that the real estates of the testator remaining unsold are sufficient for the payment of his debts remaining unpaid, and of the costs (and expenses) of this action, Declare that the Deft D. was entitled to be reimbursed the said sum of £8,521 out of the testator's real estate, except the sum of £208, part thereof, which appears by &c. to have been paid by him on account of the testator's legacies and annuities beyond the amount of his personal estate; And that the real estates of the testator in &c., mentioned to have been sold, were properly sold, and that the moneys arising from the sale of the said real estates were properly applied in payment of the sum of £4,300, the amount of the mortgages affecting such estates (and of the sum of £411, the amount of the expenses in &c. mentioned), and in repayment to the Deft D. of the sum of £8,313, the residue of the said £8,521, after deducting the said £208; And it

also appearing by &c., that the Deft D. is a creditor of the testator to the amount of £2,667, Let the said Deft retain the said sum of £208, and the sum of £2,452, and balance of the moneys arising from the sale of the testator's real estates in &c., mentioned to have been left in his hands, making together the sum of £2,660, in part satisfaction and discharge of the said sum of £2,667 so due to him."—A value to be set upon the annuities, except &c.—Personal estate being insufficient, the annuities and legacies to abate.—Interest on mortgages to be kept down out of remaining real estate.—Remaining debts and costs to be raised by sale of such estate, subject to, or with the consent of, the mortgagees.—Adjourn &c.—*Kerrison v. E. Stradbroke*, M. R., 16 June, 1826, A. 1346.

For directions as to the mode of apportioning between legatees and annuitants, where they abate, see Form 5, *sup.* p. 1643.

For decree declaring testator's widow entitled under the will to have leaseholds specifically bequeathed to her exonerated from the mortgages charged thereon, out of the personalty not specifically bequeathed, in priority to the other legacies and annuities and her annuity not entitled to priority, so far as payable out of general personalty, in aid of the rents of other leaseholds also specifically bequeathed; and the general personalty being insufficient, declaring mortgages secured on the last-mentioned leaseholds, and by policies of insurance, ought to be borne by them in proportion to their value at testator's death; and the mortgages having been paid out of the policies, declaring the legatees and annuitants entitled to have the assets marshalled, and to stand as incumbrancers on such last-mentioned leaseholds in the place of the mortgagees, and to be recouped to the extent such leaseholds ought to have contributed; and inquiry to ascertain the amount to be raised by sale or mortgage; with directions as to costs, see *Johnson v. Child*, V.-C. W., 13 Nov. 1844, A. 529; 4 Ha. 96.

For the old form of decree in a creditor's suit to administer legal and equitable assets, subject to mortgages and dower, see *Wride v. Clarke*, M. R., 1 July, 1766, B. 464; Seton, 3rd ed. 326; S. C., 2 Bro. C. C. 261, n.; 1 Dick. 382; settled by Sir T. Sewell.

8. Direction as to Right to Contribution between Pecuniary Legatees, Specific Devisees, and Residuary Legatees, where Charge of Legacies on Real Estate.

VARY the Master's certificate filed &c., so far as the same certifies that the pecuniary legacies given by the will of the above-named testator J. B., deceased, are not charged upon the testator's residuary real estate; And Declare that the said legacies are charged upon the testator's residuary real estate accordingly; And it appearing by the said Master's certificate that the testator's personal estate not specifically bequeathed will not be sufficient for the payment of his debts and funeral expenses and the costs of this action, Declare that for the purpose of providing for the payment of the testator's debts already proved or allowed or hereafter to be proved or allowed, and of the costs of this action, the real estate devised by the testator's will and codicils and the specific bequests therein contained, and in the said certificate respectively mentioned, ought to contribute to such payment in the proportions in the same certificate mentioned without making

any deduction from the value of the testator's residuary real estate in respect of the said pecuniary legacies charged thereon as aforesaid.— See *Re Bawden, National Provincial Bank of England v. Creswell, Kekewich, J.*, 19 Dec. 1893, A. 2349; (1894) 1 Ch. 693.

9. *Debts having been paid out of general Personalty, and part of Realty passing by Residuary Devise, Pecuniary Legatees not entitled to marshal, and Specific Legatees to contribute equally with the Devisees.*

DECLARE, that the personal estate specifically bequeathed by the testator's will, and the residuary real estate thereby devised, were not bound to contribute to the payment of his funeral and testamentary expenses, nor to his debts or the costs of this action, until his general personal estate had been exhausted in payment of his said funeral and testamentary expenses, debts, and costs, and that the general pecuniary legatees are not entitled to marshal the deficiency of personal estate not specifically bequeathed between the specific legacies and general legacies and residuary real estate; And it appearing &c. that the testator's personal estate not specifically bequeathed was insufficient to pay his funeral and testamentary expenses &c. to the extent of £2,303, and that the same have been paid out of the proceeds of the sale of part of the testator's residuary real estate, and that the said personal estate specifically bequeathed, and the said residuary real estate ought, having regard to the said declarations, rateably to contribute according to their respective values to the said £2,303 in the following proportions, viz., the said personal estate specifically bequeathed, £221, and the said residuary real estate, £2,082; And it appearing &c. that such real estate has already borne the said £2,082; Declare, that the £220 hereinbefore declared to belong to the said J. C. [*specific legatee*] ought to be set off against the said £221; Let the said J. C. be at liberty to pay to the Defts £1 [*the difference*]; And Let the Defts be at liberty to transfer to the said J. C. [*shares in a company specifically bequeathed to her*], and the said J. C. is to continue in possession during her life of the leasehold messuage or dwelling-house in &c. given to her by the testator's will, and of the furniture and effects of the testator in and about the said messuage &c., and to retain possession of the trinkets in &c. mentioned.—*Tomkins v. Colthurst*, V.-C. M., 15 Dec. 1875, B. 3325; S. C., 1 Ch. D. 626.

10. *Legacies payable out of two Funds, Others out of one of them only—Marshalling.*

“AND Declare that the Defts H. and W. are only entitled to one legacy of £700 each” (*payable out of D.'s mortgage and the R. and H. Railway Stock*), “together with interest at the rate and from the time

aforesaid" (£4 p. c. per ann. from one year after testator's death), "and that the principal and interest received from D.'s mortgage in the said certificate mentioned, including the dividends upon the investment thereof, are to be applied so far as they will extend in paying such legacies and interest, and that the balance of such legacies and interest and the legacies of £400 and £1,000" (payable out of the R. and H. Railway Stock) "bequeathed for the benefit of the Defts T. and P. as mentioned in the said will, together with interest thereon at the rate and from the time aforesaid, are to be paid rateably out of the moneys produced by the sale of the R. and H. Railway Stock, and the dividends accrued thereon received by the said exors since the testator's decease as far as the same will extend, and that the balance of such four legacies are to be paid rateably with the general (pecuniary) legacies hereinafter directed to be paid out of the testator's general estate."—*Sellon v. Watts*, V.-C. K., 19 Aug. 1861, B. 1877; S. C., 9 W. R. 847.

For order that legacies not charged on land should stand in place of legacies charged so far as the latter exhausted the personalty, see *Hanby v. Fisher*, 2 Col. 515.

For form of order apportioning legal and equitable assets, and enforcing priorities of debts, and providing that in such apportionment the specialty creditors (named in the first part of the schedule) were to be paid in priority out of a specified sum; and the residue to be apportioned equally amongst all the creditors; but the specialty creditors not to receive anything out of the residue until they had brought into contribution what they had already received, see *O'Brien v. Osborn*, V.-C. W., 28 Jan. 1853, B. 390; S. C., 10 Ha. 92; *Heywood v. Harris*, V.-C. S., 30 Jan. 1861, A. 351; Seton, 5th ed., Form 10, p. 1404.

For another form apportioning legal and equitable assets where the latter were not sufficient to pay a due proportion to the simple contract creditors, see *Bower v. Conyers*, V.-C. S., 21 Jan. 1871, A. 485; Seton, 4th ed., Form 11, p. 988.

11. Real Estate charged with Debts resorted to in Exoneration of Personalty in favour of Legatee—Declaration by Consent as to possible Future Augmentation of Personalty.

DECLARE that the debts and funeral and testamentary expenses of the testatrix ought to be paid out of the proceeds of the sale of her real estate in exoneration of the personalty, so as to leave the personalty not specifically bequeathed available towards payment of the legacy of £500 bequeathed to M.; And all parties other than T., by their counsel consenting to have this question now determined, Declare that, in the event of the gifts to H. and W. respectively and their respective children failing, the amounts falling in will be personalty available towards payment of the amount due in respect of the said legacy to M.—Reference to tax.—Costs to be paid as part of the testamentary expenses in accordance with the above directions.—*Re Stokes, Parsons v. Miller*, Stirling, J., 16 July, 1892, B. 1074; S. C., 67 L. T. 223.

NOTES.

MARSHALLING.

Marshalling is of two kinds. The first consists of arranging the assets of a deceased person so as to give effect to the priority of debts, as to legal assets (*v. sup.* pp. 1419 *et seq.*) on the one hand, and to the order of assets (*inf.*) on the other.

The second (which strictly, perhaps, is the only kind of marshalling) is the preventing a person who has two funds for payment of his claim from going upon one of them so as to disappoint another claimant who has that fund alone to resort to.

Now that all the assets are liable to be applied for the payment of any debt, marshalling assets in favour of creditors is no longer necessary.

Marshalling may, however, sometimes be required between legatees when some of the legacies are charged on the realty and others are not: *Hanby v. Roberts*, Amb. 127; *S. C.*, *sub nom. Hanby v. Fisher*, 2 Coll. 515, *et sup.* p. 1671; *Masters v. M.*, 1 P. Wms. 422; *Bligh v. E. Darnley*, 2 P. Wms. 619; *Norman v. Morrell*, 4 Ves. 769; *Bonner v. B.*, 13 Ves. 379; and see *Scales v. Collins*, 9 Ha. 656; and where legacies charged and one not charged are given to the same person: *Stronge v. Hawkes*, *inf.* p. 1923; and see *Joy v. Campbell*, 1 Sc. & L. 339; 3 Bli. N. S. 110.

Where two legacies are given to X. and Y., both payable out of fund "A," and X.'s also out of fund "B," X. must first exhaust fund "B," and then come upon fund A. rateably with "Y.": *Sellon v. Watts*, 9 W. R. 847, Form 10, *sup.* p. 1670.

ORDER IN WHICH ASSETS ARE APPLIED IN PAYMENT OF DEBTS.

Assets are liable for the payment of debts in the following order, subject to any express provisions in the will:—

1. The general or residuary personalty not specifically bequeathed, or exonerated or exempted: *Wride v. Clarke*, 2 Bro. C. C. 261, n.; *Davies v. Topp*, 2 Bro. C. C. 259, n.; *et sup.* Form 2, p. 1663; *Donne v. Lewis*, 2 Bro. C. C. 263; *Harmood v. Oglander*, 8 Ves. 124; *Manning v. Spomer*, 3 Ves. 117; 5th and 6th rules, *inf.* And as to the exoneration of the personal estate from its primary liability, see Sect. XI. *sup.* p. 1539, and note to Sect. XII., p. 1545.

Costs of admon, so far as they have been increased by the admon of the real estate, are to be borne by the real estate: *Re Middleton*, 19 Ch. D. 522; *Putching v. Barnett*, 51 L. J. Ch. 74.

In *Bristow v. B.*, 5 Beav. 289, there being no other assets, costs of suit were paid out of specific legacies rateably.

A fund set apart for the expenses of the trusts of a will was applicable only for trusts to be executed by the exor as such: *L. Brougham v. Poulett*, 19 Beav. 119.

A trust to pay debts from personalty is for the present purpose inoperative: *v. sup.* p. 1442.

A share of the residuary personalty which has lapsed is not liable before the other shares: *Ryves v. R.*, 11 Eq. 539; *Trethewy v. Helyar*, 4 Ch. D. 53; *Fenton v. Wills*, 7 Ch. D. 33; 37 L. T. 373; but see *Gowan v. Broughton*, 19 Eq. 77; and *Scott v. Cumberland*, 18 Eq. 578.

Lapsed specific legacies are liable rateably with the general residue: *Morley v. Tunstall*, 7 Eq. 416, n., Form 5, *sup.* p. 1667.

Where the whole realty and personalty are charged with debts, and a share lapses, the heir and next of kin bear only their proportion of the debts and rateably between them: *Ryves v. R.*, 11 Eq. 539, and cases there cited; so where part is undisposed of: *Stead v. Hardaker*, 16 Eq. 175; *Scott v. Cumberland*, 18 Eq. 585, 586.

2. Real estates specifically appropriated to, or devised in trust for, and not merely charged with, the payment of debts: *Harmood v. Oglander*, 8 Ves. 124; *Powis v. Corbit*, 3 Atk. 556; *Phillips v. Parry*, 22 Beav. 279; whether the testator after the will acquired other lands or not, notwithstanding doubts as to whether this was originally right: *Milnes v. Slater*, 8 Ves. 303.

These are equitable assets. But as to testators dying after 31 Dec. 1897, see Land Transfer Act, 1897, s. 2, sub-s. 3, *sup.* p. 1398.

3. Real estates descended: *Row v. R.*, 7 Eq. 414; *Wride v. Clarke*, 2 Bro. C. C. 261, n.; 1 Dick. 382; *Davies v. Topp*, Form 2, *sup.* p. 1663; *Harmood v. Oglander*, *sup.*; whether possessed by the devisee at the date of the will or subsequently acquired: *Manning v. Spooner*, 3 Ves. 117; *Milnes v. Slater*, 8 Ves. 304; *McClelland v. Shaw*, 2 Sch. & L. 544, 545, n.; and whether freehold or copyhold: see the Admon of Estates Act, 1833 (3 & 4 W. IV. c. 104).

These are legal assets: see *Davies v. Topp*, *sup.*; *Ball v. Harris*, 4 My. & C. 269; correcting *Mirehouse v. Scaife*, 2 My. & C. 708; and see *Re Jones*, *Dutton v. Brookfield*, 38 W. R. 90; 59 L. J. Ch. 31; 61 L. T. 661.

Tenant in fee simple of several estates, and in tail of another, devised all his realty in trust to pay debts, and suffered a recovery; *quære*, if the estate so descending was applicable before the rest: *Vickers v. Oliver*, 1 Y. & C. C. 211.

If freeholds escheat to the lord for want of heirs, they are assets to pay debts: *Evans v. Brown*, 5 Beav. 114; whether in priority to, or *pari passu* with, lands specifically devised, *quære*: *S. C.*

In *Bagot v. Legge*, 2 Dr. & S. 259, where there was no personalty, it was held that descended and devised estates must bear the costs of admon suit rateably; and see *Jackson v. Pease*, 19 Eq. 96; and so in *Hurst v. H.*, 28 Ch. D. 159, where the estate descended by reason of a forfeiture by a devisee subsequently to the testator's death; and *v. sup.* p. 1515.

4. Real estates devised, charged with the payment of debts: *Wride v. Clarke*, *Davies v. Topp*, *Harmood v. Oglander*, *sup.*; *Re Stokes*, *Pursons v. Miller*, 67 L. T. 223; *Re Salt*, *Brothwood v. Keeling*, (1895) 2 Ch. 203; and see *Re Butler*, *Le Bas v. Herbert*, 43 Ch. D. 600 (*Re Bate*, *B. v. B.*, 43 Ch. D. 600, must on this point be treated as overruled); and a lapsed share in the hands of the heir is not liable until after descended estates: *Wood v. Ordish*, 3 Sm. & G. 125; 1 Jur. N. S. 584.

These are equitable assets. But see Land Transfer Act, 1897, s. 2, sub-s. 3, *sup.* p. 1398.

5. General pecuniary legacies; and demonstrative legacies so far as the appropriated fund is insufficient to pay them: *Sellon v. Watts*, 9 W. R. 847; 20 Beav. 519; Form 24, *sup.* p. 1617; and see *Re Smith*, *S. v. S.*, (1899) 1 Ch. 365, referring to *Lutkins v. Leigh*, Cas. t. Tal. 53.

The decision in *Hensman v. Fryer*, 3 Ch. 420, that general pecuniary legacies should only contribute rateably with residuary devises has not been followed: *Gibbins v. Eyden*, 7 Eq. 371; *Collins v. Lewis*, 8 Eq. 708; *Dugdale v. D.*, 14 Eq. 234; and the decision in *Lancefield v. Iggulden*, 10 Ch. 136, has been stated not to have affirmed it on that point: *Tomkins v. Colthurst*, 1 Ch. D. 626; *Farguharson v. Floyer*, 3 Ch. D. 109.

6. Specific and residuary devises and specific bequests *pro ratâ*.

Real estates devised, not charged with debts: *Manning v. Spooner*, 3 Ves. 117; freehold or copyhold: Admon of Estates Act, 1833 (3 & 4 W. IV. c. 104); and though devised to the heir: sect. 3; and whether given by specific or residuary devise: *Hensman v. Fryer*, 3 Ch. 420; *Lancefield v. Iggulden*, 10 Ch. 136; Form 6, *sup.* p. 1668; are liable rateably with personalty specifically bequeathed: *S. C.*; *Tombs v. Roche*, 2 Col. 490, *sup.* p. 1668; *Jackson v. Pease*, 19 Eq. 96; and with funds appropriated for demonstrative legacies: *Sellon v. Watts*, 9 W. R. 847, Form 24, *sup.* p. 1617.

Freeholds and leaseholds specifically given must contribute rateably to annuities charged on them: *Fielding v. Preston*, 1 D. & J. 438.

The respective values are to be ascertained as at the testator's death: *S. C.*; *Long v. Short*, 1717, B. 596; 1 P. Wms. 403, n.; *Re Bawden*, *inf.*; and where legacies are charged on the residuary realty, and not on specifically devised realty, the amount of the legacies must not be deducted from the value of the residuary realty, for otherwise the legacies would indirectly be thrown on the specifically devised realty: *Re Bawden*, (1894) 1 Ch. 693; Form 8, *sup.* p. 1669; and see *Re Price*, *Williams v. Jenkins*, 31 Ch. D. 485; *Re Saunders-Davies*, *S. v. S.*, 34 Ch. D. 482; and as to charitable legacies, to which the same rule applies, *v. sup.* pp. 1335, 1349.

7. Property appointed by a testator's or unmarried woman's will under a general power whether freehold: *Fleming v. Buchanan*, 3 D. M. & G. 976; Form 3, *sup.* p. 1665; or personal estate: *Pardo v. Bingham*, 6 Eq. 485; *Jenney v. Andrews*, 6 Mad. 264.

But to make the property assets at all the power must be actually exercised: *Holmes v. Coghill*, 7 Ves. 499; 12 Ves. 206; and of course without valuable consideration: *Townshend v. Windham*, 2 Ves. 1, 9, 10.

Where a fund is limited to the testatrix absolutely in default of appointment by her, her appointment of it by a general gift of residue has merely the effect of including it in her general residuary personalty: *Re Hartley, Williams v. W.*, (1900) 1 Ch. 152.

Property appointed by a married woman under a general power to appoint by will only has been held not to be assets available to answer her engagements contracted during coverture: *Re Roper, R. v. Doncaster*, 39 Ch. D. 482; *Re Parkin, Hill v. Schwarz*, (1892) 3 Ch. 510; *Vaughan v. Vanderstegen*, 2 Drew. 165; *Hobday v. Peters*, 28 Beav. 354; *Blatchford v. Woolley*, 2 Dr. & S. 204; except for payment of creditors to whom she represented she was single: *Vaughan v. Vanderstegen*, 2 Drew. 363, 408; and see *Wainford v. Heyl*, 20 Eq. 321. But in other cases, both where the power to appoint was by deed or will, and where it was by will only, the property appointed has been held to be assets: *London Chart. Bk. of Australia v. Lempriere*, L. R. 4 P. C. 572, 594; *Mayd v. Field*, 3 Ch. D. 587; *Skinner v. Todd*, 51 L. J. Ch. 198; *Re Harvey's Estate, Godfrey v. Harben*, 13 Ch. D. 216; *Hodgson v. Williamson*, 15 Ch. D. 87; *Hodges v. H.*, 20 Ch. D. 749; *Re Parkin, sup.*; and see *De Burgh Lawson v. De B. L.*, 41 Ch. D. 568; *Lewin, 947 et seq.*, and *sup.* pp. 899—905.

Now, by the Married Women's Property Act, 1882, s. 4, the execution of a general power by will by a married woman is to have the effect of making the property appointed liable for her debts, and other liabilities, in the same manner as her separate estate is made liable under that Act.

The section extends to an appointment made since the Act by a married woman who had debts and liabilities existing at the date of the Act, and therefore where the *feme* in whose favour a protection order (as to the effect of which *v. sup.* p. 936) has been made exercises a general power (created subsequently to the order), the appointed property becomes liable for debts or liabilities incurred by her while under protection, whether before or after the Act: *Re Hughes, Brandon v. H.*, (1898) 1 Ch. 529, C. A.

Rents and profits of realty which have accrued since the death of the testator are resorted to immediately after the *corpus* from which they have arisen: *Davies v. Topp*, Form 2, *sup.* p. 1663; *Silk v. Pryme*, 2 Col. 509, *sup.* p. 1665; and see *Stronge v. Hawkes*, 4 D. & J. 655; and other cases, *inf.* p. 1923.

As to the mode of calculating the value of debts due from an insolvent estate where a contingency happens during admon, see *Re Bridges, Hill v. B.*, M. R. 17 Ch. D. 342.

MARSHALLING SO AS TO ENFORCE THE ORDER OF ASSETS.

Where the order in which assets are liable to pay debts has been disturbed by creditors, it will be put right by marshalling. Thus where the personalty has been exhausted in paying debts, pecuniary legatees (*Surtees v. Parkin*, 19 Beav. 406), or annuitants (*Paterson v. Scott*, 1 D. M. & G. 531), with no charge on the realty (*Kerrison v. E. Stradbroke*, Form 7, *sup.* p. 1668), or specific legatees (*Burton v. Pierpoint*, 2 P. Wms. 81; *Tipping v. T.*, 1 P. Wms. 730), or a wife claiming her *bona paraphernalia* (*S.C.*), are entitled to have the assets marshalled so as to give effect to their rights out of lands devised in trust to pay debts (*Paterson v. Scott*, Form 1, *sup.* p. 1663; 1 D. M. & G. 531), or lands descended (*Davies v. Topp*, 1 Bro. C. C. 525, *et sup.* Form 2, p. 1663; *Hanby v. Roberts*, Amb. 128; *Clifton v. Burt*, 1 P. Wms. 678; and see *McAcland v. Shaw*, 2 Sc. & L. 544), or lands charged with debts (*Surtees v. Parkin*, 19 Beav. 406; *Kerrison v. Stradbroke*, Form 7, *sup.* p. 1668; *Rickard v. Barrett*, 2 K. & J. 289), so far as the personalty has been applied to pay debts.

On the other hand, pecuniary legatees cannot marshal assets so as to throw the debts on realty devised without being charged: *Mirehouse v. Scatfe*, 2 My. & C. 695, 708; *Tomkins v. Colthurst*, Form 9, *sup.* p. 1670; although the devisee was also the heir of a testator dying before the Inheritance Act, 1833 (3 & 4 W. IV. c. 106): *Biederman v. Seymour*, 3 Beav. 368; or since: *Strickland v. S.*, 10 Sim. 374.

MARSHALLING BETWEEN LEGAL AND EQUITABLE ASSETS.

The priority of specialty debts over those by simple contract as against legal assets having been abolished, as to persons dying since 1 Jan. 1870, by the Admon of Estates Act, 1869 (32 & 33 V. c. 46), *sup.* p. 1421, the distinctions between legal and equitable assets, and the rules as to marshalling between them, are of far less importance than formerly; but as the order of priority of debts holds good in other respects as to legal assets, marshalling will still be required sometimes.

The rule is, that where judgment or other creditors have received part of their debts in priority out of legal assets, they are not allowed to receive anything out of the equitable assets without bringing into hotchpot what they have so received in priority: see *Davies v. Topp*, 1 Bro. C. C. 525, Form 2, *sup.* pp. 1663, 1664, and *sup.* p. 1672; *Chapman v. Esgar*, 1 Sm. & G. 575; *Haslewood v. Pope*, 3 P. Wms. 323; *Deg v. D.*, 2 P. Wms. 416; but see *Car v. Countess Burlington*, 1 P. Wms. 228, *contra*.

For notes as to what assets are legal, what equitable, *u. sup.* p. 1423.

SECTION XXX.—RECOUPING.

1. *Executors to stand in Creditors' or Legatees' Place.*

AND if it shall appear that any of the Defts have paid any of the testator's debts [*if so*, and legacies], they are to stand in the place of such creditors [*if so*, and legatees], as they have so paid, and to receive a satisfaction for what they have so paid [*or pro tanto*], out of the testator's estate, in like manner as such creditors [*if so*, and legatees] would have been entitled to do. And see decree in *Basset v. Percival*, 1 Cox, 270—273.

For like order for exor to stand in the place of legatees paid by him, see *Trimleston v. Colt*, L. C., 9 July, 1749; and see *Irby v. I.*, and other cases, *sup.* p. 1425.

2. *The like—Inquiry and Declaration.*

"AN inquiry what debts of the testator have been paid by the Deft out of her own moneys; Declare, that if it shall appear" &c. [Form 1, *sup.*]—*Madgett v. M.*, V.-C. M., 12 June, 1875, B. 1063.

3. *Where Executor has compounded, to be recouped actual Amounts.*

AN inquiry if the Deft hath purchased from any of the creditors of the testator or compounded with any of them for their debts, and what consideration was really paid or given or allowed by the Deft for such debts; And Declare, that what shall appear to have been actually advanced, paid, or allowed by the Deft for such debts and no more, is to be allowed to him in respect thereof.—See *Davison v. Watson*, M. R., 4 March, 1807, A. 1143; *Wheeler v. Williams*, L. C., 29 June, 1741, B. 409.

4. *Recouping Realty Amount applied for payment of Debts.*

Tax costs—"And Let the Petr, the Deft B., out of the sum of £— received by him in respect of the debt due to the testator's estate by C., as in the petition mentioned, retain and pay the said costs; And it appearing that, pursuant to the said order dated &c., the testator's real estate (not specifically devised) was sold for the purpose of paying his debts, and that out of the proceeds of such real estate a sum exceeding in amount the said sum of £— was applied for that purpose, and this Court being of opinion that the residue of the said sum of £—, so far as the same will extend, ought to be applied to recoup the said real estate, Let the Deft B. within fourteen days from the date of filing of the Taxing Master's certificate lodge the residue (if any) of the said sum of £—, the amount to be certified by the Taxing Master in Court, as directed in the Lodgment and Payment Schedule hereto."—And it is ordered that the funds to be lodged as aforesaid be dealt with as directed in the said schedule.

LODGMENT AND PAYMENT SCHEDULE.

In the High Court of Justice,

Chancery Division. 15th day of December, 1900.

Reeve v. Holland. 1900. R. 139.

Ledger Credit as above. Real estate.

I.—*Lodgment.*

Particulars of Funds to be lodged.	Person to make the Lodgment.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Residue (if any) of £ , after retaining and paying costs as in the order mentioned (amount to be certified by taxing master).	The Deft B.		

II.—*Payment.*

Funds to be dealt with. Funds to be lodged as above.

Particulars of Payments, Transfers, or other operations ordered.	Payees, Transferees, or separate accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Invest funds to be lodged in New Consols.			
Pay interest as it accrues on such New Consols during life of payee or until further order.	C. of &c. (tenant for life).		

For like order before S. C. F. R., see *Lloyd v. Davies*, M. R., 13 Nov. 1875, B. 2769,

For order for recouping personalty from realty, see *Gibson v. Montford*, L. C., 25 June, 1750, A. 583; S. C., 1 Ves. 485.

For inquiry what sums in trustees' hands arose from personalty and realty, see *Brookfield v. Bradley*, V.-C., 21 Dec. 1816, A. 567.

5. Recouping Realty for Timber cut.

“AND it appearing by the Master’s certificate, dated &c., that the sum of £1,076, the produce of the underwood cut on the real estate of the testator, was received by the Deft W., and was by him mixed up with the personal estate of the testator, Let an inquiry be made whether any and what part of the New Consols, hereinbefore directed to be lodged in Court, is attributable to the said sum of £1,076, and how much of the money to arise by the sale of the said New Consols in the payment schedule hereto directed, ought to be applied to recoup the said real estates the said sum of £1,076, and the accumulations thereof; And Let the fund in Court be dealt with as directed in the schedule hereto.”

PAYMENT SCHEDULE.

In the High Court of Justice,
Chancery Division.

Date of Order, 15 Dec. 1900.

Reeve v. Holland. 1900. R. 139.

Ledger Credit, as above. The personal estate of the testator.
Funds in Court. New Consols £3,000.

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£
Sell New Consols	3,000
Out of proceeds— Carry over to ledger credit in second column sum to be certified as the amount which ought to be applied to recoup the real estate the sum of £1,076.	<i>Reeve v. Holland</i> , 1900, R. 139.		

For similar order before S. C. F. R., see *Naylor v. Wetherell*, V.-C. L. Cranworth, 25 July, 1851, B. 1119.

NOTES.

Mortgage money in Court being paid by mistake to creditors, they had to recoup *pro rata*, the simple contract creditors being first liable, then the specialty; and the balance was to be paid by the solrs who had the conduct of the suit, and they were to pay costs of suit to recoup: *Todd v. Studholme*, 3 K. & J. 325.

Where an exor by advice of his solr paid to a creditor a debt which the Court had declared to be statute-barred, the exor, solr and creditor were held liable to repay the money to the estate: *Re Midgley*, (1893) 3 Ch. 282, C. A.

Where debts directed to be paid out of the income of the testator's estate, due to him at his decease and afterwards to become due, were actually paid by the executrix out of *corpus*, she could not be made to recoup the amount out of her life interest in property specifically bequeathed: *Re Green, Baldock v. G.*, 40 Ch. D. 610, *per* Stirling, J., following *Tewart v. Lawson*, 18 Eq. 490.

An exor may recoup himself as against the person to whom payments have been made by mistake: *Hill v. Walker*, 4 K. & J. 166.

As to legatees &c., being called upon to refund at the suit of creditors or beneficiaries, see Sect. XXVIII., *sup.* p. 1657; and as to marshalling, Sect. XXIX., *sup.* p. 1663; as to recouping tenant for life out of *corpus*, *inf.* p. 1692; and as to making solrs liable for costs, *sup.* p. 1107.

SECTION XXXI.—TENANT FOR LIFE OF RESIDUE.

1. *Inquiries as to clear Residue, and Investments and Dividends.*

1—4. ACCOUNTS of personal estate, debts, funeral expenses, and legacies,—Personal estate to be applied in a due course of admon:—
 “And Let the following &c.—5. An inquiry what was the clear residue of the testatrix's personal estate at her death, and what was the amount of such clear residue, together with the interest arising or produced therefrom, at the end of twelve months from her death; 6. An inquiry what part or parts of the personal estate of the testatrix hath or have since her death produced any, and what, interest, and what sum or sums of money hath or have been paid to or retained by H. &c., as such tenants for life as in the will mentioned, in respect of such interest; 7. An inquiry whether the clear residue of the personal estate of the testatrix, or any and what part thereof, and at what time, did not or does not consist of consols; 8. An inquiry what dividends would have arisen or been produced yearly if such clear residue or part thereof (as the case may be), or the money arising therefrom, together with the interest arising or produced from such clear residue during the twelve months next after the death of the testatrix, or the money arising from such interest, had been duly invested in consols &c., at the end of twelve months next after the death of the testatrix, and the total amount of such yearly dividends, for a period equal to that since her death.” Adjourn &c.—See *Holland v. H.*, V.-C. E., 22 June, 1844, A. 1479; *S. C.*, on further consideration, Form 4, *inf.* p. 1680.

For decree declaring, with regard to the earnings of testator's ships and the income of his share debentures and other securities as between the tenants for life of the residue and the person entitled in remainder as follows:—1. That a value ought to be put upon the ships as at the death of the testator, and that the tenants for life were entitled to 4l. p. c. per ann. (now 3 p. c., see *Wentworth v. W.*, (1900) A. C. 163; *Wyman v. Paterson*, (1900) A. C. 271, H. L.) on the amount of such value from the day of the

death of the testator, and the residue of the profits ought to be invested and form part of the testator's estate. 2. That the tenants for life were entitled to the income actually arising from the securities authorized as investments. 3. That, as to the several securities of the testator not authorized as investments, the tenants for life were entitled, as from the day of the testator's death, to the interest of so much consols as the amount that would have been realized by a conversion thereof at the end of the year after the death of the testator would have purchased at the end of the year.—Costs of all parties out of the estate.—See *Brown v. Gellatly*, 5 Aug. 1867, A. 2430, 2 Ch. 759; followed in *Porter v. Baddeley*, 5 Ch. D. 542.

For a declaration that the tenant for life was not entitled to receive the income of the unauthorized retained investments, and that such investments must be valued as at the end of a year from the testator's death, and that, as to the past, interest at the rate of 4 p. c. on that value ought to be allowed to the tenant for life, but as to the future at the rate of 3 p. c., see *In re Lynch-Blosse, Rickards v. L.*, W. N. (99) 27.

2. *The Like—Two Testators—Right of Tenant for Life—Contingent Legacies.*

1. "AN inquiry what amount of capital was required for payment of the funeral and testamentary expenses, debts, and legacies of the testator F., including all income for one year on the amount of capital to be ascertained as necessary for such payment."—2. Like inquiry as to testator W., "but not including the three contingent legacies in the said certificate mentioned; Declare, that surplus capital of the estate of the testator F., after deducting the amount of capital required for payment of his funeral and testamentary expenses, debts, and legacies, when ascertained under the said inquiry No. 1, is capital of the testator W.'s estate; Declare, as to the surplus capital of the testator W.'s estate remaining after deducting the amount required for the payment of his funeral and testamentary expenses &c., when ascertained under the said inquiry No. 2, including in such estate the capital coming from the estate of the testator F., the Deft J. as tenant for life is entitled to the income of such surplus capital from the death of the testator W., such surplus capital, so far as it is not in a state of actual investment, to be taken as invested in Consols at the death of the testator W.; Declare, that the Deft J., as tenant for life, is entitled to the income arising from so much of the testator W.'s residuary estate as may be set apart for payment of the said contingent legacies of &c.; And Let the following &c., an account of what is due to the Deft J., as such tenant for life as aforesaid; and on taking such account regard is to be had to the payments mentioned in the said certificate as having been made to him by the Plts on account of his life interest in the residue of the testator W.'s estate, and also to any other payments which shall have been made by them to him as such tenant for life; And Let the Plts A. and B. pay to the Deft J. the amount which shall be so certified to be due to him."—Tax and pay costs.—Continue accounts.—Adjourn &c.—*Allhusen v. Whittell*, V.-C. W., 28 June, 1867, A. 2168; 4 Eq. 295. For order on further consideration, see

S. C., 17 July, 1869, A. 2503; and see, as to the fund set apart for contingency, *Re Whitehead, Peacock v. Lewis*, (1894) 1 Ch. 678, following *Cranley v. Dixon*, 23 Beav. 512.

3. *Inquiry as to Capital sufficient, with the First Year's Income thereof, to pay Debts, &c.*

6. "AN inquiry what amount of capital, with the income for one year on the amount of such capital, was required for the payment of the funeral and testamentary expenses, debts, and legacies of the testatrix, including interest for one year on the legacies bearing interest; And Declare that such capital and income are properly applicable for the payment of such funeral and testamentary expenses, debts, and legacies of the testatrix, and that the surplus of the capital forms the residue of the capital of the testatrix's estate."—Amounts of such surplus, capital, and income respectively to be certified.—*Aikin v. Buller*, V.-C. S., 12 June, 1868, A. 1943; and see *Lambert v. L.*, V.-C. B., 17 Nov. 1870, B. 2869; *S. C.*, 16 Eq. 320, *et inf.* p. 1690.

4. *Further Order—Rights declared—Children and Descendants to take per stirpes—Recouping Tenants for Life—Costs—Payment of Income.*

"DECLARE, that under the will of the testatrix &c., H. &c., became and were upon the death of the testatrix joint tenants for life of the clear residue of the personal estate of the testatrix; And that upon the death of the survivor of the said H. &c. such residue is divisible between the children of J. H. &c. or their descendants, such children or descendants to take only *per stirpes* and not *per capita*; And it appearing by the said (certificate), dated &c., that the testatrix died on &c., and that the sum of £365 would have been the amount of the dividends arising from the clear residue of her estate for the period between her death and the date of such certificate, if such residue had been invested in the purchase of consols; And it also appearing by the said (certificate) that the several sums of money therein particularly mentioned, and amounting to the sum of £83, were paid to or retained by the said H. &c. out of such clear residue in respect of such their life interests as aforesaid, Declare, that the said sum of £365 was, and that the difference between that sum and the said sum of £83 is, payable out of such residue to the said H. &c., or in case of their death, to their legal pers. represves respectively, in respect of such their life interests as aforesaid; And all parties by their counsel respectively admitting that the £2,306 consols in Court &c. is the present clear residue of the testatrix's personal estate; And it appearing by the

said (certificate) that all the tenants for life are dead except the Plt, and that their represves are parties to this action"; Let by consent so much of the said £2,306 consols as will raise £282, the difference between the sums of £365 and £83, be sold as directed in the schedule hereto, and that the said £282 be paid to the Plt and such represves in the proportions in the said schedule mentioned in respect of such life interests of the said tenants for life under the said will as afore-said; And Let the funds in Court be dealt with as directed in the said schedule.—Tax costs of all parties as between solr and client, and exors' costs, charges, and expenses.—Liberty to apply.

PAYMENT SCHEDULE.

In the High Court of Justice,
Chancery Division.

Date of Order, —, 18—.

Holland v. Holland.

Ledger Credit, as above.

Funds in Court. £2,306 Consols.
£33 Cash.

Particulars of Payments, Transfers, or other operations ordered.	Payees and Transferees or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Sell sufficient Consols to raise £282, and costs to be taxed under this order.			
Out of proceeds—			
Pay such costs.			
Pay	Plt H.	[Insert proportion of £282.] [The same.]	
Pay	A. B. of &c., legal pers. represve of A., deceased.		
Pay	C. D. of &c., legal pers. represve of B., deceased.		
Pay interest on Consols or residue thereof dur- ing life of payee or further order.	Plt H. [tenant for life.]		
Pay cash	The same	£33.	

—See *Holland v. H.*, V.-C. E., 13 Nov. 1846, A. 85; *S. C.*, Form 1, *sup.* p. 1678.

This order has been redrawn to suit S. C. F. R.

For order to pay income of further funds to be paid in to tenant for life, see *Re Chamberlain*, 22 Beav. 287.

For declaration as to right of tenant for life to income of residue by will directed to be converted, see *La Terriere v. Bulmer*, 2 Sim. 22; but see *Wrey v. Smith*, 14 Sim. 202.

5. *Tenant for Life of Residue declared not entitled to Enjoyment in Specie and Conversion of Leaseholds at end of Year.*

DECLARE that the Defts F. G., M. B., H. B., and C. A. B. B. are not entitled during the life of G. W. T. G. to the whole of the rents and profits received from the leasehold hereditaments forming part of the testator's residuary estate, but are only entitled annually to a sum equal to the dividends which would be produced if the said leasehold hereditaments had been sold at the expiration of one year from the testator's death and invested in New Consols.—Direct an inquiry what sum would have been produced by a sale of the said leasehold hereditaments at the expiration of one year from the testator's death, and what income would have been produced if such sum had been in due course invested in New Consols.—The costs of all parties of the application and of the said inquiry to be taxed as between solr and client, to be paid out of the testator's estate.—See *Re Gama, G. v. Young, Stirling, J.*, 8 Ap. 1897, A. 1737; (1897) 1 Ch. 881.

6. *Declaration that Testator intended Property to be enjoyed in Specie, and that a Reversion ought not to be sold.*

DECLARE that, according to the true construction of the will and codicil of the testator J. B. deceased, the testator intended that his widow the Deft C. G. B. should enjoy in specie the estate given to her by the said will, and that the reversionary interest of the testator referred to in paragraph — of the Plt's statement of claim ought not, under the trusts of the said will and codicil, to be sold.—See *Re Bland, Miller v. B.*, Stirling, J., 5 July, 1899, A. 2686; (1899) 2 Ch. 336.

For declaration of liability for default, and inquiries as to the values of funds and stocks, and other property in money, and 3/4 p. c. Anns at stated periods, and at the times when they should have been converted under a previous decree, and of a lease for tithes, and as to its non-renewal, and as to the excess of income received by the tenants for life where the funds were to be invested in land, see *Soverby v. Clayton*, 3 Ha. 435.

For inquiry if deceased tenant for life was overpaid, or anything due to her estate, see *Howe v. E. Dartmouth, M. R.*, 30 March, 1797, A. 385; 7 Ves. 137; L. C. Eq. 68.

For inquiries as to some continuing investments, whether they were proper under the will, and direction to convert others, and to state the value of various investments at the testator's decease, and a year after, and what should be done as to some, and for payments to tenant for life on account, see *Caldecott v. C.*, 1 Y. & C. C. 324, 737.

And as to leaseholds and copyholds, and allowance of interest to tenant for life, see *Gibson v. Bott, Walker v. Shore, Ib.* 320, n., 321, n.; in the latter case the funds were to be invested in land.

For declaration that the tenant for life was entitled to interest at 4/4 p. c. from the testator's decease, out of or in respect of the interest of securities, converted, or to be converted, taking their value, where unsold, a year after testator's decease, and direction to pay him the interest of securities not converted, he undertaking to refund if called on, and the interest of securities then or to be duly invested, see *Caldecott v. C.*, 1 Y. & C. C. 738; and as to allowances to the tenant for life in respect of interest or dividends, see *Sutherland v. Cooke*, 1 Col. 503; and see *Taylor v. Clark*, 1 Ha. 168 *et seq.*

For order apportioning a charge on stock between life interest and reversion, see *Bristed v. Wilkins*, 3 Ha. 240.

For declaration as to right to rents for a period, and to the use of articles except those of which the use is the consumption, and to the interest of the produce of such as were sold, and as to the absolute right to those the use of which is the consumption, and as to ready money in the house, and English and foreign funds, see *Montresor v. M.*, 1 Col. 703.

For inquiry as to sums expended in keeping up policies of assurance, and how much thereof was to be attributed to capital and how much to income, see *Huggins v. Robinson*, V.-C. S., 6 Nov. 1868, A. 2954.

7. *Inquiry as to Investments, and if in Consols, and as to Dividends.*

"An inquiry what, at the expiration of one year after the death of the testator, was the value of the leasehold property not specifically bequeathed, and all other the personal estate of the testator not specifically bequeathed, and not at the time of his death invested in consols; And what amount of such anns would have been purchased, at that time, if a sum equal in value to the said leasehold property and personal estate had been then invested in the purchase of consols; And what would have been the amount of dividends that would have accrued in one year on such anns if purchased as aforesaid; And what would have been the total amount of dividends which would have accrued on such consols, if purchased as aforesaid, from the death of the testator down to the date of the Master's certificate, to be made in pursuance of this order."—Added to decree on the rehearing.—*Morgan v. M.*, M. R., 7 June, 1851, B. 983; 14 Beav. 72; for the original decree, see *S. C.*, 1837, B. 984.

8. *Inquiries as to Application of Corpus and Income of Testator's Personalty and Realty, to pay Debts and Interest, as between Tenant for Life and Remainderman.*

LET the following &c.:—1. An inquiry what were the particulars and amount of the personal estate of the testator S. realized subsequent to the 16 January, 1843, being the date of the bankruptcy of the firm of P. (*up to which time the interest had been kept down*); 2. An inquiry when such personal estate, and every part thereof, was realized and made available, and how much thereof consisted of capital, and how much of interest, dividends, or annual produce accrued or arisen thereon subsequent to the said 16 January, 1843, and how much thereof is applicable in case of the deficiency of real estates of the testator in respect of the debts charged thereon by his will; 3. An inquiry what amount of debts of the testator remained unpaid on the said 16 January, 1843, and what amount of interest accrued thereon from and after that day; and also what is the amount of the costs, and costs, charges, and expenses, if any, incurred in this cause, or anywise in relation to the said testator's estate, and already paid;

and whether such costs &c., if any, relate to the capital of the testator's estate, or to the management and receipt of rents and income of his real estates; 4. An inquiry how much of the said debts, and interest and costs &c., if any, were paid out of the testator's said personal estate; 5. An inquiry how much of such part of the said personal estate as consisted of capital has been applied in discharge of the principal of the said debts, and in payment of the said costs &c., if any, relating to capital, and how much in payment of interest accrued on the said debts since the said 16 January, 1843, and in payment of costs &c. relating to rents and income, and how much of such part of the said personal estate as consisted of interest, dividends, or annual produce, and of the accumulations thereof, has been applied in payment of the principal of the said debts, and in payment of the said costs &c., relating to capital, and how much in payment of interest accrued as aforesaid on the said debts and costs &c., relating to rents and income; 6. An inquiry how much of the principal of the said debts, and how much of the said costs &c., relating to capital, would remain due, if capital only of the personal estate had been applied in or towards payments of the said debts and costs &c., relating to capital, so far as the same will extend; and also how much of the interest accrued as aforesaid on the said debts, and of so much of the said costs &c., relating to rents and income as aforesaid, would remain due if the interest, dividends, and annual produce, and accumulations thereof only had been applied in or towards payment of the interest accrued as aforesaid on the said debts and of the costs &c., relating to rents and income as aforesaid; And it appearing that part of the legacies of £10,000 each, and some interest thereon (the whole of which by the decree dated &c., are declared charged exclusively on the real estate of the testator) have been paid out of his personal estate, Let the following &c.: 7. An inquiry how much of such part of the personal estate as consisted of capital has been applied in discharge of the principal of the said legacies, and how much in payment of interest accrued thereon since the said 16 January, 1843; 8. An inquiry what sum has been raised since the said 16 January, 1843, by sale of the testator's real estates, and what is the net sum which has arisen since the same date from the rents and profits of the real estates, and from interest, or accumulations of interest on such rents and profits, or on the purchase-moneys of the real estates, and from the dividends or interest of the stock in which the same may have been invested; 9. An inquiry how much of such part of the proceeds of the sale of the real estate as consisted of capital has been applied in discharge of the principal of the testator's debts, and in payment of the said costs &c., as aforesaid, relating to capital, and how much in payment of interest on the said debts and costs &c., relating to rents and income, and how much of the rents and profits, and interest and dividends, or accumulations of interest and dividends as aforesaid, has been applied in payment of the principal of the said debts, and the said costs &c., if any, relating to capital, and how much in payment of interest on the said

debts and costs &c., relating to rents and income as aforesaid ; 10. An inquiry how much of the principal of the said debts, and how much of the said costs &c., relating to capital, would remain due if the capital only of the proceeds of the said sales had been applied in payment of the said debts and costs &c., relating to capital, so far as the same would extend, and also how much of the interest of the said debts and costs &c., relating to rents and income would remain due if the net rents and profits, and interest and dividends, and accumulations of interest and dividends, as aforesaid, only had been applied in payment of the interest of the said debts and costs &c., if any, relating to rents and income as aforesaid.—Adjourn.—*Shore v. S.*, V.-C. K., 27 Jan. 1857, B. 581 ; *S. C.*, 4 Drew. 219, 501.

9. *Inquiries as to Payments, and Investment in the Funds, and Dividends, actual or possible.*

USUAL accounts of personal estate ;—“ And if it shall appear that any of the testator's debts or legacies have been paid, an inquiry what has been paid for principal, and what for interest thereof respectively, and when such payments respectively were made, and what was the clear residue of the testator's personal estate at his death ; An inquiry what part of the testator's personal estate hath from time to time since his death produced interest or dividends, and the amount of such interest or dividends, and what sums of money received for interest and dividends accrued upon or from any part of the testator's estate have been laid out at interest, or in the funds ; and the amount of the interest and produce of the sums of money received and laid out as last mentioned ; and in what securities or funds such sums of money, and the produce thereof, are now invested, and have from time to time been invested ; and what part of the testator's estate was invested in the funds at the time of his death, or hath been invested therein by his exors, or either of them, since that time, distinguishing in what funds such investments respectively were or have been made ; And if any parts of such funds did not or do not consist of consols, an inquiry what dividends would have arisen and have accrued if such of the said funds, not being consols, as were purchased before the death of the testator had been sold, and the money arising thereby had been laid out in the purchase of consols at the death of the testator ; and also what dividends the same would have produced if so sold and laid out at the end of twelve months after the death of the testator ; and also what dividends would have been produced from such funds not consisting of consols purchased since the death of the testator if the moneys wherewith the same were purchased respectively had, at the time or times of such respective purchases, been laid out in such consols, and not in such other funds ; And an inquiry what sums of money have been paid to W. &c., to whom the interest of the clear residue of the testator's estate was given for their lives and the life and lives of

the survivors and survivor of them, on account of such interest."—
Adjourn &c.—See *Smith v. Wilkinson*, L. C., 9 Feb. 1798, B. 363.

For order (where large sums of money had been paid a few years after the testator's death out of his estate in compromise of an alleged breach of trust) that on the footing that each of such sums was composed of a principal debt due when the claim originated, and of interest thereon, to the testator's death, at £5 p. c. per ann., and of interest on such principal and interest from the death to the time of payment, the several amounts of such principal debts and interest should be ascertained, and the interest until the death charged against the *corpus*, and the subsequent interest against income, see *Maclaren v. Stinton*, 11 Eq. 388, 389.

10. Profits of Business declared to be Income.

DECLARE that, according to the true construction of the will of the testator C., the profits of the business of a wholesale provision merchant, formerly belonging to the testator, which accrued whilst such business was carried on by his exors and trustees, namely, from &c. to &c., after payment thereof of all expenses, are income, and that the same ought to be paid to the tenant for life.—Costs to be paid out of testator's estate.—*Re Chancellor, C. v. Brown* (C. A.), 21 Feb. 1884, A. 253; *S. C.*, 20 Ch. D. 42, C. A.

11. Apportionment between Tenant for Life and Remainderman— Money recovered on insufficient Mortgage Security.

DECLARE that the residue of the said sum of three thousand six hundred and sixty-nine pounds fourteen shillings in the order dated &c. mentioned ought to be apportioned between capital and income in the proportion that the interest on the principal sum of three thousand five hundred pounds calculated at the rate of five pounds five shillings and ninepence p. c. per ann., being the rate made payable by the mortgage of the — day of —, from the — day of — to the — day of —, bears to the principal sum of three thousand five hundred pounds; And that the Deft E. E. S. is entitled to so much of the residue of the said sum of three thousand six hundred and sixty-nine pounds fourteen shillings as shall under the apportionment aforesaid be apportioned to income, and that the balance of the said residue forms part of the capital of the testator's estate.—See *Re Hubbuck, Hart v. Stone*, C. A., 4 Feb. 1896, A. 659; (1896) 1 Ch. 754, C. A.

NOTES.

CONVERSION AS BETWEEN TENANT FOR LIFE AND REMAINDERMAN.

Wasting Property.—When property of a wasting nature, such as short leases, is given to several persons in succession, it must be converted for the benefit and security of the remainderman; and in like manner reversions are to be sold that the tenant for life may have the benefit of them: *Dimes v. Scott*, 4 Russ. 200; *Howe v. L. Darimouth*, 7 Ves. 137, 148; 2 L. Ca. Eq.

296, 309; *Pickering v. P.*, 4 My. & C. 489, 498; *Tickner v. Old*, 18 Eq. 422; *Porter v. Baddeley*, 5 Ch. D. 542; *Rowlls v. Bebb*, (1900) 2 Ch. 107, C. A.

This rule does not proceed upon conversion being definitely intended, but on the intent of enjoyment in succession: *Cafe v. Bent*, 5 Ha. 34; *Morgan v. M.*, 14 Beav. 72, 85; *Jebb v. Tugwell*, 20 Beav. 84; and it may of course be excluded by the testator's expression of a contrary intent, e.g., where a special power is given to retain existing investments: *Gray v. Siggers*, 15 Ch. D. 74; or, in the case of reversionary property, a discretionary power of sale: *Re Pitcairn, Brandreth v. Colvin*, (1896) 2 Ch. 199; and for other instances, see *Alcock v. Soper*, 2 My. & K. 699; *Collins v. C.*, *Ib.* 703; *Bethune v. Kennedy*, 1 My. & C. 114; *Blann v. Bell*, 2 D. M. & G. 775; 5 D. & S. 658; *Holgate v. Jennings*, 24 Beav. 623; *Lean v. L.*, 23 W. R. 484; *Craig v. Wheeler*, 8 W. R. 172; 29 L. J. Ch. 374; *Wilday v. Sandys*, 7 Eq. 455; *Thursby v. T.*, 19 Eq. 395; *Re Thomas, Wood v. T.*, (1891) 3 Ch. 482.

The rule does not apply where neither fund nor parties are within the jurisdiction at testator's decease, but does when they come within: *Holland v. Hughes*, 16 Ves. 111; 3 Mer. 685.

The rule is not generally applicable to an absolute gift subject to an executory limitation over, especially where the form of the gift shows an intention that the property should be enjoyed in specie: *Re Bland, Miller v. B.*, (1899) 2 Ch. 336; Form 6, *sup.* p. 1682; but it applies to a reversionary interest although expectant on the decease of the person who is made tenant for life by the will: *Rowlls v. Bebb*, (1900) 2 Ch. 107, C. A.; and see *Re Flower, Matheson v. Goodwyn*, 62 L. T. 217; 63 L. T. 201.

It requires strong words to exclude the rule: *Re Llewellyn*, 29 Beav. 171; *Caldecott v. C.*, 1 Y. & C. C. 312; and the *onus* is on those who contend for its exclusion: *Morgan v. M.*, 14 Beav. 72; *Macdonald v. Irvine*, 8 Ch. D. 101, C. A.; *Re Eaton, Daines v. Eaton*, W. N. (94) 95; and neither a direction for payment of rents to the tenant for life nor the giving of a power of distress to deferred annuitants is sufficient to exclude the rule: *Re Game, G. v. Young*, (1897) 1 Ch. 881; Form 5, *sup.* p. 1682; nor a direction that property "not actually producing income" shall not be treated as entitling any one to the receipt of income: *Re Hubbuck, Hart v. Stone*, (1896) 1 Ch. 754, C. A.; *sup.* Form 11, p. 1686.

Even where it applies, the Court is not bound to sell if prejudicial: *Craig v. Wheeler*, 8 W. R. 172; 29 L. J. Ch. 374; and exors may exercise a reasonable discretion as to the time for conversion: *Marsden v. Kent*, 5 Ch. D. 598, C. A.; *Re Chapman, Cocks v. C.*, (1896) 2 Ch. 763, C. A.

If an annuity for years forms part of the residue, till sold it should be invested and treated as residue: *Crawley v. C.*, 7 Sim. 427; *Re Whitehead, Peacock v. Lewis*, (1894) 1 Ch. 678; but where part of the residue consisted of annuities and life policies to secure the principal, they were kept up, and the surplus annuities paid to the tenant for life: *Glengall v. Barnard*, 5 Beav. 245.

Shares in unlimited cos. should in like manner be converted: *Grayburn v. Clarkson*, 3 Ch. 605; *Sculthorpe v. Tipper*, 13 Eq. 232; *Anderson v. Read*, 22 W. R. 527; unless there is an absolute discretion to postpone conversion: *Re Norrington, Brindley v. Partridge*, 13 Ch. D. 654, C. A.

Postponement of Conversion.—Where the exors have power to postpone conversion, or it is more for the benefit of all parties, the securities are not converted; but their value at the death is ascertained, and interest at £4 p. c. per ann. on the amount paid to the tenant for life: *Re Llewellyn*, 29 Beav. 171, *et sup.* p. 1151.

This may be done under the direction of the Court, though not authorized by the will: *Gibson v. Bott*, 7 Ves. 89; *Meyer v. Simonsen*, 5 D. & S. 726.

On the same principle, where the exors have properly postponed conversion under a discretionary power, £4 p. c. per ann. formerly, and now £3 p. c., on the value is allowed to the tenant for life: *Brown v. Gellatly*, 2 Ch. 751; *Wentworth v. W.*, (1900) A. C. 163, P. C.; and see *Wyman v. Paterson*, (1900) A. C. 271, H. L.; *Rowlls v. Bebb*, (1900) 2 Ch. 107, C. A.; but this does not apply where the trust is to convert "immediately, or so soon after my decease as to my trustees may seem fit": *Sculthorpe v. Tipper*, 13 Eq. 232; nor where the trust is in their absolute discretion to convert: *Anderson v. Read*, 22 W. R. 527; *v. inf.* p. 1689; and where there was an immediate trust for conversion, with no power of postponement, the tenant for life was held entitled to the income until the actual conversion, if effected without undue delay: *Hope v. D'Hedouville*, (1893) 2 Ch. 361.

Where trustees of a will refrained from converting a reversion expectant on the decease of the person who was tenant for life under the will, and never in fact exercised any discretion in the matter in the management of the trust estate, the fund was apportioned between the representatives of the tenant for life and the remaindermen according to the principle of *Re Earl of Chesterfield's Trusts* (*inf.* p. 1692), on the footing of a conversion at the death: *Rouells v. Bebb*, (1900) 2 Ch. 107, C. A.

Where the trustees, in the exercise of an absolute discretion, carry on a business, the profits will belong to the tenant for life: *Re Crouther, Midgley v. C.*, (1895) 2 Ch. 56. In *Re Smith, Arnold v. S.*, (1896) 1 Ch. 171, the discretion not being absolute, the Court authorized the carrying on of the business for two years.

In cases, on the other hand, in which conversion has been improperly postponed, the tenant for life has been allowed only so much as would have been received as dividends if the securities had been converted at the end of the year and invested in consols: *Dimes v. Scott*, 4 Russ. 200; *Tickner v. Old*, 18 Eq. 422; *Brown v. Gellatly*, 2 Ch. 759; *Smith v. Wilkinson*, Form 9, *sup.* p. 1685. And see *Porter v. Baddeley*, 5 Ch. D. 542.

Though a sale was to be with the son's approval, he could not, as sole trustee, postpone it to his sister's prejudice: *Lord v. Wightwick*, 4 D. M. & G. 803; and the rights of the parties are not to be affected by delay in conversion, though authorized: *Grealley v. E. Chesterfield*, 13 Beav. 288; *Allhusen v. Whittell*, 4 Eq. 295; *Minors v. Battison*, 1 App. Ca. 428; *Re Earl of Chesterfield's Trusts*, 24 Ch. D. 643; *Re Chancellor, C. v. Brown*, 26 Ch. D. 42, C. A.

If trustees decline to exercise a discretion, the Court pursues its own rules: *Jones v. J.*, 5 Ha. 464.

Where ships were left to trustees in trust to sell at such times as the trustees should judge expedient, "but not without the consent of my said wife," they could not be sold against her wish, but liberty was given to apply in Chambers for a sale: *King-Sampson v. K.*, W. N. (66) 78.

Where the duty to convert is only implied, and by mistake the property has been enjoyed by the tenant for life in specie, the Court may allow him interest at £4 p. c. per ann. on the value taken at the end of the year: *Sutherland v. Cooke*, 1 Col. 503; *Re Lynch-Blosse*, W. N. (99) 27, *v. sup.* p. 1679, where interest was allowed as to the past at 4 p. c. but as to the future at 3 p. c.

Income: Tenant for Life, when entitled to whole.—The tenant for life is entitled to the whole income arising as follows:—

1. From wasting securities which the testator directed to be enjoyed in specie: *Howe v. Ld. Dartmouth*, 7 Ves. 149; *Alcock v. Soper*, and other cases, *sup.*

2. From such investments as the Court authorizes: *Caldecott v. C.*, 1 Y. & C. C. 324.

3. From investments which, though such as in general should be converted, are specially authorized by the will: *Brown v. Gellatly*, 2 Ch. 751; *Lambert v. L.*, 16 Eq. 320, where the tenant for life was held entitled to the profits from carrying on the testator's trade: *Re Chancellor, C. v. Brown*, 26 Ch. D. 42, C. A., Form 10, *sup.* p. 1686; where the testator directed that the profits of his personal estate, until conversion, should be treated as income, and the tenant for life was held entitled to the profits of his business reasonably carried on with a view to its sale as a going concern.

4. From investments not wasting, and not authorized, the sale of which the exors have special power to postpone: *Walker v. Shore*, 19 Ves. 386; *Bulkeley v. Stephens*, 3 N. R. 105; 10 L. T. 225; *Lean v. L.*, 23 W. R. 484; 32 L. T. 305; *Re Sheldon, Nixon v. S.*, 39 Ch. D. 50 (where a distinction is suggested between wasting and hazardous investments); *Re Thomas, Wood v. T.*, (1891) 3 Ch. 482; although the exor is the tenant for life: *S. C.*; and see *Lichfield v. Baker*, 2 Beav. 488, n.; 13 Beav. 446, *et inf.* p. 1692; *Baud v. Fardell*, 7 D. M. & G. 628.

5. From property directed not to be converted until a specified time, until that time arrives: *Green v. Britten*, 1 D. J. & S. 649.

6. From property to be converted at a specified time, during the period

necessarily intervening between that time and the actual conversion: *Hope v. D'Hedouville*, (1893) 2 Ch. 361.

Where trustees without authority lent money at 5 p. c., the tenant for life was entitled to the whole: *Stroud v. Gwyer*, 28 Beav. 130.

Income pending Conversion.—Where there is an express trust for conversion into money and investment in specified securities, the tenant for life is entitled from the testator's death to the income of all such parts of the estate as are invested in accordance with such trust, and as to those which have to be converted, from the time of conversion, or the end of a year, whichever happens first: *Gibson v. Bott*, 7 Ves. 89; *Angerstein v. Martin*, *Hewitt v. Morris*, T. & R. 232, 241; *La Terriere v. Bulmer*, 2 Sim. 18; *Vickers v. Scott*, 3 My. & K. 500; *Douglas v. Congreve*, 1 Keen, 410; *Taylor v. Clark*, 1 Ha. 161; *Macpherson v. M.*, 1 Macq. 243; 16 Jur. 847; *Allhusen v. Whittell*, 4 Eq. 295.

As to the income of what is unconverted within the year, the tenant for life has been held entitled, as from the death, to so much as it would have produced if invested in consols at the end of the year: *Dimes v. Scott*, 4 Russ. 200; *Taylor v. Clark*, 1 Ha. 161; *Brown v. Gellatly*, 2 Ch. 751; *Anderson v. Read*, 22 W. R. 527; *Morgan v. M.*, 14 Beav. 72, 89.

The investment in authorized securities has in some cases been treated as made at the testator's death: *Hume v. Richardson*, 4 D. F. & J. 293; *Theobald*, 5th ed. 486.

In *Anderson v. Read*, *sup.*, the rule was applied in the case of a specific legacy of shares given to trustees "upon trust to convert the same at their absolute discretion."

But in some of the older cases income from the unconverted part was given only from a year after the death: *Sitwell v. Bernard*, 6 Ves. 520; *Vickers v. Scott*, 3 My. & K. 500; *Tucker v. Boswell*, 5 Beav. 607; *Taylor v. Hibbert*, *Griffith v. Morgan*, 1 Jac. & W. 308, 311, n.

In *Entwistle v. Markland*, 6 Ves. 528, n., interest was given to the second tenant for life from the death of the first, the fund not having been invested in his life.

In *Stuart v. Bruere*, 6 Ves. 529, n., interest was given from the decree, which was within a year of the testator's death.

The income of legacies not paid till the end of the year is part of the residue: *Amphlett v. Parke*, 1 Sim. 275; 4 Russ. 75.

Where there is also a power to postpone the conversion of non-wasting securities, the tenant for life takes the actual income till conversion, and afterwards dividends, or interest, on the proceeds: *Walker v. Shore*, 19 Ves. 386; *Wrey v. Smith*, 14 Sim. 202, 212; *Bulkeley v. Stephens*, 3 N. R. 105; 10 L. T. 225; *Re Sewell*, 11 Eq. 80; and *Sparling v. Parker*, 9 Beav. 524, where this was expressly directed, as in *Burton v. Mount*, 2 Dr. & S. 383; and see *Casamajor v. Strobe*, 19 Ves. 390, n.; but he is not entitled to interest on any part which is unproductive: *Mackie v. M.*, 5 Ha. 70.

As to the case where the residue includes securities which produce less than the interest on their value and others which produce more, see *Wentworth v. W.*, (1900) A. C. 163, 172; *Theobald*, 487.

Under a gift of securities for the time being constituting or representing the residuary estate, coupled with an absolute discretionary power to the trustees to retain investments, the tenant for life was entitled to the whole net income of retained securities carrying 6 p. c. interest, and redeemable at par at a future date, but worth considerably more than par *in presenti*: *Re Thomas*, *Wood v. T.*, (1891) 3 Ch. 482.

In the case of wasting securities the tenant for life takes only interest (as to rate, *v. sup.* p. 1687) on the value at the death: *Brown v. Gellatly*, 2 Ch. 751, 758; although there was a power to retain testator's investments: *Porter v. Baddeley*, 5 Ch. D. 542 (and see *Caldecott v. C.*, 1 Y. & C. C. 312); or on the value as shown by subsequent realization: *Lord v. Wightwick*, 4 D. M. & G. 803; *Wilkinson v. Duncan*, 23 Beav. 469; *Wright v. Lambert*, 6 Ch. D. 649.

In *Yates v. Y.*, 28 Beav. 637, trustees with a power to do so having postponed the sale of land partly unproductive, the tenant for life was only entitled to the actual rents until sale; and see *Re Searle*, (1900) 2 Ch. 829.

As to what words give the trustees such discretion to postpone conversion,

see *Minors v. Battison*, 1 App. Ca. 428; and that trustees are not bound to convert within the year, even though the property is shares in an unlimited co., see *Re Norrington, Brindley v. Partridge*, 13 Ch. D. 654, C. A.

In *Scholefield v. Redfern*, 2 Dr. & S. 173, under a will giving direction as to time for sale, the tenant for life took the whole actual income of the estate, whether converted or not; and see *Miller v. M.*, 13 Eq. 263 (royalties from an open brickfield).

As to income of leaseholds which testator neglected to renew in time, see *Pinfold v. Shillingford*, 25 W. R. 425.

If the property consists of a business which is sold to one of the trustees, and the sale is set aside, the tenant for life will (*seemle*) be entitled to the profits as income: *Re Norrington, Brindley v. Partridge*, 13 Ch. D. 654, C. A.; but see *Re Hill*, 50 L. J. Ch. 551; 45 L. T. 126.

Inquiries will be directed as to how much of the funds has arisen from interest and how much from capital, in order to determine between the tenant for life and remainderman: Form 1, *sup.* p. 1678; and see *Fearns v. Young*, 9 Ves. 552; *Adair v. Shaw*, 1 Sc. & L. 277.

Where, instead of complying with a trust for conversion, the value is ascertained, and interest on the amount paid, it runs from the death: *Gibson v. Bott*, 7 Ves. 89; *Re Llewellyn*, 29 Beav. 174, *et sup.* p. 1687; *Brown v. Gellatly*, 2 Ch. 758.

Where a trust for conversion of wasting property is not expressed, but implied from there being estates in succession, the interest runs from the death: *Fearns v. Young*, 9 Ves. 549; *Meyer v. Simonsen*, 5 D. & S. 723; but see *Lord v. Wightwick*, 4 D. M. & G. 803, 813.

RESIDUE—CORPUS AND INCOME.

The residue is what remains after paying debts and legacies and the expenses of executing the will: *Trethewy v. Helyar*, 4 Ch. D. 53; *Shuttleworth v. Howarth*, C. & Ph. 228; *Massy v. Gahan*, 23 L. R. Ir. 518; and so costs should be discharged before payment of income: *Allhusen v. Whittell*, 4 Eq. 295; if sums are set apart to meet legacies on a contingency, or a conditional annuity, then (as a matter of convenience rather than of principle: see *Re Whitehead, Peacock v. Lucas*, (1894) 1 Ch. 678) the income until the contingency happens or the condition requires fulfilment is treated as part of the income of residue, and payable to the tenant for life: *Allhusen v. Whittell, sup.*; *Crawley v. C.*, 7 Sim. 427; *Shuttleworth v. Howarth, sup.*; *Re Whitehead, Peacock v. Lucas, sup.*; following *Cranley v. Dixon*, 23 Beav. 512; but where a fund is set apart to answer legacies payable *in futuro*, the interim income is in the nature of a terminable annuity to be treated as capital and invested, the dividends only being paid to the tenant for life: *Crawley v. C.*, 7 Sim. 427; *Re Whitehead, Peacock v. Lucas*, (1894) 1 Ch. 678. Interest and accumulations after twenty-one years, and till the time of payment, form part of the capital of residue: *Shuttleworth v. Howarth, sup.* (and the tenant for life of the residue receives only the income of the investment thereof: *Re Pope, Sharp v. Marshall*, (1901) 1 Ch. 64, disapproving *Re Phillips*, 49 L. J. Ch. 198, *sed qu.*); or go to the person next entitled: *Trickey v. T.*, 3 My. & K. 565.

In *Greisley v. E. Chesterfield*, 13 Beav. 288, the devisee for life of realty to be sold to pay debts was held entitled to have the first year's interest on the debts paid out of the corpus.

In *Allhusen v. Whittell*, 4 Eq. 295, Form 2, *sup.* p. 1679, the tenant for life of residue was only entitled to the income after keeping down the interest on debts as from the death: but *Greisley v. E. Chesterfield* was not cited; and see *Barnes v. Bond*, 32 Beav. 653.

In *Marshall v. Crowther*, 2 Ch. D. 199, the rule in *Allhusen v. Whittell* was preferred. It was followed in *Lambert v. L.*, 16 Eq. 320, though the debts were paid before the end of the year, and the income was large compared with the capital.

Where a testator had covenanted to pay an annuity which his personal estate proved insufficient to discharge, the tenant for life of his real estate, paying the annuity, was entitled, in respect of each payment, to a charge on corpus, but had to keep down the interest on the amount so charged: *Re Harrison, Townson v. H.*, 43 Ch. D. 55.

And where the estate was not sufficient to keep down life annuities, but if government annuities were purchased there would be a small surplus, the tenant for life was held not to be entitled to have such annuities purchased, but

the income was directed to be applied, so far as it would extend, in paying the annuities, the deficiency being from time to time made good out of capital: *Re Grant, Walker v. Martineau*, 52 L. J. Ch. 552; 48 L. T. 937; 31 W. R. 703.

And as to the incidence of interest on legacies remaining unpaid after the year, see *Masey v. Gahan*, 23 L. R. Ir. 518, *sup.*

What Property must be converted.—All shares, stocks, and securities, though not of a perishable or wasting nature, must be converted unless they are such as are allowed by law or the general rules of the Court (as to which, *v. sup.* p. 1182; Vol. I. p. 235), or expressly authorized by the testator: *Thornton v. Ellis*, 15 Beav. 193; *Sowerby v. Clayton*, 3 Ha. 430; *Caldecott v. C.*, 1 Y. & C. C. 312; *Blann v. Bell*, 2 D. M. & G. 775; 5 D. & S. 658; *Howe v. E. Dartmouth*, 7 Ves. 137; 1 L. C. Eq. 68; *Rowlls v. Bebb*, (1900) 2 Ch. 107, C. A.

Though tenant for life is entitled to enjoy in specie, turnpike bonds, being debts, must be realized: *Holgate v. Jennings*, 24 Beav. 623, 630.

If any part is invested on real security, an inquiry may be directed whether it will be for the benefit of the parties interested to call it in: *Howe v. E. Dartmouth*, 7 Ves. 137.

In *Barry v. Marriott*, 2 D. & S. 491, the Court would not allow a change of investment from consols in Court to mortgage security; and see inquiry in *Morgan v. M.*, 14 Beav. 92; but see *Lewin*, 343; and now see the Trustee Act, 1893, and O. XXII, 17, *sup.* p. 1182; Vol. I. p. 235.

Dividends were ordered to be paid to tenant for life, and on proof of his death to a second: *Re Brent*, 8 W. R. 270; but this is contrary to the usual practice: *v. sup.* Vol. I. p. 234.

The Court, in construing life estates and bequests of personalty, is not bound by rules derived from tenure, and not resting on intention, nor by rules as to realty: *Re Wynch*, 5 D. M. & G. 188; 1 Sm. & G. 427; *Goldney v. Crabb*, 19 Beav. 338.

Income or Capital.—Tenant for life of Bank stock is not entitled to a bonus unless given in the shape of an increased dividend: *Clayton v. Gresham*, 10 Ves. 288, 290; *Barclay v. Wainwright*, 14 Ves. 66; *Norris v. Harrison*, 2 Mad. 279; and formerly the tenant for life only got so much of the dividends as would make 3*l.* 10*s.* p. c., unless the order otherwise directed: see *Dale v. Hayes*, 2 Sm. & G. vii.; but by Gen. Ord. August, 1861, the tenant for life is to have the whole dividend on Bank stock in Court, unless the particular order otherwise provides; and see *Hooper v. Rossiter*, M'C. 527; *Matthews v. Maude*, 1 Russ. & M. 397.

As to the rights of tenant for life and remainderman to bonuses on shares, see *Ward v. Combe*, 7 Sim. 634; *Hollis v. Allan*, 14 W. R. 980; 12 Jur. N. S. 638; on life policies, *Courtney v. Ferrers*, 1 Sim. 137; to royalties from open brickfields, *Miller v. M.*, 13 Eq. 263; and in respect to an additional sum charged on a repayment before the contract time, *Re Searancke*, 74 L. T. 339.

Costs of sanitary works under the Public Health (London) Act, 1891, upon leasehold houses forming part of the residue are payable out of capital: *Re Lever, Cordwell v. L.*, (1897) 1 Ch. 32; and so as to drainage expenses on freeholds under the Public Health Act, 1848: *Re Barney, Harrison v. B.*, (1894) 3 Ch. 562.

A bonus arising from the profits of the half year (*Plumbe v. Neild*, 8 W. R. 337; 29 L. J. Ch. 618; 6 Jur. N. S. 529), or a special dividend from a quinquennial division of surplus profits (*Re Hopkins*, 18 Eq. 696), is income. But not profits which by the articles of partnership were not divisible: *Straker v. Wilson*, 6 Ch. 503; and see *Ibbotson v. Elam*, 1 Eq. 188; *Browne v. Collins*, 12 Eq. 586.

Where the co. has power to determine whether profits shall be treated as income or capital, the interest of the tenant for life depends on the decision of the co.: *Re Bouch, B. v. Sproule*, 12 App. Ca. 385; *Re Malam*, (1894) 3 Ch. 578; *Lewin*, 834, 835; *secus*, where there is no such power: *Re Bouch, sup.*, at pp. 397, 401; *Irving v. Houston*, 4 Paton, Sc. App. 521.

The mere fact that the profit is carried to a reserve fund is not sufficient to stamp it as capital: *Re Alsbury, Sugden v. A.*, 45 Ch. D. 237; and see *Lubbock v. British Bank of S. Africa*, (1892) 2 Ch. 198; *Foster v. New Trinidad, &c. Co.*, (1901) 1 Ch. 208.

In *Re Northage*, 60 L. J. Ch. 488; 64 L. T. 625, a declaration of bonus

dividend, and issue of shares, were regarded as separate transactions, and the tenant for life was entitled to the dividend.

And as to the question when undrawn profits can be treated as capital, see *Re Bridgewater Navig. Co.*, (1891) 2 Ch. 317, C. A.

A new allotment of shares is in general capital, not income: *Re Barton*, 5 Eq. 238; *Re Bromley*, *Sanders v. B.*, 55 L. T. 145; *secus*, if issued by way of distribution of profits: *Re Malam*, (1894) 3 Ch. 578.

The Court will go back and look into the admon of the personality for the purpose of deciding equities between tenant for life and remainderman: *Shore v. S.*, 4 Drew. 219, 501, Form 8, *sup.* p. 1683.

The value of a colliery which was worked out, instead of being sold at the end of the year, was taken at the aggregate amount of the actual annual profits, treated as deferred payments: *Lord v. Wightwick*, 4 D. M. & G. 803, *sup.* p. 1470, and see *Thursby v. T.*, 19 Eq. 395. Profits were treated as not arising under a trust before the capital duly belonged to the trust: 4 D. M. & G. 810.

In *Wright v. Lambert* (6 Ch. D. 649), the interest of a devisee for life of reversionary interests, who died before they fell in, was calculated at their value at a year from testator's death, on the assumption that they would fall in when they actually did, with 4 p. c. on that amount from the death (following *Wilkinson v. Duncan*, 23 Beav. 469; see orders, *ib.* 473, n., 1857, B. 1011).

But in the most recent cases the method adopted has been to calculate what sum put out at interest (formerly calculated at 4 p. c., but now at 3 p. c. per ann.: see *Re Goodenough*, *Marland v. Williams*, (1895) 2 Ch. 537) on the day of the testator's death, and accumulating at compound interest at that rate, with yearly rests, and deducting income tax, would, with the accumulations of interest, amount on the day when the reversion falls in or is realized to the sum actually received; and the sum so calculated represents corpus, and the rest is income: *Re Earl of Chesterfield's Trusts*, 24 Ch. D. 643; *Beavan v. B.*, 24 Ch. D. 649, n.; *Re Hobson*, *Walker v. Appach*, 55 L. J. Ch. 422; 53 L. T. 627; 34 W. R. 70; *Rowls v. Bebb*, (1900) 2 Ch. 107, C. A.; and see *Re Flower*, *Matheson v. Goodwyn*, 62 L. T. 217 (reversed on appeal on point of construction, W. N. (90) 152; 63 L. T. 201); *Re Godden*, *Teague v. Fox*, (1893) 1 Ch. 292 (applying the same principle to proceeds of working, previously to foreclosure, a colliery of which testator was mortgaged in possession).

And the same principle was applied in the case of a circus which had been taken on lease by a testator, and, being unsaleable, was retained and carried on at an annual loss by the trustees of his will after the time indicated by him for conversion of his residuary estate: *Re Hengler*, *Frowde v. H.*, (1893) 1 Ch. 586, 589 (where form of order is given adapted to meet the alternatives of annual loss or profit); but the principle is inapplicable where a fund bequeathed by the will is directed to fall into residue: *Pigott v. P.*, W. N. (93) 115; *Re Flower*, *Matheson v. Goodwyn*, 63 L. T. 201.

Where a bond debt could not be realized for some years, and then only in part, the tenant for life took 4l. p. c. on its value a year from the death: *Turner v. Newport*, 2 Ph. 14; 14 Sim. 32; and a similar principle was adopted in *Cox v. C.*, 8 Eq. 343; and *Maclaren v. Stainton*, 11 Eq. 382; and see *Ackroyd v. A.*, 18 Eq. 313; and in *Re Duke of Cleveland's Estate*, *Hay v. Wolmer*, (1895) 2 Ch. 542; interest, however, being at 3l. p. c.; and see *Lewin*, 1126, 1127. But according to *Re Grabowski*, 6 Eq. 12, the whole sum recovered is to be treated as capital till the whole capital is received; and see *Innes v. Mitchell*, 2 Ph. 346, *sup.* p. 1645; *Fletcher v. Stevenson*, 3 Ha. 360, 371. In *Wilcocks v. Butcher*, 16 Sim. 366, the tenant for life was allowed interest at 4l. p. c. upon arrears of income.

And as to the mode of apportionment where money has been properly invested on mortgage, which on ultimate realization proves insufficient to pay the principal and interest, see *Re Moore*, 54 L. J. Ch. 432; 33 W. R. 447; *Re Foster*, *Lloyd v. Carr*, 45 Ch. D. 629; *Re Ancketill's Estate*, 27 L. R. Ir. 331; *Re Hubbuck*, *Hart v. Stone*, *sup.* Form 11, p. 1686; where instalments of mortgage money are paid by successive tenants for life: *Re Nepean's Settled Estates* (1900), 1 I. R. 298; or where an unauthorized investment is realized at a loss: *Re Bird*, *Dodd v. Evans*, (1901) 1 Ch. 916; 70 L. J. Ch. 514.

Over-payment: recoupment: refunding.—Though it was held conversion was intended, the Court would not make the tenant for life account for the previous income received in specie, as no case was made on the pleadings: *Lichfield v. Baker*, 2 Beav. 481; except what was received after proving the will: *Ib.*, 488, n.; 13 Beav. 446; and so where no special charge in the bill, or direction in the decree: *Morgan v. M.*, 13 Beav. 441; and see *Mehrtens v. Andrews*, 3 Beav. 72.

A tenant for life, who had suggested the propriety of converting, was not, after thirty years, liable to refund, though the exors were made liable for the difference: *Bate v. Hooper*, 5 D. M. & G. 338; and see *Sutherland v. Cooke*, 1 Col. 503; *Hilliard v. Fulford*, 4 Ch. D. 389, Form 3, *sup.* p. 1659.

Exors making good over-payments to tenant for life, had to pay interest: *Mackenzie v. Taylor*, 7 Beav. 467; and exors allowing a tenant for life to enjoy in specie leaseholds which had since expired were liable for their value, having regard to the actual receipts, the title, though bad, not having been impeached: *Mehrtens v. Andrews*, 3 Beav. 72. Trustees made liable for over-paying the tenant for life were allowed an inquiry in the same suit with a view to recover against his assets: *Hood v. Clapham*, 19 Beav. 90.

Tenant for life is entitled to be recouped out of capital succession duty paid by him: *Cuddon v. C.*, 4 Ch. D. 583; but not out of the *corpus* of the realty interest on debts kept down by him: *Shore v. S.*, 4 Drew. 501.

As to lien of tenant for life for, or right to be recouped calls on shares, or premiums on policies, *v. sup.* p. 1621.

A direction to pay calls on shares out of income did not apply to new shares allotted after the death: *Bevan v. Waterhouse*, 3 Ch. D. 752; and as to income of specific bequests, *v. sup.* p. 1620.

Where premiums on a life policy and interest on a mortgage of the policy were paid out of income, it was held that the amount of income so expended ought to be recouped to the tenant for life with interest out of the property preserved, the balance being apportioned according to the principle of *In re E. of Chesterfield's Trusts*; *Re Morley, M. v. Haig*, (1895) 2 Ch. 738 (but *quære* whether allowance ought not to have been made in respect of the diminution of income from time to time necessitated by payments out of capital).

CHAPTER XLV.

SETTLEMENT.



SECTION I.—ESTABLISHING, AVOIDING, AND RECTIFYING SETTLEMENTS.

(I.) ENFORCING AGREEMENT FOR A SETTLEMENT.

1. *Enforcing against the Father's Representatives his Agreement prior to and in Consideration of the Marriage to settle Property on his Daughter.*

"DECLARE that the letters of A. (*the late father of the Plt*) amount to and constitute a contract by him for valuable consideration to settle the whole of the property of which he died seised or possessed upon the Plt and her children in strict settlement, subject to the payment of the debts of any creditors of the said A., and of his funeral and testamentary expenses."—Inquiry as to the particulars of the property, and a proper settlement thereof, to be executed with the approbation of the Judge; and the Defts, other than the infant children of the Plt, and all other necessary parties (if any) to join therein;—"And the Deft C. (*Plt's husband*) by his counsel at bar offering to settle the sum of £— upon the Plt and her children; Let a proper deed of settlement of the sum of £— be settled &c., and be executed by the Deft C. and all other necessary parties (if any) as the Judge shall direct."—Costs of all parties to be taxed and paid out of the testator's estate.—*Coverdale v. Eastwood*, V.-C. B., 4 Dec. 1872, A. 3201; S. C., 15 Eq. 122.

2. *Enforcing Parol Agreement by a Father on his Daughter's Marriage by directing an assignment of the Residence, which had been occupied by the Daughter and her Husband since their Marriage.*

DECLARE that the verbal agreement entered into by U., the intestate in the pleadings named, to assign the leasehold house — to the Defts K. and M., his wife, in the manner alleged in the (voluntary answer) of the said Defts, ought to be specifically performed by a proper assignment of the said leasehold house and premises, free from incumbrances, and that the said leasehold house and premises form no part

of the intestate's personal estate; And Let the Plt T. (*the admor*) on or before &c. pay off the instalments now remaining due to the C. B. Building Society in respect of the said house and premises; And Let all proper parties join in and execute a proper assignment of the said leasehold house and premises to the said Defts K. and M., his wife; such assignment to be settled &c., in case the parties differ.—Plt, out of the intestate's residuary personal estate, to pay Defts' costs of action.—Plt submitting to account, usual admon accounts.—*Ungley v. U.*, V.-C. M., 8 Nov. 1876, B. 1916; affirmed, C. A. 19 June, 1877, B. 1184; 25 W. R. 39, 733; 4 Ch. D. 73; 5 Ch. D. 887.

3. *Enforcing Agreement for Settlement of a Widow's Property on her second Marriage against the Trustee of her first Marriage Settlement.*

"**DECLARE** that the agreement for a settlement dated &c. in the pleadings mentioned ought to be specifically performed &c., and adjudge the same accordingly; And Let a proper settlement, in pursuance of such agreement, be settled by the Judge, and executed by such parties thereto as the Judge shall direct."—Reference to appoint trustees of such settlement.—Deft M. (*the trustee of the wife's first marriage settlement*) to pay into Court the sum of £—, the proceeds of Indian Railway Stock sold out by him with interest—"And Let the said Deft M. pay to the Deft A. (*wife of Plt*), on her separate receipt, £—, being the half-year's interest, less income tax, due on the — day of —." Costs of Plt and Deft A. to be taxed as between solr and client, and paid out of the said £— when so paid in &c.—*Michell v. Malings*, V.-C. H., 11 July, 1877, B. 2054.

4. *Post-nuptial Settlement—Avoidance on Bankruptcy—Wife Purchaser in good faith and for valuable Consideration.*

DECLARE that the post-nuptial settlement dated &c. in the pleadings mentioned is valid, except so far as the value of the property brought into settlement by the said N. M. P. (*a bankrupt*) may have exceeded at the date of the said settlement the amount due to the said M. P., his wife, in respect of her money received by him; And the Plts (*the late and present trustees of the bankrupt's property*) by their counsel desiring the inquiry hereinafter directed, Direct at the Plts' risk as to costs; An inquiry what was the value of the property brought by the said N. M. P. into settlement under the said post-nuptial settlement dated &c.—*Mackintosh v. Pogose*, Stirling, J., 16 Jan. 1895, B. 1478; (1895) 1 Ch. 505.

5. *Enforcing Covenant to settle Wife's Future Property.*

VARY the Master's certificate dated &c., and as varied Let the same stand as follows:—"The Legacy of £— bequeathed by the will

of A. to C. (*the wife*), for her separate use, became and was subject to the covenant on the part of Sir J. C. (*the husband*), in the said indenture of settlement contained as to the settlement of future-acquired property during the said coverture";—And it appearing that the Defts E. B. and H. B., who were the exors of the will of the said testatrix A., after paying the sum of £— as and for legacy duty on the said legacy of £—, placed the sum of £— residue thereof to the credit of the said Sir J. C. with his bankers, and allowed him to have and receive the same, or the benefit thereof; Declare that the Defts E. B. and H. B., and the said Sir J. C., are jointly and severally bound to answer and make good the said sum of £— to the said trust estate, and that the life interest of the said Sir J. C. in the said trust funds is liable to recoup the said sum of £—; And Let the said Defts E. B. and H. B., and the said Sir J. C., lodge the said sum of £— in Court as directed in the schedule hereto; And Declare that the trust funds and property, now subject to the trusts and provisions of the said indenture of settlement, consist of the several particulars mentioned in the first schedule to the chief clerk's certificate, and of the said sum of £—, being the amount of the said legacy, less duty thereon.—Directions for taxation of costs.—The Defts E. B. and H. B. to be at liberty at any time after they, or one of them, shall have lodged the said sum of £— in Court &c., and the balance, if any, which shall be certified to be due from them, to apply that the amount so paid in may be repaid out of the dividends and income of the trust funds representing the life interest of the said Sir J. C. therein.—[*Add Lodgment Schedule, Form No. 1.*]—See *Campbell v. Bainbridge*, V.-C. S., 27 June, 1868, A. 2538; *S. C.*, 6 Eq. 269.

For declaration that the limitations in a settlement in favour of the children of the settlor C. by her first marriage were valid and binding, and that the devisees under the will of the said C. were trustees of certain copyhold hereditaments, &c. in the same will mentioned, upon the trusts of the settlement, with directions for vesting the copyholds, and for taxation and payment of costs to be raised by mortgage or sale, see *Gale v. G.*, Fry, J., 7 June, 1877, A. 3313.

For declaration that the trusts of a voluntary settlement ought to be performed and carried into execution, with consequent directions, see *Hall v. H.*, L. C. and L. JJ., 26 Feb. 1873, A. 645; *S. C.*, 8 Ch. 430.

For declaration that a deed (in the nature of a family arrangement) was binding on the parties thereto, and that the Plts and the Deft S. (the husband of one of the Plts) had by their acts acquiesced therein and become bound thereby, with directions consequent for division of the property on the footing of the deed, see *Smith v. Mogford*, M. R., 13 March, 1873, B. 750; *S. C.*, 21 W. R. 472.

NOTES.

ENFORCING AGREEMENT TO SETTLE.

On the principle that a man will be bound to make good representations on the faith of which another has been induced to alter his position or incur liability—when a marriage has been contracted on the faith of a statement of intention to settle property upon the intended wife, the statement will be

treated as a contract capable of being enforced, and a settlement directed in accordance therewith:—

- (a) Against the father or his represves (subject to the claims of creditors): *Coverdale v. Eastwood*, 15 Eq. 121, Form 1, *sup.* p. 1694; *Laver v. Fielder*, 32 Beav. 1; *Hammersley v. De Biel*, 12 Cl. & F. 45; 3 Beav. 469; *Keays v. Gilmore*, I. R. 8 Eq. 290; 22 W. R. 465; and the father will not be allowed to defeat a marriage settlement executed on the faith of his representations by afterwards exercising a power to the prejudice of those interested under the settlement: *Wulford v. Gray*, 13 W. R. 366, 761; 11 Jur. N. S. 473; 12 L. T. 437.
- (b) Against the husband (*Alt v. A.*, 4 Giff. 1) and his represves, even where the letters containing the alleged agreement had been lost: *Gilchrist v. Herbert*, 20 W. R. 348; 26 L. T. 381; and against all who claim specified land, the subject of a written contract, as volunteers under the husband: *Synge v. S.*, (1894) 1 Q. B. 466, C. A.
- (c) Against the trustee of a previous marriage settlement who refused to transfer the property: *Michell v. Malings*, Form 3, *sup.* p. 1695.

The equity to have such representations made good extends to the issue of the marriage: *Wulford v. Gray*, 13 W. R. 335, 761; *Prole v. Sowdy*, 2 Giff. 1; *Randliffe v. Parkyns*, 6 Dow, 149; and in the case of a wife's reversionary interest in real estate, the husband's covenant, with her assent, that it shall be settled, may be enforced against her heir-at-law on whom it has descended: *Lee v. L.*, 4 Ch. D. 175, Form 4, *inf.* p. 1717; *Re De Ros*, *Hardwicke v. Wilmot*, 31 Ch. D. 81.

And the husband's claim under an ante-nuptial contract or articles is not after marriage, the wife being dead *s. p.*, defeated by his having refused to insure his life, or to execute a settlement pursuant to the agreement: *Jeston v. Key*, 6 Ch. 610.

But the representation must be distinct and without reserve—not mere general professions: *Maunsell v. White*, 4 H. L. C. 1039; *Moorhouse v. Colvin*, 15 Beav. 341; *McAskie v. McKay*, I. R. 2 Eq. 447; *Dashwood v. Jermyn*, 12 Ch. D. 776; *Re Allen*, *Hincks v. A.*, 49 L. J. Ch. 553; 28 W. R. 533; *Re Fickus*, (1900) 1 Ch. 331.

—must not be negatived by the terms of a settlement executed before the marriage: *Loxley v. Heath*, 1 D. F. & J. 489; 27 Beav. 523 (unless there be sufficient evidence that the settlement has been made in error: *Bold v. Hutchinson*, 5 D. M. & G. 558; *Re Badcock*, *Kingdon v. Tagart*, 17 Ch. D. 361).

—must not have been waived: *Cuton v. C.*, L. R. 2 H. L. 127; or superseded by a subsequent agreement for a settlement: *Re Badcock*, *Kingdon v. Tagart*, 17 Ch. D. 361.

—and the marriage must be shown to have taken place on the faith of the representation: *Goldcutt v. Townsend*, 28 Beav. 445; *Jameson v. Stein*, 21 Beav. 5.

And a mere voluntary statement by A. that he intended, during his life, to make an allowance to B., and to leave him a legacy by his will in lieu thereof, cannot be converted into a contract, because a third person consents, on the strength of it, to allow B. to marry her daughter: *Dashwood v. Jermyn*, 12 Ch. D. 776.

Children, both legitimate and illegitimate, of a widow are within the actual consideration of her second marriage, and her covenant to convey property for their benefit in pursuance of an agreement with her intended husband will be enforced: *Newstead v. Searles*, 1 Atk. 265; West, Ch. 287; *Clarke v. Wright*, 6 H. & N. 849; *Gale v. G.*, 6 Ch. D. 144, *sup.* p. 1696; May, Vol. Conv. 343.

Whether the children of the husband by a former marriage were within the marriage consideration was regarded as doubtful: see Dart, V. & P. 1013; and *Ithell v. Beane*, 1 Ves. 215; but it has been held that they are not: *Re Cameron and Wells*, 37 Ch. D. 32, C. A.; *Price v. Jenkins*, 4 Ch. D. 483, 488, treating *Newstead v. Searles* as an exception which ought not to be extended; but in *Mackie v. Herbertson*, 9 App. Ca. (Sc.) 303; and *De Mestre v. West*, (1891) A. C. 264; 60 L. J. C. 66; *Newstead v. Searles*, *sup.*, has been explained, on the ground that the limitations in favour of the children of the second marriage could not be effectual unless effect were also given to those in favour of the children of the former marriage.

A marriage contract will not be carried out partially; and accordingly effect will be given to provisions for the benefit of a stranger: *Davenport v. Bishop*, 2 Y. & C. C. 451; although the stranger or volunteer could not have enforced them against the contracting parties: *Colyear v. L. Musgrave*, 2 Kce. 81.

A covenant by a man on marriage to lay out money in land to be settled on the wife and children, with remainder to himself in fee, may be enforced by his heir, if any of the uses are subsisting at the husband's death: *Barham v. E. Clarendon*, 10 Ha. 126; but a covenant to settle after-acquired property will not be enforced in favour of the heir-at-law: *Re Anstis, Chetwynd v. Morgan*, 31 Ch. D. 596, C. A.

A post-nuptial settlement, the consideration passing only as between husband and wife, is necessarily voluntary as regards the children of the marriage: *Green v. Paterson*, 32 Ch. D. 95, C. A.; *secus*, if grounded on consideration moving from them: *Baysspoole v. Collins*, 6 Ch. 228.

An infant, though incapable (except with the approbation of the Court, under the Infants Settlement Act, *sup.* pp. 1061, 1062) of binding herself by covenant in her marriage settlement that her reversionary property shall be settled, cannot withdraw from the settlement such property when it falls into possession without giving up interests given to her in the other settled property, and accordingly must elect: *Coltrington v. C.*, L. R. 7 H. L. 854; 8 Ch. 578; *Carter v. Silber*, (1891) 3 Ch. 553; *S. C.*, (1892) 2 Ch. 278, C. A.; *S. C. (nom. Edwards v. Carter)*, (1893) A. C. 360, H. L.; *Smith's Will*, 38 L. T. 466; *Willoughby v. Middleton*, 2 J. & H. 344; *Re Queade's Trusts*, 33 W. R. 816; 54 L. J. Ch. 786; 53 L. T. 74; *Anderson v. Abbot*, 23 Beav. 457; and see *Streatfield v. S.*, 1 L. C. Eq. 416.

Marriage articles executed by an adult and infant, though voidable by the infant on attaining twenty-one, are binding on the adult: *Re Smith's Trusts*, 25 L. R. Ir. 439.

The receipt of a provision covenanted to be paid as part of the marriage arrangement, and therefore within the consideration (see *Codrington v. Lindsay*, 8 Ch. 578, 592), will amount to ratification of the settlement: *Smith's Will*, 38 L. T. 466.

As to ratification and confirmation, see *Simpson, Infants*, 34, 35; 2 L. C. Eq. p. 902; 7th ed. 852 (*Hornsby v. Lee*); and that a settlement incomplete as to part of the property therein comprised may be confirmed and have effect given to it as a testamentary instrument by a subsequent will, see *Bizzev v. Flight*, 3 Ch. D. 269. The principle of election applies also to contracts for valuable consideration resting in articles as distinguished from an executed settlement: *Brown v. B.*, 2 Eq. 481; *Savill v. S.*, 2 Coll. 721.

As to confirmation by a married woman, *v. sup.* p. 901.

In transactions between husband and wife or parent and child, the Court will anxiously lay hold of any circumstances constituting a consideration from the grantee to the grantor to take the case out of the disability of a voluntary conveyance: *Rosher v. Williams*, 20 Eq. 210, 218; *Townend v. Toker*, 1 Ch. 446.

A bargain between husband and wife affecting their interests in real estate, and afterwards embodied in a post-nuptial settlement, will be supported as a deed for valuable consideration, even against a subsequent creditor or purchaser for value, from whom it has been suppressed: *Teasdale v. Braithwaite*, 4 Ch. D. 85; 5 Ch. D. 630, C. A.; *Hewison v. Negus*, 16 Beav. 594, affirmed 17 Jur. 567; *Re Foster and Lister*, 6 Ch. D. 87; but not if the settlement does not refer to the agreement and settles the property in a substantially different way: *Trowell v. Shenton*, 9 Ch. D. 318, C. A.

But a post-nuptial settlement made in pursuance of the husband's ante-nuptial parol agreement has been held to be merely voluntary, and as such void against his creditors: *Warden v. Jones*, 2 D. & J. 76; *Goldicutt v. Townsend*, 28 Beav. 445; *Randall v. Morgan*, 12 Ves. 67; *contra*, *Dundas v. Dutens*, 2 Cox, 235; 1 Ves. jun. 196; unless the marriage has taken place on the faith of the agreement, or there have been acts of part performance independently of the marriage: *Cooper v. Wormald*, 27 Beav. 266; *Surcombe v. Pinniger*, 3 D. M. & G. 571; and see *Caton v. C.*, L. R. 2 H. L. 131; 1 Ch. 137; *Dav. Conv.*, vol. iii. pp. 635, 636.

And a post-nuptial settlement of realty and personalty, to which the wife was absolutely entitled for her separate use, was held voluntary, although

the husband's possible estate by the curtesy was bound: *Shurmur v. Sedgwick*, 24 Ch. D. 597.

VOLUNTARY SETTLEMENTS BINDING ON THE SETTLOR.

In order to render a voluntary settlement or assignment valid and effectual, the settlor must have done everything which from the nature of the property was necessary in order to part with his interest and render the settlement binding upon him, by putting the property out of his power; or there must have been a valid declaration of trust (which in the case of personalty may be parol as well as written: see *Peckham v. Taylor*, 31 Beav. 250): *Ellison v. E.*, 1 L. C. Eq. 6th ed. 291; 2 L. C. Eq. 7th ed. 835.

Effect has accordingly been given to voluntary assignments where the transfer, though incomplete, is as complete as the nature of the interest admits: *Kekewich v. Manning*, 1 D. M. & G. 176; *Richardson v. R.*, 3 Eq. 686; *Pearson v. Amicable Soc.*, 27 Beav. 229; *Voyle v. Hughes*, 2 Sm. & G. 18; *Parnell v. Hingston*, 3 Sm. & G. 337; *Re King, Sewell v. K.*, 14 Ch. D. 179; *Re Smith, Bull v. Smith*, 84 L. T. 835;

—even where the subject of the assignment has been retained by the grantor without notice to the trustees or persons interested under the assignment: *Donaldson v. D.*, Kay, 711; *Way's Trusts*, 2 D. J. & S. 365; *Bonfield v. Hassell*, 32 Beav. 217; and as to such notice, see *Browne v. Savage*, 4 Drew. 635;

—and a voluntary transfer of stock may be complete without the knowledge of the transferee, and there is not necessarily a *locus penitentiae* until communication to him: *Standing v. Bowring*, 31 Ch. D. 282, C. A.; but a gift of chattels capable of delivery, made *per verba de presenti* by a donor to a donee, does not pass the property in the chattels without delivery: *Cochrane v. Moore*, 25 Q. B. D. 57.

—and in the case of a policy of assurance (no deed of assignment being necessary) a letter, expressed to be a formal assignment previous to a deed, was held to constitute a complete assignment, though no notice was given to the assurance office and no deed ever executed: *Re King, Sewell v. K.*, 14 Ch. D. 179;

—and that an assignment of debts may be complete though the securities for them (bills of sale) are not assigned with them, see *Re Patrick*, (1891) 1 Ch. 82, 88, C. A.;

—and an ultimate limitation in a marriage settlement in favour of an unascertained class of next of kin of the wife, being an executed trust, is irrevocable: *Paul v. P.*, 20 Ch. D. 742, C. A.

A delivery of a promissory note to the donor's exor, to be handed over after the donor's death to a third person, on the fulfilment of a condition, was held to create a trust: *Re Richards, Shenstone v. Brock*, 36 Ch. D. 541; and so the indorsement and delivery of a banker's deposit receipt coupled with the appointment of the donee to be executor of the donor: *Re Griffin, G. v. G.*, (1899) 1 Ch. 408; and as to the effect of a voluntary bond or covenant, see *Lewin*, 82, 83.

And the subsequent acquisition by the settlor of the legal estate in property of which he has by voluntary settlement conveyed his equitable interest will not avoid the voluntary settlement: *Gilbert v. Overton*, 2 H. & M. 110.

An assignment of a mere expectancy being ineffectual, the trustees taking under it hold for the assignor: *Re Tilt*, 74 L. T. 163; W. N. (96) 9; and see *Lewin*, 75.

The Court will not convert an imperfect gift into a declaration of trust, and accordingly a voluntary settlement intended to take effect as a transfer cannot, where the transfer is incomplete, be carried out as a declaration of trust: *Mitroy v. Lord*, 4 D. F. & J. 264; *Jones v. Lock*, 1 Ch. 25; *Warriner v. Rogers*, 16 Eq. 310; *Richards v. Delbridge*, 18 Eq. 11; *Heartley v. Nicholson*, 19 Eq. 233; *Moore v. M.*, 43 L. J. Ch. 617; 18 Eq. 474; *Re Hancock, H. v. Berrey*, 57 L. J. Ch. 793; 59 L. T. 197; 36 W. R. 710; nor an informal instrument which was intended to operate as a testamentary disposition: *Towers v. Hogan*, 23 L. R. Ir. 53; and where the assignment is not absolute, but only by way of equitable charge, so that the transaction depends on

contract, equity will not assist the volunteer: *Re Earl of Lucan, Ld. Fitzhardinge v. Cobden*, 45 Ch. D. 470.

And this principle applies equally to imperfect gifts in favour of a wife or children: *Price v. P.*, 14 Beav. 598; *Jefferys v. J.*, C. & P. 138; *Re Breton, B. v. Woolven*, 17 Ch. D. 416; *Vincent v. V.*, 56 L. T. 243; and see *Re Whitaker, W. v. W.*, 21 Ch. D. 657, 666.

Where a husband by deed assigned leaseholds to his wife, "her executors, admors, and assigns, as her separate estate," it was held that the deed operated as a valid declaration of trust: *Fox v. Hawks*, 13 Ch. D. 822; *sed qu.*; see *Re Breton, B. v. Woolven, sup.*

The cases of *Richardson v. R.*, 3 Eq. 686; *Morgan v. Malleson*, 10 Eq. 475; so far as they conflict with the above rule, have not been followed.

To establish a valid declaration of trust or gift, rebutting the presumption of resulting trust, the evidence must be clear and distinct; but though the burden of proof is on the person setting up the declaration of trust or gift, his evidence will not be disregarded: *Roberts v. R.*, 12 Jur. N. S. 971; 15 L. T. 260; 15 W. R. 117; *Fowkes v. Pascoe*, 10 Ch. 343; and see *Marshall v. Crutwell*, 20 Eq. 328; *Upton v. Brown*, 12 Ch. D. 872.

If a person invests funds in the names of the trustees of his marriage settlement, the presumption is that they hold upon the trusts of the settlement: *Re Curteis*, 14 Eq. 217; but under a marriage settlement, where trusts for children were void for remoteness, there was a resulting trust for the settlor: *Re Nash's Settlement*, 51 L. J. Ch. 511; 30 W. R. 406; 46 L. T. 97.

On failure of the objects of a society for providing annuities for the widows of deceased members there was held to be no resulting trust in favour of the represes of the members who had all died: *Cunnack v. Edwards*, (1896) 2 Ch. 679, C. A.; reversing (1895) 1 Ch. 489; *secus*, where the object was to raise funds by means of weekly contributions for the assistance of the members of a dissolved trade union: *Re Printers' and Transferrers' Amalgamated Trade Protection Society*, (1899) 2 Ch. 184; *inf.* p. 2173, Form 11; or for the maintenance and support of two deceased necessitous ladies: *Re The Abbott Fund*, (1900) 2 Ch. 326.

But the question of resulting trust is one of construction: Lewin, 159; and under a creditor's deed assigning a business to trustees upon trust to carry it on for the creditors, and divide the profits and proceeds among them in rateable proportions, there was no resulting trust for the assignors: *Smith v. Cooke*, (1891) A. C. 297; reversing *S. C.*, 45 Ch. D. 38, C. A.

And the Infants Settlement Act, 1855 (18 & 19 V. c. 43), authorizes an out-and-out appointment by an infant under which a resulting trust for the infant may arise: *Re Scott, S. v. Hanbury*, (1891) 1 Ch. 298.

A married woman, so long as the transfer remained incomplete, might retract her consent: *Penfold v. Mould*, 4 Eq. 562.

If a voluntary settlement has been avoided by a subsequent sale, the *c. q. t.* have no equity against the purchase-money: *Daking v. Whimper*, 26 Beav. 568.

And for the doctrine of the Court as to voluntary and incomplete settlements, see *Bridge v. B.*, 16 Beav. 315; *Beech v. Keep*, 18 Beav. 285; *Ward v. Audland*, 8 Beav. 213 (earlier cases collected); *Ellison v. E.*, 1 L. C. Eq. 6th ed. 291; 2 L. C. Eq. 7th ed. 835; Lewin, Trusts, 68 *et seq.*; and as to the well-established distinction between a complete voluntary trust and a voluntary contract to create a trust, and that the latter will not be enforced, see Lewin, 84; *Re D'Angibau, Andrews v. A.*, 15 Ch. D. 228, C. A.; *Re Anstis, Chetwynd v. Morgan*, 31 Ch. D. 596, C. A.

As to voluntary settlements which are void as against creditors, see Chap. LI., "SPECIFIC RELIEF."

AFTER-ACQUIRED PROPERTY.

The primary object of a covenant to settle a wife's after-acquired property is to exclude the husband's marital right and bind property which would otherwise be subject thereto: see *Edye v. Addison*, 1 H. & M. 781; *Burn-Murdock v. Charlesworth*, 23 W. R. 743; *Mackenzie's Settlement*, 2 Ch. 345; *Fisher v. Shirley*, 43 Ch. D. 290; and while a liberal construction will be given to the covenant in order to effect such object (see *Spring v. Pride*, 4 D. J. & S. 395; *Cornwell v. Keith*, 3 Ch. D. 767), the operation will not, in the absence of expressions showing a contrary intention, be extended beyond coverture, even though the words "during coverture" are not contained in

the covenant: *Re Edwards*, 9 Ch. 97; *Campbell's Policies*, 6 Ch. D. 686; 25 W. R. 268; *Alleyn v. Hussey*, 22 W. R. 203; *Dickinson v. Dillwyn*, 8 Eq. 546; *Carter v. C.*, 1b. 551; *Re Coghlan, Broughton v. B.*, (1894) 3 Ch. 76; *Fisher v. Shirley, sup.*; *secus*, if the husband survives: *S. C.*

And this rule applies to an assignment in the settlement of property to be afterwards acquired: *Holloway v. H.*, 25 W. R. 575; and such an assignment will not be held to comprise money given long afterwards by husband to wife: *Coles v. C.*, (1901) 1 Ch. 711.

The effect of the covenant if ambiguous may be determined by reference to a recital: *Re Coghlan, Broughton v. B.*, (1894) 3 Ch. 76.

Where two ante-nuptial settlements were executed, each of which contained a covenant for settlement of the wife's after-acquired property, the Court refused to hold that the first settlement was superseded by the second: *Re Gundry, Mills v. Mills*, (1898) 2 Ch. 504.

The cases as to what property is bound by such a provision are not easily reconciled, except perhaps on the particular words of each covenant.

In the case of property to which the wife was entitled at the time of the settlement for a reversionary interest, vested or contingent, there must, in general, have been a change during coverture from a reversionary to a possessory title in order to bring it within the covenant: *Archer v. Kelly*, 1 Dr. & Sm. 300; *Clinton's Trust*, 13 Eq. 305.

Accordingly property which has actually descended, devolved, or become vested in possession at the time of the settlement is not within a covenant to settle property which the wife, or husband in her right, "shall become entitled to": *Churchill v. Shepherd*, 33 Beav. 107; *Wilton v. Colvin*, 3 Drew, 617; *Broune's Will*, 7 Eq. 231; *Wyndham's Trusts*, 1 Eq. 290; *Re Garnett, Robinson v. Gandy*, 33 Ch. D. 300, C. A.; distinguishing *Williams v. Mercier*, 10 App. Ca. 1, where property devolving on the husband *eo instanti* of the marriage in right of the wife, was held to be included, because there was nothing in the settlement except the covenant which could affect the existing property. Where covenant was limited to existing interests, a fund subsequently appointed to the covenantor as one of a class of children, who also took in default of appointment, was not bound: *Sweetapple v. Horlock*, 11 Ch. D. 745.

So also reversionary property, which though vested at the time of the settlement, does not fall into possession during the coverture: *Peilder's Settlement*, 10 Eq. 585 (and cases there collected); *Jones's Will*, 2 Ch. D. 362; 45 L. J. Ch. 428; and the change from a contingent to an absolute interest is not sufficient if the interest remains reversionary during coverture: *Michell's Trusts*, 9 Ch. D. 5, C. A. (reversing 6 Ch. D. 618); *secus*, where the covenant is in general terms and the reversionary property comes into possession after the death of the wife, but during the life of the husband: *Fisher v. Shirley*, 43 Ch. D. 290.

But it has been held *contra* that the husband's acquisition of an interest in the property by marriage satisfies the words of futurity: *Viant's Settlement*, 18 Eq. 436; *Hamilton v. James*, 1 R. 11 Eq. 223; and see *Re Hill*, 11 W. R. 930; 9 Jur. 942; 8 L. T. 825; *Rose v. Cornish*, 16 L. T. 786; *Graftley v. Humpage*, 1 Beav. 40.

And in *Agar v. George*, 2 Ch. D. 706; *Cornmell v. Keith*, 3 Ch. D. 767, interests contingent at the time of the settlement which did not fall into possession until after the termination of the coverture were held bound by the particular covenant; and reversionary property, though liable to be divested, was included in a covenant extending to property to which the wife was or might become entitled: *Re Jackson's Will*, 13 Ch. D. 189; *Re Mackenzie's Settlement*, 2 Ch. 345; and see *Re Ware, Cumberlege v. W.*, 45 Ch. D. 269.

Under a covenant to "convey, assign, or assure," a *feme covert* could not be compelled to enlarge by a disentailing assurance an estate tail to which she had become entitled: *Hilbers v. Parkinson*, 25 Ch. D. 200.

If the covenant contains an exception of property otherwise "settled," a sum left to the wife's separate use will be excluded: *Re Berens*, 59 L. T. 626; *Kane v. K.*, 16 Ch. D. 207.

As to the meaning of the words "at one and the same time, and from one and the same source," see *Re Pares*, *Re Scott Chad*, (1901) 1 Ch. 708.

Property given to a woman's separate use, without any restraint on anticipation, is bound by a covenant to settle her after-acquired property, if both she and her husband have entered into the engagement: *Campbell v. Bainbridge*, 6 Eq. 269; *Coventry v. C.*, 32 Beav. 612; *Brooks v. Keith*, 1 Dr. & Sm.

462; *Willoughby v. Middleton*, 2 J. & H. 344; *Re D'Estampe's Settlement*, *D'E. v. Crowe*, 53 L. J. Ch. 1117; 51 L. T. 502; 32 W. R. 978 (showing that the fact that the husband only is expressed to "covenant" is not conclusive to show that the covenant was not intended to be joint); *Re De Ros, Hardwicke v. Wilmot*, 31 Ch. D. 81 (where the wife, joining in the deed, was bound by a recital that her property was to be settled); *Re Haden, Coling v. H.*, (1898) 2 Ch. 220 (where the covenant was by husband alone, but the wife was a party to and executed the deed).

Secus, if the engagement is that of the husband only: *Ramsden v. Smith*, 2 Drew. 298; *Galaker v. Reynardson*, 13 W. R. 487; 12 L. T. 134; and see *Young v. Smith*, 1 Eq. 180; *Webb's Trusts*, 48 L. J. Ch. 769; *Macpherson v. M.*, 55 L. J. Ch. 922; 55 L. T. 346; and see *Re Rickman, Stokes v. R.*, 80 L. T. 518; *Re Smith, Robson v. Tidy*, W. N. (00) 75; though the settlement contains a recital of an agreement that the wife's property should be settled: *Dawes v. Treadwell*, 18 Ch. D. 354, C. A.;

—or if the property is inalienable during coverture, or subject to a restraint on anticipation: *Coventry v. C.*, *sup.*; *Brooks v. Keith*, *sup.*; *Re Sarel*, 4 N. R. 321; *Re Currey, Gibson v. Way*, 32 Ch. D. 361;

—or the conditions upon which it is given are inconsistent with the trusts of the settlement: *Mainwaring's Settlement*, 2 Eq. 487; *Thornton v. Bright*, 2 My. & C. 230.

But no mere expression of an intention on the part of the donor of property will take it out of the settlement, if upon the true construction of the covenant it falls within it: *Re Allnutt, Pott v. Brassey*, 22 Ch. D. 275; *Scholfield v. Spooner*, 26 Ch. D. 94, C. A.

And the effect of sect. 19 of the Married Women's Property Act appears to be that a covenant for settlement of after-acquired property belonging to the wife will, though entered into by the husband alone, bind all her property as fully as would have been the case if the Act had never passed: *Re Whitaker, Christian v. W.*, 34 Ch. D. 227, C. A.; *Hancock v. H.*, 38 Ch. D. 78, C. A.; *Stevens v. Trevor-Garrick*, (1893) 2 Ch. 307; *Re Stonor's Trusts*, 24 Ch. D. 195; and *v. sup.* p. 919.

Property over which the wife has a general power of appointment is not within the covenant: *Ewart v. E.*, 11 Ha. 276; *Townshend v. Harrouby*, 4 Jur. N. S. 353; 27 L. J. Ch. 553; 6 W. R. 413; nor is a life interest only: *S. C.*; and see *St. Aubyn v. Humphreys*, 22 Beav. 175.

Savings out of the income derived under the settlement will not, it would seem, in general be regarded as included in the covenant to settle after-acquired property: *Finlay v. Darling*, (1897) 1 Ch. 719, not following *Re Bendy, Wallis v. B.*, (1895) 1 Ch. 109; and see Lewin on Trusts, 10th ed., 943.

Under the Infants' Settlement Act, 1855, empowering infants to make settlements of property in "expectancy," a covenant by an infant for settlement of after-acquired property extended to an interest acquired by him under the will of a person who died after the execution of the settlement: *Re Johnson, Moore v. J.*, (1891) 3 Ch. 48.

An officer's half-pay, which has been after the date of the settlement capitalized under the Pensions Commutation Act, 1871 (34 & 35 V. c. 36), is not bound by his covenant to settle property to which he then was, or should during the coverture become, entitled: *Churchill v. Denny*, 20 Eq. 534.

In a covenant to settle after-acquired property of a specified amount, the words "at any time" have been held to mean at any one time (*Hood v. Franklin*, 16 Eq. 496), and from the same source: *Re Hooper*, 13 W. R. 710; 12 L. T. 137; 5 N. R. 462; 11 Jur. N. S. 478.

For the mode of estimating the value of such property when derived from different sources, and for the deduction of succession or other duties, see *Mackenzie's Settlement*, 2 Ch. 345; and for a successful evasion of the covenant by the execution by the wife of successive deeds appointing to her own separate use a large sum bequeathed upon such trusts as she should appoint, in sums just within the limit, see *Bower v. Smith*, 11 Eq. 279.

And that under a covenant by a testator to pay a sum "free from all deductions whatsoever" to the trustees of a settlement, his exor is not concerned to see to the payment of the succession duty, but that such duty must come out of the fund, see *Re Higgins, Day v. Turnell*, 31 Ch. D. 142, C. A.

FAMILY ARRANGEMENTS.

Family arrangements being regarded with favour by the Court, effect has been given to them in cases where, if entered into between mere strangers, they would not, according to the ordinary rules of Equity, have been held binding: *Williams v. W.*, 2 Ch. 294; *Miller v. Harrison*, 1 R. 5 Eq. 324; *Joddrell v. J.*, 9 Beav. 45; 14 Beav. 397; *Hoghton v. H.*, 15 Beav. 278; and see *Stapilton v. S.*, 1 L. C. Eq. 223; *Wycherley v. W.*, 3 Eden, 175.

The amount of consideration will not be minutely scanned: *Williams v. W.*, *sup.*: *Head v. Godlee*, Joh. 53; and a family arrangement by parol only, which has been acted on, will be enforced: *Neale v. N.*, 1 Keen, 672; *Williams v. W.*, *sup.*

The avoidance of family litigation, or quieting disputes, well founded or not, affords sufficient consideration: *Smith v. Mogford*, 21 W. R. 472; *Gordon v. G.*, 3 Swa. 400; *Case v. C.*, 38 W. R. 183; 61 L. T. 789; and provided there be good faith and honest intention, with full and fair communication of all material circumstances, it is not invalidated by a mistaken notion by the parties of their rights: *Greenwood v. G.*, 2 D. J. & S. 28; *Lawton v. Campion*, 18 Beav. 87; *Harvey v. Cooke*, 4 Russ. 57.

But if founded upon mistake or misrepresentation (even though innocently made) to which the other party is accessory, a family settlement will be set aside: *Fane v. F.*, 20 Eq. 698.

The influence of a father may be legitimately exercised to induce an elder son on coming of age to make a proper and permanent settlement for the benefit of his family: *Hartopp v. H.*, 21 Beav. 265; but if by influence or pressure the father obtains any undue personal benefit either for himself or in favour of his creditors, the transaction is liable to be set aside: *Turner v. Collins*, 7 Ch. 329; *Hoghton v. H.*, 15 Beav. 278; *Baker v. Bradley*, 7 D. M. & G. 597; though even then the entire arrangement is not necessarily invalidated, but the objectionable provisions may be expunged, and, the father relinquishing the benefit, the rest of the settlement may stand good: *Hoblyn v. H.*, 41 Ch. D. 200.

And as to the necessity of independent advice in such a case, see *Tucker v. Bennett*, 38 Ch. D. 1, C. A.

So also where a creditor by threats, &c. induces a father to compel his sons to join him in a security for his debt, the creditor cannot retain the benefit of that security unless he shows that the sons knew the true nature of the transaction, and that no undue influence was exercised: *Berdoe v. Dawson*, 34 Beav. 609; or unless upon the result of the whole transaction the son obtains valuable consideration: *Potts v. Surr*, 34 Beav. 543; and see *Jenner v. J.*, 2 D. F. & J. 539.

This rule applies where a younger brother joins in a security for his elder brother's debt: *Sercombe v. Saunders*, 34 Beav. 382; and see *Chambers v. Crabbe*, *Ib.* 457.

So also where trustees have by pressure obtained the execution of a deed in the nature of a family arrangement, the deed may be set aside and the trustees ordered to pay the costs of an action for that purpose: *Ellis v. Barker*, 7 Ch. 104.

As between husband and wife, a deed compromising litigated rights has been upheld as a family arrangement: *Joddrell v. J.*, 9 Beav. 45; and see *Barron v. Willis*, (1899) 2 Ch. 578; (1900) 2 Ch. 121, C. A.

Though good as a family arrangement, a settlement may be void as against creditors: *Penhall v. Elwin*, 1 Sm. & G. 258.

A family arrangement which has been entered into on the faith that all parties named therein will execute and be bound by it, fails altogether if one of the parties does not execute: *Peto v. P.*, 16 Sim. 590; even where non-execution is caused by the disability of coverture: *Bolitho v. Hillyar*, 34 Beav. 180.

Upon the question how far infants will be bound by an arrangement affecting their reversionary interests entered into by their parents, see *Taylor v. Cartwright*, 14 Eq. 167.

(II.) AVOIDING SETTLEMENTS.

1. *Voluntary Settlement set aside for Improvidence without Fraud.*

"DECLARE that the indenture of settlement, dated &c., is void and ought to be set aside; And Let the Defts E. and F. (*the trustees*), within &c., deliver up the said indenture of settlement to the Plt M. E. to be cancelled." Defts' costs of suit to be taxed as between solr and client, including any charges and expenses properly incurred in executing the trusts, and the costs of and incidental to the transfer hereinafter mentioned; And Let the Defts E. and F. join in and execute a proper transfer of the mortgage in the (bill) mentioned to the Plt or to whom she shall appoint, to be settled, &c., in case the parties differ, and deliver over to the Plt upon oath, or to whom she shall appoint, all title deeds &c. in their possession or power relating to the said mortgage; And Let, upon the execution of such transfer, the said Plt M. E. pay to the Defts E. and F. their said costs when so taxed.—*Everitt v. E.*, V.-C. J., 1 July, 1870, A. 1782; S. C., 10 Eq. 405.

For decree on bill, after a lady's death, by her husband and admor setting aside a settlement executed by her when unmarried, and without proper advice, as improper and improvident, though not fraudulent, see *Prideaux v. Lonsdale*, L. J.J., 7 May, 1863, B. 968; S. C., 1 D. J. & S. 433.

For decree setting aside at suit of a widow an improvident settlement executed on her marriage, and containing provisions for her children by any future marriage, without any power of revocation, see *Wollaston v. Tribe*, M. R., 15 Nov. 1869, B. 3171; 9 Eq. 44.

For decree declaring a post-nuptial settlement of after-acquired property not binding on the wife as to her moneys not actually received during coverture and so far as regarded her real estate, she electing to take against the settlement, but that she was bound to recoup what she had received under the settlement for the benefit of the issue, see *Anderson v. Abbott*, 23 Beav. 457.

2. *Re-settlement set aside on the ground of Mistake, subject to Dealings with the Property—Vesting Interests of unborn Issue.*

DECLARE, that the said indenture of settlement of &c. was made and executed by the Plt under mistake, and that it ought to be set aside, subject nevertheless and without prejudice to the sale in the pleadings mentioned of portions of the estate comprised therein made in execution, or intended execution, of the powers therein in that behalf contained; And Let a copy of this judgment be indorsed upon the said indenture of settlement; And Let all proper parties, at the Plt's expense, execute all such conveyances (if any) as may be necessary, and as the Judge shall direct, for the purpose of giving effect to the above declaration, and for giving effect to such sale as aforesaid, such conveyances to be settled by the Judge in case the parties differ; And Declare, that the interests in the lands and hereditaments comprised in the said indenture of any unborn issue of the Plt and of the Deft H. F. respectively, are the interests of persons who upon coming into existence would be entitled to such interests upon trust within the

meaning of the Trustee Act, 1893; And Let all such interests of all such unborn issue vest in the Plt.—Directions as to costs, including in the costs of the trustee any charges and expenses properly incurred by him as trustee of the said indenture of settlement.—See *Fane v. F.*, V.-C. H., 3 July, 1875, A. 1266; S. C., 20 Eq. 698.

3. *Settlement upon Marriage with a Deceased Wife's Niece containing Provisions for the Settlor's Children, whether by the Former or by the Intended Marriage, set aside except as to the Trust for the Settlor, until the Intended Marriage.*

VARY the judgment so far as regards the declaration therein contained, "That the indenture, dated &c., was wholly void, and that the share or interest of W. B. in the fund therein mentioned, and thereby expressed to be conveyed to the trustees of the said indenture, formed part of the personal estate of the said W. B."; And instead, thereof Declare that a valid marriage having never taken place between W. B. in the pleadings named, and E. J. [*deceased wife's niece*], therein also named, and the said W. B. having departed this life, the whole beneficial interest in the funds and property comprised in or assigned by the indenture of &c., in the pleadings mentioned, was vested in the said W. B. at the time of his death, and that neither the said E. J., nor any child of the said W. B., nor any child of the said E. J., acquired or has any beneficial interest or title in or to the said funds and property, or any part thereof, under or by means of the said indenture.—See *Chapman v. Bradley*, L. JJ., 5 Dec. 1863, A. 2361; S. C., 4 D. J. & S. 71; and see *Pawson v. Brown*, V.-C. M., 5 Nov. 1879, B. 2149; 13 Ch. D. 202.

4. *Setting aside a Settlement of Plaintiff's Real and Personal Property executed in consideration of Plaintiff's Marriage with her Deceased Sister's Husband.*

"DECLARE, that the conveyance, grant, and assignment of the real estate and the bond for £—, in the pleadings mentioned, by the indenture of settlement, dated &c., made or expressed to be made between the Deft J. N., and the Plt A., his wife [*deceased wife's sister*], of the one part, and X. [*the trustee*], of the other part, ought to be set aside, and adjudge the same accordingly; And Let the said deed, dated &c., be delivered up to the Plts to be cancelled; And Declare, that the Plt C. [*purchaser from A. of her mortgaged property*] is entitled to redeem the mortgaged property comprised in the indenture, dated &c., in the pleadings mentioned, and thereby assigned to the Deft Allison [*mortgagee*]."—1. Account of what is now due to the mortgagee under and by virtue of his mortgage security and for his costs, to be taxed; Upon the Plt C. paying to him the amount certified

to be due within six months after &c., he to assign the mortgaged premises to the Plt C., and deliver up all deeds; Deft J. N. to pay Plt C. his costs of action to be taxed.—“And Let the following &c.—2. An account of all sums of money received by the Deft J. N. in respect of the rents and profits of the real estate at —, in the said indenture of settlement, dated &c., mentioned, and for principal and interest in respect of the bond debt of £900, in the said indenture also mentioned; 3. An account of all payments properly made by the Deft J. N., for repairs and permanent improvements on the said real estate, or in respect of any of the debts and liabilities of the Plt A., including the said mortgage debt and interest to the said Deft Allison, or any part thereof respectively; 4. An inquiry what is proper to be allowed to the Deft J. N. for the maintenance, clothing, and medical attendance of the Plt A. during the time she resided with the said J. N.”—Adjourn &c.—Liberty to apply.—*Coulson v. Allison*, V.-C. S., 21 June, 1860, A. 1465; S. C., 2 Giff. 287; affirmed, 2 D. F. & J. 521.

*5. Declaration that Property of intended Wife not bound by Settlement
—Intended Husband to deliver up same to be Cancelled.*

DECLARE that any property which the Plt was seised, possessed of or entitled to when she executed the settlement in the pleadings mentioned, proposed to be made in contemplation of the intended marriage between the Plt and the Deft C., or which she has since become entitled to, is not, under the circumstances which have happened, in any way subject to or bound by the provision in such proposed settlement for the settlement of other or after-acquired property; And declare that the estate of the testator is not, in the events which have happened, under any liability by reason of his execution of such settlement, and that the Plt is entitled to have and receive her share of the testator's residuary estate, without any deduction therefrom in respect of any such alleged liability as aforesaid; And the Deft C. admitting that such settlement is in his custody, Let the Deft C., on or before &c., deliver up the said settlement to the Plt and the Deft B. to be cancelled.—*Bond v. Walford*, Pearson, J., 29 March, 1886, A. 534; S. C., 32 Ch. D. 238.

*6. Trustees of Settlement set aside by Court to retain Costs out of
Moneys in their Hands.*

DECLARE that the limitations over on the bankruptcy of William Frederick Hamilton contained in the indenture of settlement dated &c., and made between W. F. H. of the one part, and H. H. P. and H. W. R. of the other part, in the pleadings mentioned during the life of the said W. F. H. are void as against the Plt, and that the Plt, the trustee of the property of the said W. F. H., a bankrupt, is entitled

to the income of the property comprised in the said indenture of settlement during the remainder of the life of the said W. F. H., and to any capital which may be paid to him under the said indenture of settlement on or after he attains the age of twenty-five years (subject and without prejudice to the provisions as to such capital contained in the said indenture of settlement); And Let the Defts H. H. P. and H. W. B. pay the accrued and accruing income received and to be received by them as trustees of the said indenture of settlement during the life of the said W. F. H., after retaining their costs of this action (to be taxed in case the parties differ), to the Plt A. W. M., the trustee of the property of W. F. H., a bankrupt.—Liberty to apply.—See *Merry v. Pownall*, Kekewich, J., 25 Jan. 1898, B. 406; (1898) 1 Ch. 306.

AVOIDING SETTLEMENTS.

A settlement may be set aside or treated as a nullity, and the settlor remitted to his original rights:

- (a) Where the consideration fails, as in the case of an invalid marriage, *e.g.*, with the deceased wife's sister (*Chapman v. Bradley*, 4 D. J. & S. 71; 33 Beav. 61; *Coulson v. Allison*, 2 D. F. & J. 521; 2 Giff. 279; *Pawson v. Brown*, 13 Ch. D. 202; Forms 3, 4, *sup.* pp. 1705, 1706; *Phillips v. Probyn*, (1899) 1 Ch. 811), or where the marriage has not taken place: see *Mitford v. Reynolds*, 16 Sim. 130; *Bond v. Walford*, 32 Ch. D. 238, Form 5, *sup.* (where the engagement was broken off, and after the lapse of three and a half years the Court declared the engrossment of the settlement, which was in the custody of the intended husband's solrs, void as a settlement, and ordered it to be given up); *Essery v. Cowlard*, 26 Ch. D. 191 (where a settlement made in contemplation of a marriage which never took place, the parties living together as husband and wife, and having children, was held to be determined, and the trusts at an end); *secus*, where the marriage has been dissolved by the Divorce Court: *Fitzgerald v. Chapman*, 1 Ch. D. 563; *Burton v. Sturgeon*, 2 Ch. D. 318; and see Chap. XXXVII., Sect. VI. (II.) *sup.* p. 966.
- (b) Where, apart from fraud, undue influence, or improper motive, the transaction is of an improvident character, *e.g.*, where a young lady, having lately attained twenty-one, settled her property, without power of revocation, so as to deprive herself of all control over it in the event of future marriage: see *Everitt v. E.*, 10 Eq. 405, Form 1, *sup.* p. 1704; *Prideaux v. Lonsdale*, 1 D. J. & S. 433; *Powell v. P.*, (1900) 1 Ch. 243.

In a deed of this character (and in any voluntary settlement) a power of revocation ought to be inserted: *Powell v. P.*, *sup.*; and the absence of such a power has been stated to be "all but a conclusive reason for setting aside the deed": *Coutts v. Acworth*, 8 Eq. 558, 568; and see *Wollaston v. Tribe*, 9 Eq. 44; but this view has not been taken in later cases, and the absence of a power of revocation, though a circumstance to be taken into account, of more or less weight according to the other circumstances of each case, will not *per se* be fatal to a voluntary settlement: *Toker v. T.*, 3 D. J. & S. 487; 31 Beav. 629; *Phillips v. Mullings*, 7 Ch. 244; *Henry v. Armstrong*, 18 Ch. D. 668; *Horan v. MacMahon*, 17 L. B. Ir. 641, 654; especially where the settlement is not unreasonable or improvident, and no intention to make the deed revocable is shown: *Hall v. H.*, 8 Ch. 430 (reversing 14 Eq. 365); but if the person claiming under the deed, being a solr, omits to call the attention of the settlor to the results of omitting the power of revocation, the deed cannot stand: *Horan v. MacMahon*, *sup.*

Such a settlement has been set aside after the death of the lady without issue, at the suit of her husband and admor: *Prideaux v. Lonsdale*, 1 D. J. & S. 433.

Misrepresentations made on the occasion of an ante-nuptial settlement by a wife, as to her divorce from her previous husband, form no ground for setting aside the settlement, the marriage being a sufficient consideration: *Johnston v. J.*, 32 W. R. 1016; aff. (C. A.) 33 W. R. 239.

When the Court is asked to set aside a voluntary settlement on the ground that the settlor did not really understand what he was doing, the provisions in the settlement are immaterial except so far as their character shows that he could not have understood their effect: *Dutton v. Thompson*, 23 Ch. D. 278, C. A.

As a rule, a voluntary settlement cannot be rectified, but can only be dealt with by setting the whole aside: see *Hoghton v. H.*, 15 Beav. 278; *Phillipson v. Kerry*, 32 Beav. 628; but see *Hoblyn v. H.*, 41 Ch. D. 200, that in a family re-settlement objectionable provisions benefiting the father may be expunged without affecting the rest of the instrument.

If, however, the settlor, having subsequently married, has had children, the settlement will not be set aside *in toto*, so as to give the property to her husband, but (with consent of the husband) varied in accordance with a draft settlement submitted to and approved by the Judge: *Bell v. Thompson*, W. N. (78) 121.

And if the settlor agrees that part of the deed shall stand, his voluntary settlement may be rectified by striking out the part as to which he seeks relief: *Turner v. Collins*, 7 Ch. 329.

Acquiescence and subsequent dealings on the faith of the deed may prevent the settlor from avoiding an improvident voluntary settlement: *Jarratt v. Aldam*, 9 Eq. 463.

Where a settlement is wholly set aside, the contract of trusteeship being avoided, the trustee has no right to costs, and cannot appeal as to them: *Dutton v. Thompson*, 23 Ch. D. 278, C. A.; but see *Merry v. Pownall*, (1898) 1 Ch. 306, Form 6, *sup.*, where, in a successful action to set aside a settlement, the trustees who had acted properly and not caused unnecessary expense, were allowed to retain their solr and client costs out of the fund before handing it over.

As to the right of persons interested under a voluntary conveyance to maintain an action to set aside a prior conveyance voidable in equity, see *Dickinson v. Burrell*, 1 Eq. 337.

As to avoiding voluntary settlements on the ground of influence, or as being fraudulent as against creditors, see Chap. LI., "SPECIFIC RELIEF."

(III.) RECTIFYING SETTLEMENTS.

1. Rectification of Settlement to correspond with Marriage Articles by excepting certain after-acquired Property.

DECLARE that the indenture of settlement dated &c., ought to be varied and rectified by excepting from the covenant therein contained for the settlement of after-acquired property of the Plt F. M. V., all such pecuniary legacies as the Plt F. M. V. was then, or at any future time might become entitled to; And order and adjudge that the said indenture of settlement be varied and rectified accordingly; And Declare that the said indenture of settlement, as so varied and rectified as aforesaid, ought to take effect in like manner as if the said exception had been inserted in the said indenture of settlement at the time of the execution thereof by the parties thereto; And Let a copy of this judgment be indorsed on the said indenture of settlement.—Tax as between solr and client the costs of the Plts and Defts of this action, including in the costs of the Defts J. O'H., A. J. B. and G. S. L. any charges and expenses properly incurred by them as trustees of the said indenture, and not already taxed or allowed (beyond their costs of this

action); And Let the Defts J. O'H., A. J. B. and G. S. L., out of the funds in their hands as such trustees as aforesaid, pay to the Plts and the Defts H. De S., A. D'A., E. D., M. T., J. D., A. C., A. M. B., H. W. N. B. and S. H. P. respectively, the amount of their said costs when taxed, and thereout also retain their own costs as aforesaid.—*Viditz v. O'Hagan*, Cozens-Hardy, J., transferred from North, J., 14 June, 1899, B. 793; (1899) 2 Ch. 569.

2. Rectification of Settlement to correspond with Ante-nuptial Agreement by declaring Plaintiff absolutely entitled.

"DECLARE, that the indenture of settlement, dated &c., in the pleadings mentioned, was not executed in accordance with the agreement made previously to the marriage of the Plt [*the widow*] with J. C., deceased, in the pleadings named, and ought to be rectified, so as to carry into effect the true meaning of the said agreement. And Declare, that in the events which have happened the Plt is absolutely entitled to the arrears of rent due at the death of the said J. C., and all rents and dividends which have accrued since his death, in respect of the property subject to the trusts of the said indenture of settlement; and that the Plt is now absolutely entitled to all the said trust property." [And Let a copy of these declarations be indorsed upon the said indenture of settlement.]—Tax the costs of the Plt and the Defts [*the trustees*] as between solr and client; Defts to raise, and pay, and retain such costs out of the trust fund standing in their names, and transfer the residue thereof to the Plt; and also convey to her the lands subject to the trusts.—*Liberty to apply.*—*Cogan v. Duffield*, V.-C. B., 21 July, 1875, A. 1439; 20 Eq. 789; 2 Ch. D. 46, C. A.; *Squibb v. White*, M. R., 19 Nov. 1859, B. 321.

3. Rectification of Articles and Settlement in similar Case.

DECLARE, that the Plt is entitled to have the said articles, dated &c., and the said indenture of settlement in the pleadings mentioned, reformed and rectified in such manner and form as that in the events that have happened of the Plt having survived her husband, W. P., and there having been no child of the marriage between them, the funds now subject to the said indenture of settlement be held by the Deft J., in trust for the Plt, her exors, admors, and assigns absolutely, as part of her separate estate. And Let the bonds, dated &c. [*given by W. P. to the trustees*], be (within &c.) delivered up by the Deft J. to the Plt, the executrix of the will of the said W. P., to be cancelled; And Let a copy of this (declaration) be indorsed on the said indenture of settlement, dated &c.; And Let the Deft J. pay and retain the costs of the Plt and of the Defts of this action out of the funds subject to the trusts of the said indenture of settlement; such costs to be taxed &c. as between solr and client, including in the costs of the Deft J.

any (costs) charges and expenses properly incurred by him as trustee of the said indenture of settlement beyond his costs of this action.—*Smith v. Iliffe*, V.-C. B., 13 July, 1875, B. 1246; *S. C.*, 20 Eq. 666.

4. *Rectification by insertion of Proviso in accordance with Counsel's Draft.*

DECLARE that the indenture of settlement dated &c., ought to be varied and rectified by inserting therein a proviso or power of revocation in the terms of the proviso or power of revocation which was originally settled and inserted in the draft of the said indenture of settlement by the Plt's counsel as in the Statement of Claim mentioned, and order and adjudge the same accordingly; And declare that the said indenture of settlement, so varied and rectified as aforesaid, ought to take effect in like manner as if the said proviso or power had been inserted in the said indenture of settlement at the time of the execution thereof by the parties thereto. [And Let a copy of this judgment be indorsed upon the said indenture of settlement.]—*Welman v. W.*, Malins, V.-C., 21 July, 1880, B. 1396; *S. C.*, 15 Ch. D. 570.

5. *Rectification of Settlement executed under Mistake.*

DECLARE that the indenture of settlement dated &c., in the statement of claim mentioned was, in the particulars hereinafter specified, executed under mistake; and that in the covenant to pay the yearly sum of £250, contained in the said indenture, it was not intended to include the words "Herbert Hull and Sarah Wood, and after the death of any of them, during the lives of the survivors;" and that the said indenture ought to be rectified by reading the same as if in the covenant therein contained for the payment of the said yearly sum of £250 the words "Herbert Hull and Sarah Wood, and after the death of any of them, during the lives of the survivors," had been omitted; And Let a copy of this (declaration) be indorsed on the said indenture.—*Tax costs of all parties, and pay same out of the trust estate.*—*Brown v. Hull*, V.-C. H., 16 Dec. 1876, A. 2100.

6. *Rectification of Settlement of Land—Conveyances to be executed.*

DECLARE that the first schedule to, and the plans respectively annexed to the indenture of settlement dated &c. in the pleadings mentioned, ought to have been framed otherwise than as they now stand in the following respects; that is to say, by striking out such of the particulars enumerated in the — parts respectively, of the said first schedule as are specified in the — divisions of the first schedule annexed to this order, and by inserting in lieu thereof the particulars enumerated in the divisions respectively of the second schedule

annexed to this order, and by substituting for the plans of property situate at M. and P. respectively, now annexed to the said indenture of settlement, the plans marked &c., identified by the signature of the registrar in the margin thereof, and stamped with his official seal, and a duplicate of which, identified in the same manner, has been filed in the Central Office; and by striking out from the particulars enumerated in the — part of the said first schedule to the indenture of settlement, and from the plan of property situate at C., annexed to the said indenture, the parcel in such particulars and plans respectively numbered &c., and by adding to the plans now annexed to the said indenture of settlement the plan of property situate in the township of M., marked &c., identified by the signature of the registrar in the margin thereof, and stamped with his official seal, and a duplicate of which, identified in the same manner, has been filed in the Central Office; And this Court doth declare that the said indenture ought to be construed and take effect as if the first schedule and the plans thereto annexed had been framed, as it is hereby declared that they ought to have been framed, and as appears by the second schedule to this order, and the said plans marked &c.; And Let all proper parties execute such acts and deeds as may be necessary, and as the Judge shall approve for the purpose of giving effect to the above declarations, and for vesting the estates in the trustee or trustees of the said indenture of settlement; And Let a copy of this order be indorsed on the said indenture of settlement.—Costs of all parties to be taxed as between solr and client.—Deft F. (*the trustee*) to be at liberty to pay and retain the same out of any funds in his hands representing corpus of the trust estate.—Liberty to apply.—*E. of Mexborough v. V. Pollington*, M. R., 22 Feb. 1879, B. 588. See also *Cordeaux v. Fullerton*, 28 W. R. 320.

7. Rectification so as to vest Legal Fee Simple in Plaintiff in events which had happened.

DECLARE that the indenture of settlement, dated &c., was executed under mistake in so far as, in the events which have happened, of the Plt having survived her husband, and not having concurred with him in exercising the joint power of appointment reserved to them, it failed to vest the hereditaments &c. in the Plt for an estate in fee simple in possession, and that the said indenture was intended, in the events aforesaid, to vest the said hereditaments &c. in the Plt for an estate in fee simple in possession, and that the Plt is entitled to have the said indenture reformed and rectified in manner hereinafter specified; Declare that, in the events which have happened as aforesaid, the said indenture ought to be reformed and rectified by &c.; And Let the said indenture be rectified accordingly; And Let a copy of this order be indorsed on the said indenture; And the Court is of opinion that upon the said indenture being reformed and rectified as aforesaid no convey-

ance of the legal estate previously outstanding thereunder during the life of the Plt will be necessary.—*Hanley v. Pearson*, Bacon, V.-C., 13 Dec. 1879, A. 2469; S. C., 13 Ch. D. 545.

8. *Rectification of Settlement by inserting a Power of Appointment by the Wife—New Trustees appointed.*

“**DECLARE** that the indenture of settlement dated &c. in the pleadings mentioned ought to be rectified by inserting as the first trust relating to the sum of £— therein mentioned, a power enabling the Plt (*the wife*) to direct that the said trust fund, and each and every part thereof, and the income thereof, shall be held and applied as she, notwithstanding her coverture, shall from time to time by deed, with or without a power of revocation and new appointment, or by will or codicil, direct and appoint; And Let the said indenture of settlement be rectified accordingly;”—Copy of this declaration to be indorsed upon the said indenture of settlement; “And the Defts P. and O., by their counsel, desiring to retire from being trustees of the said indenture, Let the said H. and B. be appointed trustees of the said indenture of settlement in substitution for the Defts P. and O.; And Let the trust estate, and premises comprised in the said indenture of &c., vest in the said H. and B., upon the trusts of the said indenture of settlement, so rectified as aforesaid; And Let the right to sue for and recover any choses in action, subject to the trusts of the said indenture, and any interest in respect thereof, vest in the said new trustees upon the trusts aforesaid.”—Costs of Plts and Defts to be taxed as between solr and client, and be a charge upon the corpus of the trust funds, to be raised and paid by the new trustees.—*Liberty to apply*.—*Pigott v. P.*, L. JJ. for V.-C. W., 24 Feb. 1873, B. 1225.

9. *Rectification of Settlement by inserting General Power of Appointment by Settlers before limitation to Next of Kin.*

DECLARE that the indenture of settlement, dated &c., made between &c., ought to be rectified by reading the same as if there was inserted therein, prior to the limitation in trust for the person or persons on the part of the Plt's father, who under the statutes for the distribution of the effects of intestates, would, on the Plt's decease, have been entitled thereto if he had died intestate leaving paternal relations only, a power for the Plt by deed or will to appoint the trust funds in such manner and to such persons as the Plt shall think proper, and that the aforesaid limitation in favour of the next of kin should be conditional upon the non-execution of the aforesaid power, and subject to any execution thereof, and order and adjudge the same accordingly; Let a copy of this order be indorsed on the said indenture of settlement.—*James v. Couchman*, North, J., 24 Feb. 1885, A. 1037; S. C., 29 Ch. D. 212.

10. *The like, on Petition under Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42.*

UPON petition &c. This Court being of opinion that the words "exors, admors, and assigns," were inadvertently used in the said indenture of settlement dated &c., instead of words "heirs, exors, admors, and assigns," Let the said settlement be rectified accordingly; And this Court being of opinion that in the events which have happened the Petr A. (*the husband*) is absolutely entitled to all the property comprised in the said settlement, Let the fund in Court be dealt with as directed in the Payment Schedule hereto; And Let a copy of this order be indorsed upon the said indenture of settlement.—[Add Payment Schedule directing fund in Court to be paid to the Petr A.]—See *Re Bird's Trusts*, V.-C. M., 26 July, 1876, A. 2239; S. C., 3 Ch. D. 214.

For similar order under the same Act, see *Re De la Touche's Settlement*, V.-C. J., 25 June, 1870, A. 1786; S. C., 10 Eq. 599.

NOTES.

RECTIFYING SETTLEMENTS—JURISDICTION OF COURT.

Courts of Equity have long exercised jurisdiction to rectify mistakes in settlements, so as to carry out the intents of the parties; and by the Judicature Act, 1873, s. 34, the rectification, setting aside, or cancellation of deeds, or other written instruments, has been assigned to the Chancery Division of the High Court.

And, notwithstanding sect. 47 of the Fines and Recoveries Act, the Court can rectify, on the ground of mistake, a deed of re-settlement enrolled under the Act: *Hall-Dare v. H.*, 31 Ch. D. 251, C. A.

The general rule has been stated to be that if articles are entered into before marriage, and a settlement made after marriage, and the two do not coincide, the Court will "set up the articles against the settlement," and reform the settlement; but if the articles and settlement are both ante-nuptial, the settlement will be taken as a new agreement, "and shall control the articles," see *Legg v. Goldwire*, 1 L. C. Eq. 17, and notes, *Ib.*, pp. 41, 45; *Peachey on Settlements*, 134; *Story*, Eq. Jur. § 155.

Where two ante-nuptial settlements were executed, the Court refused to hold that the first was superseded by the second, the covenant in which as to after-acquired property was somewhat less stringent than in the first: *Re Gundry, Mills v. M.* (1898) 2 Ch. 504.

And though the limitations of a post-nuptial settlement may agree with the words of the articles, still if it does not carry out their intent, or that of the parties thereto, the Court will reform the settlement: see *Cogan v. Duffield*, 2 Ch. D. 44, 49, C. A.; *Smith v. Iliffe*, 20 Eq. 666; *Bold v. Hutchinson*, 5 D. M. & G. 567.

In order to rectify a settlement, or other instrument, on the ground of mistake, the evidence of the real intention of the parties at the time of execution, and of mistake common to all parties, must be clear and unambiguous: *Fowler v. F.*, 4 D. & J. 250; *Bentley v. Mackay*, 31 Beav. 143, 151; 4 D. F. & J. 279; *Rooke v. L. Kensington*, 2 K. & J. 753; *Elwes v. E.*, 3 D. F. & J. 667; 2 Giff. 545; *Tucker v. Bennett*, 38 Ch. D. 1, C. A.; especially in the case of a marriage settlement, where there have been children of the marriage: *E. Bradford v. Romney*, 30 Beav. 431; *M. Breadalbane v. M. Chandos*, 2 My. & C. 713; *Harris v. Pepperell*, 5 Eq. 1, 4; *Loxley v. Heath*, 1 D. F. & J. 489; *Re Badcock, Kingdon v. Tagert*, 17 Ch. D. 361. The extent of the proposed

alteration must be clearly defined by evidence contemporaneous with or anterior to the deed: *E. Bradford v. Romney*, 30 Beav. 431; the mistake must have been mutual, not of one party only: *Sells v. S.*, 1 Dr. & S. 42; and, *a fortiori*, an ante-nuptial settlement executed by the husband not under any mistake, but under protest, will not be rectified at his suit after marriage: *Eaton v. Bennett*, 34 Beav. 196.

As to the exercise of the jurisdiction in cases of mistake to rectify contracts as between vendor and purchaser, *v. inf.* Chap. LI., Sect. 11.

EVIDENCE.

A settlement may be rectified on parol evidence of the intention of the parties: *Tomlinson v. Leigh*, 11 Jur. N. S. 962; 13 L. T. 516; 14 W. R. 121; *Lackersteen v. L.*, 6 Jur. N. S. 1111; 3 L. T. 581; 30 L. J. Ch. 5; *Wilkinson v. Nelson*, 7 Jur. N. S. 480; 9 W. R. 393; and on the uncontradicted evidence of the wife surviving without issue, where the probabilities of the case were strongly in her favour: *Smith v. Iliffe*, 20 Eq. 666, Form 3, *sup.* p. 1709; *Cook v. Fearn*, 27 W. R. 212; 48 L. J. Ch. 63; 39 L. T. 348; *Edwards v. Bingham*, 28 W. R. 89; and an alleged technical error whereby the legal estate was not vested in the Plt in the events which had happened was rectified on her evidence alone, no other evidence being procurable: *Hanley v. Pearson*, 13 Ch. D. 543, Form 7, *sup.* p. 1711; and where the settlement was prepared in haste by the husband, who was a solr, it was rectified after his death on the evidence of the wife that it did not carry out the bargain between them, and was not explained to her: *Lovesy v. Smith*, 15 Ch. D. 655; and the fact that she claimed to retain the benefit of his settlement on her was no bar to the rectification: *S. C.*

But there must be very clear and distinct evidence of the intention at the time when the settlement was executed: *Tucker v. Bennett*, 38 Ch. D. 1, C. A.; and "there is hardly a single case where, many years after the settlement was executed, on mere parol evidence, uncontradicted, because there was no one to contradict it, the Court has altered a deed because one of the parties afterwards desired that it should not stand as it was executed."

And rectification on uncorroborated parol evidence was refused where there was nothing repugnant, inconsistent, or improbable on the face of the instrument so as to induce the belief of a mistake: *M'Cormack v. M.*, 11 Eq. 130; and the Court will not rely on such uncorroborated evidence even though the rectification would bring the settlement into accordance with recognised and appropriate precedents: *Bonhote v. Henderson*, (1895) 1 Ch. 742; *S. C.*, (1895) 2 Ch. 202, C. A. (affirmed on different grounds).

Parol evidence for rectification must be unimpeachable, and of the clearest character: see *Townsend v. Stangroom*, 6 Ves. 228; and cases cited Taylor, Evidence, p. 970 (8th ed.); 749 (9th ed.).

Previous correspondence is not enough without clear evidence of fraud or mistake, especially where the settlement has been executed and long acted upon: *Loxley v. Heath*, 1 D. F. & J. 489; 27 Beav. 523; and the Court is reluctant to try actions for rectification on affidavit evidence unless circumstances justify it, as, *ex. gr.*, where final written instructions are proved, and it is clear that the deed as executed departed from them: *Bonhote v. Henderson*, *sup.*

A father living on affectionate terms with his daughter is her natural agent in reference to the preparation and provisions of her marriage settlement, and she need not have any legal advice independent of the family solr, unless the father is taking a benefit from her under the settlement: *Tucker v. Bennett*, 38 Ch. D. 1, C. A.

Rectification of a settlement in accordance with an ante-nuptial agreement recited in the settlement, but not forthcoming, was refused: *Mignan v. Parry*, 31 Beav. 211.

PROCEDURE.

In rectifying a deed, the usual course is merely to direct the judgment or declaration of the Court to be indorsed on the settlement (Forms 3, 4, 8, pp. 1709—1712), which has been held sufficient to pass the legal estate, with-

out directing any conveyance: see *White v. W.*, 15 Eq. 247; 42 L. J. Ch. 28; *Hanley v. Pearson*, 13 Ch. D. 545, Form 7, *sup.* p. 1711; but in *Malmesbury v. M.*, 31 Beav. 401, 419, 26 July, 1862, B. 1868, a direction was contained in the decree that all parties should execute and do such conveyances and acts as might be necessary, and as the Judge should approve, for the purpose of giving legal effect to the declaration; and see *Clark v. Malpas*, 4 D. F. & J. 401, 404, Chap. LL., "SPECIFIC RELIEF." In *Stock v. Vining*, 25 Beav. 235, the alterations in the deed were initialled by the Judge; and also, though considered unnecessary, by desire of the parties in *White v. W.*, *sup.*

A settlement was ordered to be rectified on petition under the Trustee Relief Act: see *Re Bird's Trusts*, Form 10, *sup.* p. 1713; 3 Ch. D. 214; *De la Touche's Settlement*, 10 Eq. 599; *Hoare's Trust*, 4 Giff. 254, 259; *Re Hoffe's Estate Act*, 82 L. T. 556; 48 W. R. 507; W. N. (00) 114; though in *Re Malet*, 8 Jur. N. S. 226, the M. R., disapproving *Re Morse*, 21 Beav. 174, held that he could not reform a deed upon petition.

The following are instances of rectification of settlements so as to carry out the intention of the parties:—

—by transposing an estate tail and a term for raising portions: *Uvedale v. Halfpenny*, 2 P. Wms. 151; *Heneage v. Hunloke*, 2 Atk. 457; *Duke v. Goldesborough*, M. R., 1 Dec. 1747, A. 313 (Seton, 3rd ed. p. 497);

—by giving the wife (instead of the husband) the first life interest in her property: *Clark v. Girdwood*, 25 W. R. 575; 26 W. R. 90;

—by giving the wife a power of appointment: *Pigott v. P.*, Form 8, *sup.* p. 1712.

—by giving the wife a power of appointment by deed as well as by will: *Edwards v. Bingham*, 28 W. R. 89;

—by giving her a power of appointment by will during coverture, and by deed or will on discovery: *Cordeaux v. Fullerton*, 28 W. R. 320; 41 L. T. 651.

—by omitting a trust for the husband of a moiety of the capital of the trust funds (the wife's property): *Lovesy v. Smith*, 15 Ch. D. 655;

—by giving the settlor a power of appointment by deed or will in default or failure of issue: *James v. Couchman*, 29 Ch. D. 212;

—by adding a power of revocation, and directing as consequent thereon that a new settlement with all proper powers should be made under the direction of the Court: *Welman v. W.*, 15 Ch. D. 570;

—by striking out a clause against anticipation: *Torre v. T.*, 1 Sm. & G. 518;

—by striking out words erroneously introduced: *Stock v. Vining*, 25 Beav. 235;

—by rectifying an excessive exercise of a power of appointment: *Daniel v. Arkwright*, 2 H. & M. 95;

—by inserting a hotchpot clause: *Williamson v. Nelson*, 7 Jur. N. S. 480;

—by modifying or extending a power of sale and exchange: *Malmesbury v. M.*, 31 Beav. 401, 1862, B. 1868; *Jones v. J.*, 1846, A. 1429; 5 Ha. 440;

—by providing a portion for an only child who, from being a daughter, was excluded from the limitations of the real estate: *King v. King-Harman*, I. R. 7 Eq. 446;

—by limiting estates in tail male in accordance with the intention of the parties erroneously represented by the articles: *D. Bedford v. M. Abercorn*, 1 My. & C. 312;

—by the introduction of the word "heirs" before the word "exors," in a settlement of real estate: *Re Bird's Trusts*, 3 Ch. D. 214, Form 10, *sup.* p. 1713;

—by inserting a covenant to make good a sum guaranteed by the articles as the daughter's marriage portion: *Bold v. Hutchinson*, 5 D. M. & G. 567;

—by inserting a limitation to the use of the wife (who had survived her husband without issue) in fee: *Hanley v. Pearson*, 13 Ch. D. 545, Form 7, *sup.* p. 1711;

—by declaring the wife, who had survived without children, absolutely entitled to her property brought into settlement: *Cogan v. Duffield*, 2 Ch. D. 44, C. A.; 20 Eq. 789; *Smith v. Iliffe*, 20 Eq. 666; Forms 2, 3, *sup.*, pp. 1709, 1710; *Wolterbeck v. Barrow*, 23 Beav. 423 (notwithstanding the lapse of thirty-five years);

—by rectifying a settlement so as to give effect to a will thereby through

mistake revoked: *Walker v. Armstrong*, 8 D. M. & G. 531; 21 Beav. 284; and see *Wright v. Goff*, 22 Beav. 207.

For other instances, see *Hamil v. White*, 3 Jo. & L. 695; *Tebbit v. T.*, 1 D. & S. 510.

COSTS.

In the absence of fraud, there is no jurisdiction to make the solr, whose mistake or carelessness has rendered an action to rectify necessary, pay the costs thereof: *Clark v. Girdwood*, 7 Ch. D. 9, 23; 26 W. R. 90 (reversing on this point 25 W. R. 575); and where no blame attaches to any of the parties, the costs of all parties will come out of the corpus of the property: *Stock v. Vining*, 25 Beav. 235; and see *Clark v. Girdwood*, 26 W. R. 90, 1877, A. 3534; and in *James v. Couchman*, 29 Ch. D. 212, Form 9, *sup.* p. 1712, following *Everitt v. E.*, 10 Eq. 405, the trustees' costs of defending a successful action to rectify a settlement were declared to be a charge on the property.

SECTION II.—EXECUTORY SETTLEMENTS.

1. *Marriage Articles carried out—Lands to be settled.*

DECLARE that the marriage articles, dated &c., ought to be specifically performed and carried into execution; And adjudge the same accordingly. And Let the real [freehold, copyhold, or leasehold] estates therein comprised be conveyed [assured or assigned] and settled to the uses, upon the trusts, intents and purposes mentioned or declared in and by the said articles, or such of them as are subsisting and capable of taking effect; And Let such conveyance [assurance or assignment] be settled by the Judge; And Let all proper parties join therein as the Judge shall direct.—Liberty to apply.

2. *The like—Lands to be purchased.*

DECLARE &c. And any of the parties are to be at liberty to propose a proper purchase of lands of inheritance [or real, freehold, copyhold, or leasehold estates], of the clear yearly value of £—, according to the true intent and meaning of the said articles.

3. *The like—Inquiries as to Trust Estate, Incumbrances, and Advances—New Trustee—Leave to apply as to Sale, Enfranchisement or Demise.*

“DECLARE that the marriage articles, dated &c., in the pleadings mentioned, ought to be specifically performed and carried into execution, and adjudge the same accordingly.—And Let the following &c. ; 1. An inquiry of what particulars the trust estate, subject to the trusts of the said articles, consisted at the date of the said articles, and what dealings and transactions have since taken place with respect thereto,

and of what the same now consists ; 2. An inquiry what incumbrances (if any) affect the said trust estate, and whether, having regard to the said articles, any advances have been properly made on account of the said trust estate for surrenders thereof, and admittances thereto, or in relation to the said trust estate, or to the admon of the estate of S., deceased, in the said articles mentioned, or otherwise ; 3. An account of what, if anything, is due, and to whom, in respect of such advances.” —New trustee to be appointed in the place of G., the deceased trustee of the said articles, and of the settlement pursuant thereto hereinafter directed, jointly with the Deft P.—“And Let the Deft P. convey, assign, and transfer the trust estate, funds, and property vested in him under the said articles, so as to vest the same in the trustee so to be appointed jointly with him the said Deft, upon the trusts declared by the said articles, or such of them as are now subsisting or capable of taking effect, such conveyance and assignment to be settled by the Judge ; And Let a proper settlement of the trust premises, subject to the trusts of the said articles, be settled &c., having regard to the provisions of the said articles (but such settlement is not to contain any power of appointment exercisable by the Plt in favour of her children, or any of them) ; And Let such settlement be executed by the Plt, and by such other proper parties as the Judge shall direct ; And any party interested is to be at liberty to apply as to any sale or enfranchisement of any part of the trust premises, or as to laying out or demising for building purposes or otherwise the same or any part thereof, and for any other direction as to the said trust premises, or as to the admon of the trusts of the settlement thereof ; And Let M., the exor of the said G., be at liberty to deliver up to the Deft P., as surviving trustee of the said articles, the deeds and documents of title in his possession relating to the trust premises, but such delivery is to be without prejudice to any charge or lien which the Plt may be entitled to thereon, in respect of any payments made by her to the said M. ; And, if necessary, the Deft P. is to be at liberty to take such proceedings as he shall be advised, with the approbation of the Judge, for the recovery of the possession of the said deeds and documents.—Adjourn, &c.—*Porter v. P.*, V.-C. S., 21 Jan. 1871, B. 303.

For order on further consideration in same case, the estates having been sold under the leave to apply, see *Porter v. P.*, V.-C. H., 10th Feb. 1877, B. 435.

4. *Marriage Articles comprising intended Wife's Share of Real Estate enforced against her Infant Child and Heir-at-law in an Action by her Husband and other Child—Conveyance directed under Trustee Act, 1893, to uses of Settlement to be executed.*

ADJUDGE specific performance of the agreement of &c. (*ante-nuptial agreement*).—And Let the share of M. L. (*the deceased wife*), in the hereditaments comprised in the settlement of &c. (*settlement on the marriage*

of *M. L.'s father and mother*) in the statement of claim mentioned, be conveyed and settled to the uses, upon the trusts, and for the intents and purposes mentioned and declared in and by the said articles, or such of them as are subsisting and capable of taking effect; such conveyance to be settled by the Judge, and to be executed by all proper parties thereto as the Judge shall direct.—And Declare that the Deft (*infant son and heir-at-law of M. L.*) is a trustee within the meaning of the Trustee Act, 1893, of the estate and interest in the share of the said *M. L.* of the said hereditaments which, at her death, descended upon him as her heir-at-law; And Let *A. B.*, of &c., be appointed to convey the said share of the said hereditaments for all the estate and interest therein of the said Deft, to the uses of the settlement to be so made as aforesaid; And Let the said *A. B.* convey the same accordingly.—Liberty to apply.—*Lee v. L.*, *M. R.*, 4 Dec. 1876, *B.* 2094; *S. C.*, 4 Ch. D. 175.

For decree for performance of marriage articles, and declaring the rights of the parties interested thereunder—and for delivery of possession of Plt's moiety of the estate, and for account of rents since the death of Plt's father, see *Taggart v. T.*, 1 Sc. & Lef. 88.

For inquiry, where an infant, who married under articles as to her realty and personalty approved by the Court, died *s. p.* without confirming them, and the husband offered to adopt them if compensated from the personalty for the realty, whether it was for the benefit of her sole heiress, and one of her next of kin, and of her other children, to elect to take the realty, or to confirm the articles on the footing of that offer, see *Savill v. S.*, 2 Coll. 727. And see *Brown v. B.*, 2 Eq. 481 (explaining and distinguishing *Campbell v. Ingilby*, 21 Beav. 567; 1 D. & J. 393; and *Field v. Moore*, 19 Beav. 176); *Anderson v. Abbott*, 23 Beav. 457.

5. *Lands to be purchased and settled pursuant to Will—Interim Investment.*

“DECLARE that the directions in the testator's will contained, as to the purchase of lands of inheritance [*or real (freehold, copyhold, or leasehold) estate, if so, of the clear yearly value of £—*], ought to be performed and carried into execution; And adjudge the same accordingly; Let the clear residue of the testator's personal estate be laid out in the purchase of such lands &c., with the approbation of the Judge; And Let such lands be settled to the uses &c. [Form 1, p. 1716] by the testator's will; And when any such purchase shall offer, any of the parties are to be at liberty to propose the same.”—Direction for payment of the residue of the testator's estate into Court, and for its investment, and payment of dividends to tenant for life.

For declaration that the testator's residuary estate ought to be invested in the purchase of real estates, according to the will, to be settled to uses in favour of the Plt and his issue male, in strict settlement, with remainder to like uses in favour of the Deft and his issue male, &c., as in the will mentioned, see *Shelton v. Watson*, *V.-C. E.*, 26 Feb. 1849, *B.* 686; 16 Sim. 546.

6. *Inquiry as to Purchases made—And purchased Lands and future Purchases to be settled.*

AND it being alleged that part of the testator's estate has been laid out by the trustees of his will in the purchase of lands according to the directions of his will, Let an inquiry be made whether any, and what, purchases have been so made, and whether the same are proper purchases according to the direction of the said will; And whether the estates so purchased have been properly settled to, for, and upon the several uses &c. [Form 1, p. 1716] in the will mentioned; And if it shall appear that the same are proper purchases but that the estates so purchased have not been settled according to the direction of the said will, Let the same be conveyed and settled &c." [Form 1, p. 1716].—Directions that any other lands hereafter purchased with the residue of the testator's personal estate, or any part thereof, be also settled, with the approbation of the (Judge), in like manner; and to appoint new trustee.—See *Pocklington v. Holford*, M. R., 15 Feb. 1773, B. 349.

7. *Settlement to be approved and executed—Costs.*

LET a proper settlement be approved of by the Judge of the freehold, copyhold, and leasehold estates and personal property by the second codicil to the will of M., Dowager Countess A., directed to be settled; and all proper parties are to join in and execute such settlement as the Judge shall direct.—Costs of all parties to be taxed as between solr and client, including any charges and expenses properly incurred by the Plts as trustees in relation to such settlement, or to the suit, or otherwise consequent on the decree, and to be raised and paid out of the trust estate.—*V. Holmesdale v. Sackville-West*, V.-O. W., 2 June, 1866, A. 1163; S. C., 3 Eq. 474; 12 Eq. 280; 4 H. L. 543.

8. *Executory Devise—Directions for Strict Settlement—Heirlooms and Chattels.*

DECLARE, First, that the estates and properties devised by and now subject to the trusts of the second codicil to the will of M. &c., ought to be settled and limited in a course of strict settlement to the second and other younger sons of E. for their respective lives, without impeachment of waste, with remainder to their respective first and other sons in tail male in the order and succession mentioned in the letters patent, dated &c., in the proceedings mentioned; and that the leasehold estates and premises, and the statues, pictures, books, household goods and furniture, chattels and effects, comprised in and now subject to the trusts of the second codicil, ought to be settled on and for such trusts and purposes, and in such manner, as will best and nearest correspond with such course of strict settlement, and so that

the said statues, pictures, books, household goods and furniture, chattels and effects, may go with the mansion-house at K., as or in the nature of heirlooms, according to the uses and limitations of such mansion-house, so far as the rules of law and equity will allow; but not to vest in a tenant in tail taking by purchase, and dying under twenty-one years of age without leaving issue inheritable under the entail. Secondly, that the settlement ought to contain powers of jointuring and charging portions for younger children to the limits contained in the will of the testatrix. Thirdly, that in the settlement there ought to be inserted a shifting clause in the words contained in the settlement mentioned in the Chief Clerk's certificate, dated &c. Fourthly, that the costs of all parties, as between solr and client, of this appeal, ought to be provided for out of the estate.—Remit the cause to the (Chancery Division).—*V. Holmesdale v. Sackville-West*, V.-C. J., 16 June, 1870, A. 1651, as recited in the order making the order of Dom. Proc. an order of the Court of Chancery; *S. C.*, L. R. 4 H. L. 543; and for the shifting clause which was inserted in the settlement pursuant to the above order, and for the construction put upon it by C. A. (affirming V.-C. B.), see *Cope v. De La Warr*, 8 Ch. 982.

For an inquiry as to a barony, and how descendible, and parties entitled as lineal descendants, and as to the subsisting limitations and estates and interests comprised in the indenture, which directed the property, so far as the law would permit, to accompany the dignity while held by any lineal descendant, see *Bankes v. Le Despencer*, 1834, A. 261; and for the order on further directions, directing a settlement of the property upon the uses, &c. of the indenture, *S. C.*, 1839, A. 749; and for subsequent proceedings under the order, *S. C.*, 1842, A. 1150; 10 Sim. 576; 11 Sim. 508.

For directions carrying out an executory trust of jewels bequeathed to A., "to go and be held as heirlooms by him and his eldest son on his decease, and to go and descend to the eldest son of such eldest son, and so on to the eldest son of his descendants, as far as the rules of law or equity will permit," see *Shelley v. S.*, 6 Eq. 540, Chap. XLIV., Sect. XXII., Form 20, *sup.* p. 1615.

9. *Executory Devise executed by directing a Conveyance to the Use of the First Taker during his Life, with Remainder to his First and other Sons and Daughters as Purchasers in Tail.*

DECLARE, that the trusts of the will of R., the testator &c., so far as the same remain to be carried into execution ought to be performed &c.; And Declare, that according to the true construction of the said will the direction to convey, assign, and assure the hereditaments therein mentioned to uses in favour of T. F., with a limitation over in favour of R. T., the testator's daughter, is an executory trust to be executed, so far as the freehold part thereof is concerned, by a conveyance to the use of the said T. F. during his life, with remainder to his issue as purchasers in tail, with remainder to the said R. T. in fee; and, so far as the leasehold part thereof is concerned, by a conveyance in trust for the said T. F. during his life, with provisions for his issue

as purchasers, with an executory gift over, in the event of his dying without leaving issue living at his death, to the said R. T., her exors, admors, and assigns; And Let the indentures, dated &c., in the pleadings mentioned [*executed by T. F. under a mistaken assumption that he was entitled to be made tenant in tail*], be delivered up to be cancelled; And Let, in accordance with the foregoing declaration, proper assurances be made, to be settled by the Judge in case the parties differ, of the said freehold and leasehold hereditaments, for the purpose of carrying into effect the said direction in the will of the testator.—Liberty to apply in Chambers as to any such assurance or otherwise.—*Thompson v. Fisher*, V.-C. J., 31 May, 1870, B. 1777; 10 Eq. 207.

See, also, for the mode of carrying out an executory devise of lands "unto A. B. and his heirs in strict entail," *Graves v. Hicks*, 10 Sim. 536, 548; "to the use of or in trust for A. B. for life, without impeachment of waste, with remainder to his issue in tail male in strict settlement," *Trevor v. T.*, 13 Sim. 108, 138; 1 H. L. C. 239.

10. *Executory Devise—Life Estates not dispunishable for Waste.*

(ESTABLISH the will of the testator, J. D.)—DECLARE that the trusts of the will of &c. ought to be performed and carried into execution, and adjudge the same accordingly;—And Let the Deft G. D. [*first tenant for life*] execute a settlement, to be approved by the Judge in Chambers, pursuant to the directions contained in the said will; And Declare, that in such settlement there ought not to be inserted any direction or provision rendering the Deft or the Plt, as tenants for life, dispunishable for waste, but that proper powers should be inserted in such settlement for the cutting of timber, and for the improvement and management of the estate in due course for the benefit of all persons interested therein.—*Davenport v. D.*, V.-C. W., 4 Nov. 1863, A. 2427; 1 H. & M. 775; and for the like order, see *Stanley v. Coulthurst*, V.-C. M., 22 July, 1870, B. 2886; S. C., 10 Eq. 259.

For decree for settlement of personalty, or a legacy with declaration as to the trusts to be inserted, see *Stonor v. Curwen*, 5 Sim. 273; *Young v. Macintosh*, 13 Sim. 451.

The form of reference is to approve of a settlement in pursuance of the will, articles, or other direction upon which it was to be founded, leaving the view of the case as stated by the Court to be carried out by the deed without more particular declarations as to the interests to be taken by the parties: *Williams v. Teale*, 6 Ha. 254.

11. *Judgment for Settlement pursuant to Will.*

[Testator devised his estates in trust to accumulate rents and profits till S., second son of his nephew, attained twenty-one, then to convey to him and his issue male in strict settlement; in default of such issue, and in case of the death of S. before twenty-one, on like trusts for J., the third son, and the other younger sons; with a proviso, that if any of them succeeded to his father's estate, the next remainderman should take.—S. attained twenty-one, but had previously succeeded to his father's estate; the Plt, his only son,

claimed as tenant in tail; the represves of J., deceased, and other younger sons, claimed under the proviso; S., the heir, claimed the rents and profits from his attaining twenty-one till the Plt's birth, as undisposed of; they had been received by J., after the 18th of February, 1805, when he attained twenty-one.]

"**DECLARE**, that the Plt upon his birth became entitled to an estate in tail male in the estates devised by the will of the testator &c., and that the same ought to be settled accordingly, pursuant to the directions expressed in the said will; And Let a settlement be made of the said estates accordingly; And Let the same be approved of by the (Judge); And Let all proper parties join therein &c.; And Declare, that the rents and profits of the estates which accrued before the 23rd day of January, 1804, when the Deft S. attained the age of twenty-one years, ought to be invested in the purchase of real estates, according to the directions of the testator's will; and that the Deft S., as the heir-at-law of the testator, is entitled to all such parts of those rents and profits, and of the dividends and interest of the securities in which the accumulated rents and profits were invested, and of the rents and profits of the estates purchased with the accumulated rents and profits, as accrued between the 23rd day of January, 1804, and the 24th day of November, 1806, when the Plt was born; and that the Plt is entitled to all such of the said rents and profits, and dividends and interest, as have accrued since that day."—Account of rents and profits from the death of the testator, up to the 18th February, 1805, received by S., the elder, or by C., his wife, both deceased, or by the Defts, the exors of J., deceased, distinguishing how much accrued, and was received, prior to the 23rd January, 1804, and how much after that day; Inquiry, how the same have been applied and disposed of, and in what securities the same or any part thereof have been invested, and whether any, and what, estates have been purchased therewith, or with any and what part thereof, and to whom such purchased estates were conveyed, and in whom the legal estate is now vested; Inquiry, by whom the dividends and interest of such securities, and the rents and profits of such purchased estates have from time to time been received, and to what amount, distinguishing how much thereof was received prior to the 23rd January, 1804, and how much between the 23rd January, 1804, and the 18th February, 1805, and how much between that day and the 24th November, 1806, and how the same dividends and interest, and rents and profits, have been applied and disposed of; Account of rents and profits of the estates devised by the testator's will which, since the 18th February, 1805, were received by J., deceased, or by the Defts, his exors, since his decease, distinguishing how much thereof accrued, and was received, prior to the 24th November, 1806, and how much since that day, and how the same have been applied and disposed of; What on the said account shall appear to have been received by S. the elder, to be answered by his exors, out of his assets; What received by C., to be answered by her exors; What received by the Defts respectively, since the death of C., to be answered by them; And what received by J., to be answered by his exors, out of his assets.—Tax all parties'

costs of suit to this time.—Reserve payment.—Adjourn &c.—*Stanley v. S.*, M. R., 11 Dec. 1809, B. 461; 16 Ves. 491.

12. Investment in Land to be settled to the Uses of the Settlement.

THIS Court being of opinion that the freehold, [copyhold or leasehold] estate, situate &c., in the petition mentioned, is a proper purchase wherein to invest the sum of £—, to be raised as hereinafter mentioned, Let an inquiry be made whether a good title can be made to the said estate; [or, Let an inquiry be made whether the freehold &c. estate (*see above*) is a proper purchase wherein &c. (*as above*); And if so, whether a good title can be made to the said estate]; And in case a good title can be made thereto, Let a proper conveyance [assurance, or assignment] of the said estate be approved by the Judge; And Let, upon the execution of such conveyance [or assignment] by such parties thereto as the Judge shall direct, being certified [or upon it being certified that such assurance has been made, by such parties as the Judge shall direct], the funds in Court be dealt with as directed in the payment schedule hereto.—[*Add Payment Schedule, Form 62, p. 223.*]

This form is equally applicable in an action to administer real and personal estate where the sanction of the Court is required by the trustees for an investment in land.

NOTES.

EXECUTORY TRUSTS—MARRIAGE ARTICLES—SETTLEMENT UNDER WILL.

In marriage articles the object and purpose are sufficiently indicated to enable the Court so to mould the executory trusts, which from their nature require some further instrument for their complete legal expression, as not to allow the plain intention in favour of the issue of the marriage to be defeated by informal, insufficient, or even technical expressions wrongly used. A will containing executory trusts does not afford the same *prima facie* indication, and an intention that the words of limitation used are not to have their strict proper technical sense must appear in some manner on the will itself: see *Blackburn v. Stables*, 2 V. & B. 367; *E. Stamford v. Hobart*, 3 Bro. P. C. 31; *Sackville-West v. V. Holmesdale*, L. R. 4 H. L. 543, 555, 572; *L. Glenorchy v. Bosville*, 2 L. C. Eq. 763; Theobald, Wills; Watson's Comp. 554.

Marriage articles will be construed not formally, but as instructions for a settlement: *Phillips v. James*, 3 D. J. & S. 72; *Symonds v. Wilkes*, 13 W. R. 1026; but if on the face of an instrument executed before marriage under the name of articles the trusts are perfect, the instrument will be construed as a complete, and not a merely executory settlement: *De Havilland v. Saumarez*, 14 W. R. 118; *Fullerton v. Martin*, 1 Dr. & S. 31.

In favour of children effect has been given to directions uncertain in character, e.g., "a suitable provision": *Brenan v. B.*, 1 R. 2 Eq. 266.

Directions to settle, some of which would be void for remoteness, may be modified so as to carry out the testator's intention consistently with legal rules: *Lyddon v. Ellison*, 19 Beav. 565; and see *Miles v. Harford*, 12 Ch. D. 691.

A tenancy in common has been limited as the most convenient form of settlement upon words which, strictly construed, imported joint tenancy: *Mayn v. M.*, 5 Eq. 150; *Taggart v. T.*, 1 Sch. & L. 84.

Effect has also been given to an expression in a letter naming three persons, to whom a debenture was soon afterwards transferred without

any declaration of trust, trustees for A. and her children, as a declaration of trust of the debenture for A. for life, with remainder to her children as joint tenants: *Re Bellasis*, 12 Eq. 218.

A covenant in marriage articles to settle an estate upon issue by the intended wife will be carried into effect as a covenant for a strict settlement, the husband taking an estate for life only without any power to create charges in favour of younger children: *Grier v. G.*, L. R. 5 H. L. 688; *Dod v. D.*, Amb. 274.

But if the articles indicate an intention that the children shall take as tenants in common, a strict settlement will not be directed: *Taggart v. T.*, 1 Sch. & L. 84; *E. Lowther v. Westmoreland*, 1 Cox, 64.

As to the general frame of a strict settlement, see *Sackville-West v. V. Holmesdale*, L. R. 4 H. L. 543; 3 Eq. 474; *S. C.*, 12 Eq. 280; *Thompson v. Fisher*, 10 Eq. 207, Forms 8, 9, *sup.* pp. 1720, 1721; *Dav. Conv.* vol. iii. 271—275.

For the insertion of powers of jointturing and charging portions for younger children, see *Sackville-West v. V. Holmesdale*, L. R. 4 H. L. 543; *S. C.*, 12 Eq. 280.

And for the form of a settlement of a money fund pursuant to articles, see *Roche v. R.*, 2 J. & L. 561.

In the absence of any indication of intention to that effect, the Court has refused to insert a hotchpot clause: *Lees v. L.*, I. R. 5 Eq., 549; but in a modern settlement the Court has supplied such a clause: *Miller v. Gulson*, 13 L. R. Ir. 408, 428.

For the introduction of a power of sale over subsequently-acquired real estate (analogous to a power to alter and vary investments of personal estate), see *Elton v. E.*, 27 Beav. 634; *Re Garnett-Orme and Hargreave*, 25 Ch. D. 595; of an ordinary power of sale and exchange, *Wise v. Piper*, 13 Ch. D. 848, 853; *Turner v. Sargent*, 17 Beav. 515; of a power to grant mining leases of subsequently-acquired real estate, see *Scott v. Steward*, 27 Beav. 367.

A power of appointment was not inserted where there was a direction for equal division amongst the children: *Re Parrott, Walter v. P.*, 33 Ch. D. 274, C. A.; but where the fund was bequeathed to a man until marriage, and then to be settled on his wife and children, a power for husband and wife by deed, and survivor by will to appoint amongst the children was inserted: *Re Gowan, G. v. G.*, 17 Ch. D. 778, observing on *Oliver v. O.*, 10 Ch. D. 765.

And for the usual powers in a settlement under marriage articles, see 2 L. C. Eq. 78; *Dav. Conv.* vol. iii. p. 663.

A person named as trustee may sue for a performance of the articles, though he has not formally accepted the trust: *Cooke v. Fryer*, 1 Ha. 498.

The husband's claim under marriage articles after the death of the wife without issue is not defeated by his having refused to execute a settlement drawn in pursuance of the articles: *Jeston v. Key*, 6 Ch. 610.

As to the power after marriage and before execution of the settlement of varying the articles, see *D. Bedford v. M. Abercorn*, 1 My. & C. 312.

And that parties who had deliberately executed a settlement in pursuance of an ante-nuptial contract could not, even before the marriage took place, revoke the settlement, see *Page v. Horne*, 9 Beav. 566; 11 Beav. 227.

Heirlooms.—Upon the question of settling chattels directed to be held as heirlooms, or on the same uses as the realty, as far as the rules of law and equity will permit, and under trusts executed or executory, see *Scarsdale v. Curzon*, 1 J. & H. 40; and see *Harrington v. H.*, L. R. 5 H. L. 87; 3 Ch. 564; *Shelley v. S.*, 6 Eq. 540, and *v. sup.* p. 1615, in which case, the executory bequest being of family jewels unconnected with any real estate, the intention of the instrument was construed to be that the chattels were to go to the persons taking for the time being under the limitations of the settlement, but so that the property should not vest in any person so taking if that person did not attain the specified age, or fulfil the specified condition; and that, subject to these limitations, the first taker was entitled absolutely; and see *Angerstein v. A.*, (1895) 2 Ch. 883, where chattels bequeathed as heirlooms to be enjoyed by the person for the time being entitled to the "actual" possession of the settled real estate were held not to vest absolutely

in a tenant in tail who predeceased the tenant for life; *Lewin*, 132, 133; *Wms. Exors.* 9th ed. 638.

A gift of chattels to a peer and his successors, "to be enjoyed with and to go with the title," does not create an executory trust or any obligation binding on the legatee: *Re Johnston, Cockerell v. E. Essex*, 26 Ch. D. 538; and so where a condition uncertain as to its mode of operation was attached, the first person succeeding to the honour took the chattels absolutely: *V. Exmouth v. Praed*, 23 Ch. D. 158, Form 19, *sup.* p. 1615; but a gift of paintings, &c., "to be held and settled as heirlooms, and to go with the title," is executory, and confers life interests only on persons *in esse* at the death of the testator: *Re Johnston, sup.*; and a disposition of chattels to follow a dignity is good where no rule against perpetuities is transgressed: *Montagu v. L. Inchiquin*, 23 W. R. 592; 32 L. T. 427.

Where the words of a codicil altering the limitations in the will were ambiguous, effect was given to the clear intention to knit the personality to the realty: *Re Toury, Dallas v. Law*, 41 Ch. D. 64, C. A.; comparing *Carlington v. Payne*, 5 Ves. 404, and *Martineau v. Briggs*, 23 W. R. 589; 45 L. J. Ch. 674; and see *Liddell v. L.*, 64 L. J. Ch. 674; 73 L. T. 303.

Separate Use.—If the lady is an infant, and her property is settled under the direction of the Court, a restraint on anticipation will be inserted; but if she is of age and independent judgment, the property will be settled to her separate use only: see *Dav. Conv.* vol. iii. p. 72, and cases there cited.

Directions for property to be settled on a daughter and her issue so as not to be liable for the debts, &c. of any husband, or so that, if she marry, she may enjoy the income during her life for her separate use, have been carried into effect by inserting a restraint upon anticipation: see *Stanley v. Jackman*, 23 Beav. 450; *Turner v. Sargent*, 17 Beav. 515; *Dunnill's Trusts*, L. R. 6 Eq. 322.

In *Re Parrott, Walter v. P.*, 33 Ch. D. 274, C. A., a restraint on anticipation was inserted, although the fund was simply directed to be settled on the testator's daughter for life, and to be invested for her in good securities in the names of trustees.

And under similar directions a power to appoint a life estate to the husband has been sanctioned: see *Charlton v. Rendall*, 11 Ha. 296; *Stanley v. Jackman, sup.*; and see *Montefiore v. Behrens*, 1 Eq. 171, where the life estate so to be appointed was made determinable on alienation by the husband or his bankruptcy.

A benefit conferred on the testator's daughter's husband, "if living" (the testator having referred to her as the wife of W.), could not be extended to a future husband: *Re Parrott, Walter v. P.*, 33 Ch. D. 274, C. A.; but where the husbands of daughters were to take life interests in remainder, and an intention was shown to include children of a future marriage, a second husband was included: *Nash v. Allen*, 42 Ch. D. 54.

And for the form of settlement where a testator has directed that his daughters' shares shall be settled on themselves strictly, see *Loch v. Bagley*, 4 Eq. 122; *Young v. Macintosh*, 13 Sim. 445, 451.

There being on the terms of the bequest no trust for a settlement capable of execution, daughters have been held entitled absolutely on attaining twenty-one, and being then unmarried: *Magrath v. Morehead*, 12 Eq. 491.

And for the frame and provisions of a settlement of a married woman's property under the direction of the Court, see Chap. XXXVII., "MARRIED WOMAN," p. 951.

Shifting Clauses.—Shifting clauses (forfeiting on failure to comply with certain conditions, or on certain contingencies existing and giving rise to new interests) are distinguished from clauses in the case of portions, the object of which is to secure equality of provision: *Stanhope v. Collingwood*, L. R. 4 H. L. 43; 4 Eq. 286.

The exact event contemplated by the testator must have happened for their taking effect: *Meyrick v. Laws*, 9 Ch. 237; *Gardiner v. Jellicoe*, 11 H. L. C. 323; 12 C. B. N. S. 568; 11 W. R. 999.

They will be construed strictly: *Walmesley v. Gerard*, 29 Beav. 321; *Musgrave v. Brooke*, 26 Ch. D. 792; and in execution of an executory trust will not be so framed as to annihilate jointures and portions in the event of the estates going over: *V. Holmesdale v. West*, 12 Eq. 280.

But ignorance of the contents of the will does not protect the devisee or legatee from the consequences of non-compliance with the provisions in default of which the estate is given over: *Astley v. E. Essex*, 18 Eq. 290; *Hodge's Legacy*, 16 Eq. 92.

See also on the question of shifting clauses, and the mode of construing and giving effect to them, *Egerton v. Brownlow*, 4 H. L. C. 1; *Turton v. Lambarde*, 1 D. F. & J. 495; *Trevor v. T.*, 13 Sim. 108, 150; *Kenlis v. E. Bective*, 34 Beav. 587; *Bagot v. Legge*, 12 W. R. 1037; *Meredith v. Treffry*, 12 Ch. D. 170; *Cope v. E. De la Warr*, 8 Ch. 982 (proviso that if A. should succeed to the earldom of D., the succession to the property settled on a lesser dignity should "devolve upon" another person): *Hervey-Bathurst v. Stanley*, 4 Ch. D. 251; affirmed, *sub nom. Bathurst v. Errington*, 2 App. Ca. 698 (proviso that in case B. or C. should become the eldest son of S., the estate thereby devised should determine): *Viscount Exmouth v. Praed*, 23 Ch. D. 158 (that a condition by way of defeasance must be definite in ascertainment of its operation as well as in its terms): *Leslie v. E. Rothes*, (1894) 2 Ch. 499, C. A. (powers of management during minority preventing infant earl from being held to be in "possession or receipt of rents and profits"); and as to a younger son becoming an eldest son for the purposes of the settlement, see Sect. III., *inf.* pp. 1734, 1735.

A shifting clause which, if applied verbatim to leaseholds (settled by reference), might be bad for remoteness was modified so as to render it free from that objection: *Miles v. Harford*, 12 Ch. D. 691.

Name and Arms Clause.—See *Astley v. E. Essex*, 18 Eq. 290; *Catt's Trust*, 2 H. & M. 46; *Re Williams*, 6 Jur. N. S. 1064; *Blagrave v. Bradshaw*, 4 Drew. 230; *Bennett v. B.*, 2 Dr. & S. 266; *Semple v. Holland*, 33 Beav. 94; *D'Eyncourt v. Gregory*, 1 Ch. D. 441 (that a name and arms clause is not complied with by merely adding the required surname before the original surname); *Re Eversley, Mildmay v. M.*, (1900) 1 Ch. 96, distinguishing *D'Eyncourt v. Gregory*, 1 Ch. D. 441 (that a clause directing the use of the name "alone or together" with the devisee's own family name is complied with by the use of the prescribed name either before or after the family name): *Austen v. Collins*, 54 L. T. 903 (that, *semble*, a mere voluntary assumption of a coat of arms is not sufficient): *Re Farrer and Champion*, W. N. (87) 102; *Musgrave v. Brooke*, 26 Ch. D. 792 (that such a clause must be construed strictly, and that the cesser and limitation over must fit in with each other); *Riggs-Miller v. Wheatley*, 28 L. R. Ir. 144 (day of death of tenant for life not to be counted in year allowed for compliance); *Bevan v. Mahon-Hagan*, 27 L. R. Ir. 399 (royal licence necessary to confer right to assume and bear arms); *Re Varley, Thornton v. V.*, 62 L. J. Ch. 652 (person entitled to actual possession).

As to the importance of the clause in aiding the construction of a gift of successive estates tail, see *Studdert v. Von Steigilitz*, 23 L. R. Ir. 564.

Where by reason of non-compliance with a name and arms clause by a tenant for life his life interest in real estate and funds, and securities went over to his son, who predeceased him without issue, it was held that the father took the rents during his life as special occupant, but the income of the funds and securities formed part of the son's personalty: *Re Mitchell, Moore v. M.*, (1892) 2 Ch. 87.

The execution of a disentailing deed by a tenant in tail of real estate was held not to relieve him from liability to forfeiture of personal estate, bequeathed to go along with the realty, for non-compliance with a name and arms clause affecting the personalty: *Re Cornwallis, C. v. Wykeham Martin*, 32 Ch. D. 388.

Residence.—See *Walcot v. Botfield*, Kay, 534; *Dunne v. D.*, 3 Sm. & G. 22; 7 D. M. & G. 207; *Re Moir, Warner v. M.*, 25 Ch. D. 605.

Religious Profession.—See *Seymour v. Vernon*, 10 Jur. N. S. 487; *Re Williams*, 6 Jur. N. S. 1064; *Exp. Dickson*, 1 Sim. N. S. 37; *Hodgson v. Halford*, 11 Ch. D. 959; *Wainwright v. Miller*, (1897) 2 Ch. 255.

Waste.—In executing an executory trust giving life estates, power to commit waste will not be given to the tenants for life: *Davenport v. D.*, 1 H. & M. 775; Form 10, *sup.* p. 1721; notwithstanding the use by the

testator of the words "in strict settlement": *Stanley v. Coulthurst*, 10 Eq. 259.

If, however, in order to effect the general intention, words importing a larger estate are cut down to an estate for life, such life estate will be made unimpeachable for waste: see *Leonard v. E. Sussez*, 2 Ver. 526; *Bankes v. Le Despencer*, 10 Sim. 576; 11 Sim. 508; *Lewin*, 131, 578.

Under a direction to settle real estate to the separate use for life of a married woman, the estate will not be made unimpeachable for waste: *Clive v. C.*, 7 Ch. 433.

INVESTMENT IN LAND.

Applications for investment in land are usually by summons in Chambers, for approval of the conditional contract.

The Court must be satisfied that the proposed investment is fit and proper in all respects: *Bethell v. Abraham*, 17 Eq. 24, 27; and the usual practice is to direct an inquiry whether the investment is fit and proper, and if so, whether a good title can be made: *Lewin*, Trusts, 570.

But the Court may be satisfied with the evidence of the fitness of the proposed purchase or security produced at the time of making the application, in which case the investment is at once approved, subject to the inquiry as to title. If the Court is not so satisfied, an inquiry as to fitness is directed, or the matter is adjourned.

To obtain the order approving the purchase without inquiry, there must be an affidavit of one or more surveyors, stating the value, rental, and outgoings, and proving the circumstances which render the purchase desirable: *Re Kinsey*, 1 N. R. 303; and in all cases of purchase or loan on mortgage trustees must employ their own valuers: *Ingle v. Partridge*, 34 Beav. 412.

The inquiry as to title will be upon a general reference, and not "according to the conditions," though liberty may be given to apply in Chambers for leave to dispense with any particular requisition: *Exp. Christ's Hospital*, 2 H. & M. 166; *Meyrick v. Laws*, 34 Beav. 58; but purchases, under special conditions, of a title not strictly marketable may be sanctioned by the Court whenever the acquisition of the specific property is, from the circumstances, a matter of importance to the trust: *Dart*, V. & P. 99.

By the Vendor and Purchaser Act, 1874 (37 & 38 V. c. 78), s. 1, forty years is substituted for sixty years as the period of commencement of title which a purchaser may require.

For the form of affidavit in support of the application, of examination of the abstract of title, certificate of result of inquiry as to title, and of settlement (and execution) of the deed, and affidavit and certificate of execution, see *D. C. F.* 574 *et seq.*

A power to invest in the purchase of lands or hereditaments in fee simple in possession authorizes an investment in the purchase of freehold ground rents: *Re Peyton's Settlement*, L. R. 7 Eq. 463; but an investment of a fund in Court in house property will not be sanctioned: *Moore v. Waller*, 11 W. R. 713; 28 L. T. 448.

Under special circumstances, the Court has sanctioned the purchase by trustees, with powers of investment in land adjoining the settled property, of mines partly under the settled estates: *Bellot v. Littler*, 22 W. R. 836; 30 L. T. 861.

And as to investments by trustees, *v. sup.* Chap. XLI., pp. 1177 *et seq.*

A power of re-sale will be inferred from a direction that real estates when purchased shall be held on such trusts as will best correspond with the subsisting trusts, and be considered as personal estate for the purposes of the settlement: *Tait v. Lathbury*, 1 Eq. 174.

SECTION III.—PERFORMING THE TRUSTS OF SETTLEMENTS.

(I.) CARRYING SETTLEMENT INTO EXECUTION.

1. *Judgment to perform Trusts of Settlement, and for Accounts and Inquiries as to Trust Estate in Suit by Cestuis que Trust.*

DECLARE that the trusts of the indenture of settlement, dated &c., made between &c., ought to be performed and carried into execution, and adjudge the same accordingly; And Let the following &c.:—1. An inquiry what children the said L. has had by his marriage with the Deft S. L., or by any previous marriage, and whether such children be living or dead, and if any of them be dead, when they died respectively, and who are the legal pers. represves of such of them as may be dead; 2. An account of the principal money subject to the trusts of the said indenture of settlement received by the Defts G. and C., or either of them, or by the Deft G. jointly with B. deceased, or by any person or persons by their order or for their use as trustees or trustee of the said indenture of settlement; 3. An inquiry upon what securities the said trust funds have been and now are invested, and whether such investments have been properly made, having regard to the terms and powers contained in the said settlement.—Adjourn, &c.—See *Lang v. Griffiths*, M. R., 21 March, 1859, B. 1418.

2. *The like, in Action to perform the Trusts and for Partition.*

“DECLARE that the trusts of the settlement in the pleadings mentioned ought to be performed and carried into execution, and adjudge the same accordingly; And Let the following &c.:—1. An inquiry whether E. G. (*the wife*) in the pleadings named is living or dead, and if dead, when she died, and whether or not in the lifetime of G. G. (*the husband*) therein also named, and whether she ever, and when, and in any and what manner exercised the power of appointment in the said indenture of settlement contained, and if so, in favour of what person or persons, and whether any such appointment was ever revoked, and if so, in what manner; 2. An inquiry what children the said E. G. had by her marriage with the said G. G., or by her previous husband A., in the pleadings named, and when such children were born respectively, and whether they are all living, or if any of them are dead, when they died respectively, and who are the heirs-at-law or real represves, and also the legal pers. represves of such of the said children as may have died after attaining the age of twenty-one years respectively; 3. An inquiry who are the persons respectively entitled to the hereditaments and premises comprised in the said indenture of settlement, and in what respective shares and proportions, and whether any and which of such shares are subject to or comprised in any and what settlement or settlements; 4. An inquiry what real

and personal estate is now subject to the trusts of the said indenture of settlement, and upon what securities so much of the trust premises as consists of personal estate is now invested, and whether such investments were properly made, having regard to the terms and powers contained in the said indenture; 5. An inquiry whether any and which of the children of the said E. G. have in any way charged or incumbered their respective interests under the said indenture of settlement, and what incumbrances (if any) affect so much of the real estate comprised in the said indenture as has not been sold, or any and what parts thereof, and what is due and to whom in respect of such incumbrances respectively, and what are the priorities of such incumbrances respectively; 6. An inquiry whether any and what parts of the real estate comprised in the said indenture of settlement have been sold, and if so, by and to whom, and for what sum or sums of money, and by whom the purchase-money has been received, and how the same has been applied or disposed of; 7. And if it shall appear that the purchase-money of such parts (if any) of the said real estate as have been sold has been received by the Defts P. and H., or either of them, or by any person or persons by their order or for their use as trustees of the said indenture of settlement, an account of the proceeds of such sale or sales; 8. An account of the rents and profits of the said real estate received by the Defts P. and H., or either of them, or by any person &c.; 9. An inquiry whether it will be for the benefit of the several persons interested under the said indenture of settlement that the real estate comprised therein should be sold."—Defts desiring to retire, Directions to appoint new trustees; Defts to convey, assign, and transfer the trust estate &c., so as to vest the same in the trustees to be appointed.—Adjourn &c.—See *Aburrow v. Pink*, V.-C. S., 30 May, 1870, A. 1341.

For the like decree, see *James v. J.*, V.-C. M., 27 May, 1871, A. 1527.

3. *Trustees of Settlement authorized to purchase Reversion of Leasehold Property, with Provisions for compensating Tenants for Life.*

THIS Court being of opinion that the purchase of the freehold and reversion of the hereditaments comprised in the several leases of the — day of —, in the pleadings mentioned, at the prices and upon the terms therein stated, is a proper investment for the sum of £—, and the Defts H. A. and S., by their counsel, consenting to such purchase and investment; Let the Plts be at liberty to complete the said purchase at the price and upon the terms aforesaid, and to pay the purchase-money of £— out of the moneys in their hands available for re-investment in land to be settled to the uses and upon the trusts of the will of the said testator; And Let the Plts be at liberty from time to time, by and out of the moneys for the time being in their hands available for re-investment in land to be settled as aforesaid (if and so far as may be neces-

sary), to pay from and after the death of the Deft H. A., until the — day of —, if the Deft Dame G. S. shall so long live, until the Deft Dame G. S. for her sole and separate use, without power of anticipation, such annual sum (if any) as may be required, having regard to the rental for the time being of the hereditaments comprised in the leases in the pleadings mentioned, to compensate such loss as for the time being may be sustained by the said Dame G. S. in consequence of the investment of the said sum of £— in the purchase of the said reversion, the amount of such loss in any year to be ascertained from the difference between the clear beneficial rental for that year of the said hereditaments comprised in the said leases, and the sum of £935, being the amount of the sum of £295, the present yearly beneficial rental of the said hereditaments, and the sum of £640, the amount of interest at the rate of 4 p. c. per ann. on the said sum of £—; Plts to retain and pay the costs of all parties (including their own costs, charges, and expenses relating to the trust estate) out of the moneys in their hands available for re-investment in land to be settled as aforesaid, such costs to be taxed.—*Liberty to apply.*—*Errington v. Ackers*, V.-C. M., 20 March, 1875, A. 644.

NOTES.

As to procedure by originating summons for execution of trusts, *v. sup.* p. 1479.

By O. LV, 15A, it is provided that no order for the execution of a trust or for accounts or inquiries concerning property held upon any trust, or the parties entitled thereto, is to be made except by the Judge in person.

Where an action for execution of trusts proved to be unnecessary, the Plts, tenants for life, were ordered to pay the costs of the action up to and including the trial: *Fane v. F.*, 13 Ch. D. 228, *et v. sup.* pp. 1170, 1516.

As to the power of the Court to sanction the surrender of a settled policy where the settlor (the husband) is unable to perform his covenant to pay premiums, see *Re Steen*, S. v. *Peebles*, 25 L. R. Ir. 544.

(II.) RAISING PORTIONS—ADVANCEMENT—HOTOHPOT.

1. Declaration that Portions were well charged, with Directions for raising them.

DIRECTIONS for the appointment of P. and T., as trustees of the settlement, in substitution for the deceased trustees, and vesting the trust estate [Chap. XLI., "TRUSTEES," *sup.* pp. 1210, 1211]; "And Declare that the sum of £5,000 was well charged by the indenture of settlement, dated &c., and was well appointed by the deed-poll, dated &c., and that the same is now raisable under the term of twelve hundred years comprised in the said indenture by the trustees of the said indenture; And Let the Defts P. and T. raise the said sum of £5,000 by sale or mortgage of the hereditaments and premises comprised in the said indenture (of settlement), or of some part or parts of such hereditaments and premises [Forms 14, 18, Chap. XLIV. pp. 1454, 1456]; and the Deft M. K. (*the tenant for life in possession*), by

his counsel consenting thereto, Let the said Deft M. K. pay to P. and T. their costs of raising the said sum of £5,000.”—Costs of Plts and Defts to be taxed and paid by the Defts P. and T. out of the £5,000 so to be raised ;—“ And Let the Defts P. and T. pay one equal moiety of the residue of the said sum of £5,000 to the Plts A., K. and F. (*the trustees of the marriage settlement of a child to whom one moiety of the £5,000 had been appointed*) ; And Let P. and T. invest one-fifth of the remaining moiety of the residue of the said sum of £5,000 in their names in consols ; and apply the interest as it accrues on the anns to be so purchased towards the maintenance and education of the infant Deft G. (*appointee of £500*) during her minority, or until further order.”—Directions for payment out of the residue of the £5,000 of principal and interest due to the incumbrancers on the share of B. K. (*appointee of the remaining £2,000*), and payment of the ultimate residue of the said sum of £5,000 to the Deft B. K.—Liberty to apply.—*Knapp v. K.*, V.-C. B., 22 May, 1871, A. 1291 ; S. C., 12 Eq. 238.

For decree to raise by mortgage or sale of the settled estate a sum of 25,000*l.*, charged by the testator with portions for his daughters and interest thereon, and with mortgages and incumbrances, see *Fane v. E. Sandwich*, L. C., 3 May, 1748, A. 516 ; Seton, 3rd ed. p. 283.

2. Portions to be secured by Mortgage.

LET a mortgage of the testator's estates be made, with the approbation &c., to a proper trustee or trustees, to be approved of by the Judge, for securing the said portions &c., and also the legacy of &c. [Form 18, Chap. XLIV. p. 1456] ; And Let such trustee or trustees execute a declaration of trust of the said sums so to be secured as aforesaid ; as to the said sum of &c., the portion of A., in trust for her benefit ; as to the said legacy of &c., given to B., in trust for her benefit ; and as to the said sum of &c., the portion of C., the wife of the Deft D., upon the trusts contained in the settlement, dated &c., made on the marriage of the Deft C. with the Deft D., such declaration of trust to be settled by &c.—See *Gordon v. Panton*, M. R., 28 June, 1786, A. 711.

3. Raising Portions—Advances—Satisfaction.

“ DECLARE, that the Plt A. is entitled in right of his wife to £—, being one-fifth of the sum of £—, agreed by the articles of &c., to be charged on the estate &c. for the portions of younger children in case of a son, and to interest on the same, after the rate of 4 p. c. per ann. from the death of &c.”—Like declaration as to two other daughters.—And Let the following &c. : 1. An account of what is due to the Plt and to &c. for principal and interest on their said portions accordingly ; 2. An inquiry whether any, and what, sums of money were advanced by way of portions on the respective marriages of &c. [*the two other*

daughters] by their father; And Declare, that in case it shall appear that they have been advanced any sum more than the sum of £—, which they would be entitled to under the said articles, the same must be considered as a satisfaction for the several portions due to them by the said articles, and that those portions so due to them under the said articles will sink into the land for the benefit of the Deft E [*the lunatic*]; 3. And Let, in case it shall appear that the said &c. were not advanced to the extent of £—, an account be taken of what is due for principal and interest in respect of their portions of £— each, such interest to be computed after the rate of £4 p. c. per ann. from the death of the said &c.; And Let what shall be certified to be due to the Plt, and the said Defts for principal and interest, as aforesaid, together with the costs hereafter directed, be raised by sale or mortgage of a competent part of the estate charged with the payment of the sum of £—, with the approbation &c. [Form 19, Chap. XLIV. p. 1457];—“(And Declare that the Deft E., the son, being a lunatic, such person as shall advance the money required upon the security of the said estate is to hold and enjoy the same free from all claims and demands of the said Deft E., or any claiming by, from, or under him, till he shall be repaid the principal sum).”—Liberty to apply for payment of the portions when raised.—*Smith v. Church*, L. C., 9 June, 1769, B. 573.

4. *Inquiries as to Advances and Shares.*

“LET the following inquiries be made, viz. :—1. An inquiry whether the testator in his lifetime gave, advanced, or settled to, for, or upon any and which of his children any sum or sums of money or other property; and if so, what was the amount or value thereof; 2. An inquiry whether any and what payments, appropriations, or advances have been made by the exors of the will of the testator since his death, to or on account of the children of the testator, or any and which of them, in respect of their shares of his residuary estate, or otherwise; 3. An inquiry of what the residuary personal and real estate of the testator consisted.”—*Windsor v. Cross*, V.-C. L. Cranworth, 16 Nov. 1850, B. 393; *Whitaker v. Goodwin*, M. R., 27 May, 1871, B. 1242.

For declaration (on demurrer) that the proposed application of one moiety of the trust funds by way of advancement to the Deft L. (towards the discharge of debts and incumbrances) was within the power contained in the will of the testator (to apply a moiety of the trust funds “in or towards the preferment or advancement of L. or otherwise for his benefit in such manner as the trustees should in their discretion think fit”), see *Louther v. Bentinck*, M. R., 19 Dec. 1874, B. 3569; *S. C.*, 19 Eq. 166.

For declaration (on petition by the trustees) that the Petrs would, under the power contained in the testator's will authorizing the trustees thereof to apply any part or parts, not exceeding in the whole one-half of the capital of the share of each of the testator's daughters, at any period or periods of the life of each such daughter for her advancement, or otherwise for her benefit, be justified in advancing £—, part of the share of T. (one of the daughters) in the testator's residuary estate to P. T. (her husband), on his executing such bond as in the petition mentioned, see *Re Kershaw*, V.-C. M., 27 June, 1868, A. 1931; 6 Eq. 322.

5. *Advancement of Part of a Son's Expectant Share conditionally on his executing a Post-nuptial Settlement.*

THIS Court being of opinion that the draft settlement, which is identified by the signature of —, the solrs for all parties, in the margin thereof, is (will be) a proper settlement of the expectant share of and in the trust moneys comprised in the indenture of settlement, dated &c. (*made on the parents' marriage*), Declare that under the circumstances in the pleadings stated the trustees of the said indenture of settlement dated &c., are (upon the execution of a settlement in accordance with the said draft settlement by all necessary parties and) with the consent of the Plt S. and his wife (*the parents*), and at the request of the Plt E. (*the son*) (will be) authorized to advance and make over one equal fourth part of the said trust moneys to the said Plt E.'s trustees, to be held by them upon the trusts and with and subject to the powers, provisos, agreements, and declarations in and by the said draft settlement (intended to be) stated, declared, and contained concerning the same.—*Roper-Curzon v. Roper-Curzon*, M. R., 6 March, 1871, B. 602; S. C., 11 Eq. 452.

6. *Hotchpot—Life Interests brought into—Inquiry as to Value—Inquiries and Declarations as to Settled and Appointed Property.*

THE application by originating summons of A. B., which upon hearing &c., was adjourned &c.; Let the following inquiry be made:—(1.) An inquiry of what particulars the trust property, now subject to the trusts of the indenture of settlement, dated &c., consists; And Let, pending such inquiry, the question raised by the summons as to whether the Plt should take any proceedings to enforce the covenant contained in the said settlement to settle after-acquired property of C. D., and the question of priority of the charge of £— referred to in the affidavit of &c., stand over; Declare that the income on £— covenanted to be paid by the said C. D. in the said settlement, and on £—, settled by the settlement dated &c., and on the investments of such two sums, was well appointed by the will of the said C. D., as to one-half to &c., and as to the remaining half to &c.; Declare that the limitations by way of appointment contained in the will of the said C. D., intended to take effect subject or subsequent to the life interests of the said E. and F., are invalid; Declare that the said E. and F. must bring their respective life interests into hotchpot, and for that purpose Let the following further inquiry be made:—(2.) An inquiry what were the values of the life interests of the said E. and F. respectively at the death of the said C. D.; Declare that the appointed trust estate is to be retained and administered by the Plts and the Defts as trustees of the said settlements, and not by the trustees of the will of C. D.—Tax and pay costs without prejudice to any question as

to what fund ought ultimately to bear the same.—Adjourn further consideration.—*Re Heathcote, Trench v. H.*, Kekewich, J., 15 Jan. 1891, A. 139; W. N. (91) 10.

7. *Advances to be brought into Hotchpot.*

DECLARE that interest at the rate of 4 p. c. per ann. from the — day of — is chargeable in respect of the value of the testator's business, and on the advances to the Deft S. S. D., and also on the advances to the testator's children after attaining the age of twenty-one years; And Declare that advances out of income to the testator's children after attaining the age of twenty-one years, but without interest, are to be brought into account, and advances out of income to the testator's children before attaining that age are not to be brought into account or to carry interest.—*Re Dallmeyer, D. v. D.*, Kekewich, J., 17 July, 1895, A. 3188, as varied by C. A., 18 Dec. 1895, A. 5024; (1896) 1 Ch. 372, C. A.

8. *Interest on Advances at 3 per cent. from Testator's Death.*

DECLARE that the testator was not intestate as to (six thousand pounds) in the summons mentioned, part of the one third share of his residuary estate bequeathed in trust for the Deft E. M.; And Declare that the Deft E. M. is to be charged in account with interest at 3 p. c. per ann. on the said (six thousand pounds) as from the — day of —, the date of the testator's death.—*Re Lambert, Middleton v. Moore*, Stirling, J., 27 May, 1897, B. 2593; (1897) 2 Ch. 169.

NOTES.

PORTIONS.

The leading principle of the law of portions for younger children is equality of division, so that while no child shall be excluded, none shall take a double provision.

Accordingly, in the usual provision excluding from a portion "an eldest or only son," the eldest son is the one who, by taking the family estate, is already otherwise provided for; i.e., it must be, independently of age and natural birth, that "eldership which carries the estate along with it": *Duke v. Doidge*, 2 Vez. 203, n.; *Ellison v. Thomas*, 1 D. J. & S. 18; *Collingwood v. Stanhope*, L. R. 4 H. L. 43, 58; *Shuttleworth v. Murray*, (1900) 1 Ch. 795, 797; S. C., (1901) 1 Ch. 819, C. A.

And younger children are children other than the child who has succeeded to the family estate: *Re Bayley's Settlement*, 6 Ch. 590; 9 Eq. 491; *Chadwick v. Doleman*, 2 Vez. 528.

But the general rule must give way to the express language of the will or settlement; e.g., where the testator defines the expression "younger children" by giving their names: *Re Prytherch, P. v. Williams*, 42 Ch. D. 590.

If the eldest son dies *s. p.* before the time when the portions become payable, the second son thereupon becoming an eldest son, and entitled as such to the settled (family) estate, is excluded from a portion: *Chadwick v. Doleman*, *sup.*; *L. Teynham v. Webb*, 2 Vez. 198; *Bayley's Settlement*, *sup.*; *Re*

Smith's Estate, 27 L. R. Ir. 121; *secus*, if the second son becoming an eldest son during his father's lifetime has been excluded from the bulk of the estate by a previous disentailing deed: *Macoubry v. Jones*, 2 K. & J. 684; or succeeds to the reversion of the settled property, not under the instrument creating the portions, but by descent: *Sing v. Lealie*, 2 H. & M. 68.

So also an only son, excluded from the settled estate by the father's forfeiture, was held entitled to personal estate from which, if he had taken the settled estate as an eldest or only son, he would have been excluded: *John-son v. Foulds*, 5 Eq. 268.

And an eldest son (by birth) who has attained twenty-one but dies in his father's lifetime without inheritable issue, and without having barred the entail, will, through his represes, be entitled to a portion; the period for ascertaining who fills the character of eldest son being the time when the portions are payable: *Ellison v. Thomas*, 1 D. J. & S. 18; *Davies v. Huguenin*, 1 H. & M. 730; *Collingwood v. Stanhope*, L. R. 4 H. L. 43; *secus*, when the provision proceeds from a stranger: see *Sandeman v. Mackenzie*, 1 J. & H. 613, 630; *Theed's Settlement*, 3 K. & J. 375, 380; *Domville v. Winnington*, 26 Ch. D. 382; and see *Dav. Conv.*, vol. iii. pp. 421, &c.; *Lewin, Trusts*, pp. 448, 449.

Where the eldest son concurred with his father in disentailing and re-settling the estate, and on the occasion of such resettlement the equivalent of a younger child's portion was raised and paid to him, and he subsequently died in the lifetime of the father, his reprieve was held not to be entitled to the share of a younger child: *Re Fitzgerald's Estate*, (1891) 3 Ch. 394 (where it was said that the case might be doubtful if a trifling sum only were raised).

If the estate, being sold, is insufficient to pay the charges, so that the eldest son gets nothing, he is not therefore entitled to share in the portions for younger children: *Reid v. Hoare*, 26 Ch. D. 363.

In the analogous case of a shifting use, *e.g.*, a provision by a person not *in loco parentis*, where the estate given by him to the younger children of A. is directed to determine upon the persons selected succeeding to their own family estate by "becoming the eldest son of A.," it has been held that, for the shifting use to arise, the period during which the contingency is to happen is limited to the lifetime of A.; *i.e.*, a younger son of A. must during the life of A. fill the character and occupy the position of an eldest son and heir apparent: see *Hervey-Bathurst v. Stanley*, 4 Ch. D. 251; affirmed, *nom. Bathurst v. Errington*, 2 App. Ca. 698.

But in a shifting clause the words "eldest" and "younger" are read in their primary signification: *Meredith v. Treffry*, 12 Ch. D. 170; *Wilbraham v. Scarisbrick*, 1 H. L. C. 167; and an eldest son cannot be excluded simply because of his own act in concurring in a sale, and taking the benefit of the purchase-money: *Shuttleworth v. Murray*, (1901) 1 Ch. 819, C. A.

Without express words to that effect, the rule excluding a younger child on his becoming the eldest does not apply where the provision or settlement is made by a person not a parent and not standing *in loco parentis*: *Sandeman v. Mackenzie*, 1 J. & H. 613, 628; *Domville v. Winnington*, *sup.*

Portions are not payable during the lifetime of the parents, unless there is a clear manifestation of intention to that effect, even though by so holding the deed creating the charge will be rendered inoperative: *Ford v. Tynte*, 2 D. J. & S. 557.

Younger children dying under twenty-one, or in the case of daughters under that age and unmarried, will in general be excluded; but the pers. represes of those who, though dying before the period of distribution, have, by attaining twenty-one or marriage, acquired vested interests, will be entitled, unless there is a clear intent in words "absolutely compulsory" that the surviving children are exclusively to take: see *Davies v. Huguenin*, 1 H. & M. 730; *Currie v. Larkins*, 4 D. J. & S. 245; and that where no period of vesting is pointed out by the settlement, portions will, according to the ordinary rule, vest in sons at twenty-one and in daughters at that age or marriage: see *Remnant v. Hood*, 2 D. F. & J. 396; *Hougrave v. Courtier*, 3 V. & B. 79; *Emperor v. Rolfe*, 1 Ves. sen. 208; so that words referring to survivorship will not readily be construed as importing that the portion is to be contingent on the child surviving: *Wakefield v. Moffat*, 10 App. Ca. 422;

Re Knowles, Nottage v. Buxton, 21 Ch. D. 806; and the rule applies to portions created by will as well as those created by deed: *Re Knowles, Nottage v. Buxton*, 21 Ch. D. 806; *Re Hamlet, Stephen v. Cunningham*, 38 Ch. D. 183; 39 Ch. D. 426, C. A.; *Jackson v. Dover*, 2 H. & M. 209; and in construing powers to appoint portions charged on land the Court leans to the like construction: *Henty v. Wrey*, 21 Ch. D. 332, C. A.; 19 Ch. D. 492; and appointments vesting such portions in infants of tender years are viewed with suspicion: *S. C.*

It has been held that the whole amount may be raised when some of the portions have become payable, though some of the children have not acquired vested interests: *Gillibrand v. Gould*, 5 Sim. 149; *Leech v. L.*, 2 Dr. & War. 568; and see *Knapp v. K.*, 12 Eq. 238; but in other cases, on the ground that infants are entitled to the security of the land until their portions become payable, and that it is inexpedient to raise a larger sum than is required for portions actually due, the Court has refused to order the amount of portions not actually payable to be raised: *Sheppard v. Wilson*, 4 Ha. 392; *Wynter v. Bold*, 1 Sim. & Stu. 507; and see on this question, *Dav. Conv.* vol. iii. 456.

The income of an expectant or contingent portion under a will or settlement made by a father or person *in loco parentis* may be applied during minority for maintenance: *Knapp v. K.*, 12 Eq. 238, Form 1, *sup.* p. 1730; *Re Greaves' Settled Estates*, (1900) 2 Ch. 683, adopting statement in *Lewin on Trusts* (10th ed.), pp. 472, 473, to the effect that portions provided for children, whether payable at a certain age or not, are in general so far contingent as to sink into the land, where the children do not live to want them, and so far vested as to carry with them such rate of interest or allowance as the Court deems necessary for maintenance.

The costs of raising portions are payable from the estate, and not out of the portions: *Michell v. M.*, 4 Beav. 549; and see *Armstrong v. A.*, 18 Eq. 541; but the trustee of a term cannot charge the tenant for life with costs of obtaining a transferee of the mortgage of the term: *Sewell v. Bishop*, 62 L. J. Ch. 615.

Portions charged on land in general carry interest at 4 p. c. in England, and 5 p. c. in Ireland, from the time when the capital ought to be raised: *Young v. Waterpark*, 13 Sim. 199; 15 L. J. Ch. 63; *Balfour v. Cooper*, 23 Ch. D. 472, C. A. (*q. v.* as to the right of the donee of the power to fix the rate of interest).

Provisions for raising portions "for any child or children of any grantor, settlor, or deviser, or any child, &c., of any person taking any interest under any such conveyance, settlement, or devise," are exempted from the operation of the Accumulations Act, 1800 (39 & 40 G. 3, c. 98), in effect limiting the period of accumulations to (1) the life of the grantor; (2) twenty-one years from the death of grantor or testator; or (3) minorities of persons living at his death; or (4) who would be beneficiaries if of full age: see s. 2.

A direction to accumulate beyond the period limited by the Thellusson Act, and then to divide the aggregate fund amongst members of the family, is not a provision for raising portions within this exception: *Mathews v. Kelle*, 3 Ch. 691; 4 Eq. 467; *Eyre v. Marsden*, 2 Kee. 584; *Edwards v. Tuck*, 3 D. M. & G. 40; *Watt v. Wood*, 2 Dr. & Sm. 56; *Re Walker, W. v. W.*, 54 L. T. 792; and for the construction of the proviso, see *Barrington v. Liddell*, 2 D. M. & G. 480; 10 Ha. 429; *Beech v. St. Vincent*, 3 D. & S. 678; and cases collected, *Lewin, Trusts*, 92 *et seq.*; *Theobald*, 534 *et seq.*; *Wats. Comp.* 6, 7.

The four periods specified in sect. 1 are alternative and not cumulative: *Jagger v. J.*, 20 Ch. D. 729; *Wilson v. W.*, 1 Sim. N. S. 288; and see *Re Errington, Errington-Turbett v. E.*, 76 L. T. 616.

Although the Act of 1800 does not apply to Irish estates, the rents of Irish property when severed and invested cannot be accumulated beyond the period fixed by the Act: *Ellis v. Maxwell*, 12 Beav. 104; so also the rents of leaseholds in England belonging to a testator domiciled in Ireland: *Freke v. L. Carberry*, 16 Eq. 461; and see *Heywood v. H.*, 29 Beav. 9.

The Act does not affect the application of the doctrine that a legatee may put an end to an accumulation which is exclusively for his own benefit: *Wharton v. Masterman*, (1895) A. C. 186, H. L., affirming C. A. (1894) 2 Ch. 184, *sub nom.* *Harbin v. Masterman*.

When the accumulation directed by the testator has been arrested by the operation of the Act the surplus rents or income accruing during the period

for which the accumulation was directed will devolve on the heir-at-law or next of kin as undisposed of; and the enjoyment of the person entitled in reversion is not accelerated so as to give him the surplus income after the legal limit: *Weatherall v. Thornburgh*, 8 Ch. D. 261; *Talbot v. Jevors*, 20 Eq. 255; *Green v. Gascoyne*, 4 D. J. & S. 565; *Re Travis, Frost v. Greateorex*, (1900) 2 Ch. 541, C. A.; *Lewin*, 94.

By the Accumulations Act, 1892 (55 & 56 V. c. 58), accumulations of income for the purchase of land only are restricted to the minorities of beneficiaries. The word "land" is not confined to corporeal hereditaments: *Re Clutterbuck*, (1901) 2 Ch. 285, explaining *Re Danson*, W. N. (95) 102.

By the Judicature Act, 1873, s. 34, proceedings for the raising of portions, or other charges on land, are assigned to the Chancery Division of the High Court; and in R. S. C. App. (A.), Part III. s. 1, a form of indorsement of claim for this proceeding is given.

HOTCHPOT CLAUSE.

Where one fund was settled by reference to another fund as to which there was a hotchpot clause, it was held that the two funds were distinct for purposes of hotchpot so that children could share in the one without having to account for sums appointed to them out of the other: *Re M. Bristol, E. Grey v. G.*, (1897) 1 Ch. 946; and see *Re North, Meates v. Bishop*, 76 L. T. 186.

In applying a hotchpot clause a reference to sums which a father has covenanted to "give" to his son may be construed as including sums secured by the father's covenant for the benefit of the son, his wife and children: *Wheeler v. Humphreys*, (1898) A. C. 506, H. L., affirming C. A., (1897) 1 Ch. 325, *sub nom. Re Cosier*.

A hotchpot clause contained in an appointment may be valid although the effect of it may be to benefit persons who were not objects of the power: *Re Buckley's Trusts*, W. N. (93) 95.

Life interests must be brought into hotchpot, and the value must be calculated not by reference to the duration of the interests, but by an actuarial valuation of them when they first took effect, e.g., at the death of the settlor: *Re Heathcote, Trench v. H.*, W. N. (91) 10, *v. sup.* p. 1512, and Form 6, p. 1733.

For form of schedule to order bringing advances into hotchpot, *v. sup.* p. 221.

ADEMPMENT AND SATISFACTION.

The doctrine of ademption (where the will precedes the settlement) and satisfaction (where the settlement precedes the gift or legacy) is founded upon the leaning of the Court against double portions in the endeavour to secure equality of division between younger children, and that no child shall be unduly favoured to the prejudice of the others; and does not arise in the case of provisions made by persons neither parents nor standing *in loco parentis*: *Montefiore v. Guedalla*, 1 D. F. & J. 93; *Cooper v. C.*, 8 Ch. 813; *Exp. Pye*, 2 L. C. Eq. 366.

The rule is easier of application where the will precedes the settlement than where the will, from being subsequent to the settlement, raises a question of testamentary intention: *Cooper v. Macdonald*, 16 Eq. 258; *Chichester v. Coventry*, L. R. 2 H. L. 71.

Ademption.—Legacies given by a father, or person *in loco parentis*, will, subject to certain qualifications, be presumed to have been *ademed* (i.e., cancelled, or taken out of the will) by his subsequent gifts or provisions for the child: *Fowkes v. Pascoe*, 10 Ch. 343; *E. Durham v. Wharton*, 3 Cl. & F. 146; *Trimmer v. Bayne*, 7 Ves. 515;

—either completely or *pro tanto*, as the provision is greater, equal to, or less than the legacy: *Pym v. Lockyer*, 5 My. & Cr. 34; *Dawson v. D.*, 4 Eq. 504; *Nevin v. Drysdale*, *Ib.* 517.

The presumption, as in the case of satisfaction, applies only to fathers, or persons who have placed themselves *in loco parentis*, not in the case of a

stranger, unless the subsequent advance is proved to be for the very purpose of satisfying the legacy: *Exp. Pye*, 18 Ves. 190; 2 L. C. Eq. 366; *Trimmer v. Bayne*, *sup.*; and not, it would seem, to a mother: *Re Ashton, Ingram v. Papillon*, (1897) 2 Ch. 574 (reversed on appeal on other grounds, (1898) 1 Ch. 142, C. A.); nor to grandparents, from the mere fact of their making a provision for their grandchildren: *Lyddon v. Ellison*, 19 Beav. 365; and see *Watson v. W.*, 33 Beav. 574; and is not to be extended to every case of gift made after the will to members of a family whom the testator has selected as his residuary legatees: *Fowkes v. Pascoe*, 10 Ch. 343.

To raise the presumption of ademption, it is not essential that the subsequent gift shall have been made upon the marriage of the donee, or any other special occasion: *Leighton v. L.*, 18 Eq. 458.

Formerly, a gift of residue was distinguished from a legacy, and held not to be adeemed by a portion, the one being uncertain in amount, the other *ex vi termini* certain: *Farnham v. Phillips*, 2 Atk. 215; *Freemantle v. Bankes*, 5 Ves. 79.

But it is now settled that a gift of a share of residue may be adeemed by a portion, and conversely that a gift of residue operates as a satisfaction of an engagement to provide a portion: *Thynne v. E. Glengall*, 2 H. L. C. 131; *Dawson v. D.*, 4 Eq. 504; *Montefiore v. Guedalla*, 1 D. F. & J. 93; *Stevenson v. Musson*, 17 Eq. 78.

The rule that a bequest of a share of residue will be adeemed by a subsequent advance, and that such advance must be brought into hotchpot, applies only for the benefit of testator's children *inter se*; not as between the children and other residuary legatees: *Meinertzhagen v. Walters*, 7 Ch. 670; *Re Stewart, S. v. S.*, 29 W. R. 275; 15 Ch. D. 539.

Though a gift of farming stock is *prima facie* not to be regarded as an advance, yet evidence of intention is admissible to prove that it was to be taken as in part of a share of residue: *Re Turner, T. v. T.*, 53 L. T. 379; *Grove v. E. of Salisbury*, 3 Bro. C. C. 425; *Kirk v. Eddowes*, 3 Ha. 509.

A gift of his business by a father to his son, the father retaining a benefit, may operate as an ademption *pro tanto* of a share of residue given to the son by the father's will: *Re Vickers, V. v. V.*, 37 Ch. D. 525 (distinguishing *Holmes v. H.*, 1 Bro. C. C. 535); there being nothing in the nature of such property to rebut the presumption against double portions: *S. C.*; *Bengough v. Walker*, 15 Ves. 507; *Re Lawes*, 20 Ch. D. 81.

The advances must be substantial; not merely small payments or occasional gifts: *Watson v. W.*, 33 Beav. 574; *Cooper v. C.*, 8 Ch. 813; *Peacock's Estate*, 14 Eq. 236; *Ravenscroft v. Jones*, 4 D. J. & S. 224; 32 Beav. 669; *Schofield v. Heap*, 27 Beav. 93.

Nor will a legacy to a daughter be adeemed by a gift of money to her husband, not made in consequence of any promise before marriage: *Ravenscroft v. Jones*, *sup.*

So also a gift of residue to a daughter, with remainder to her children, will not be adeemed by a payment to the husband absolutely as part of her marriage portion: *Cooper v. Macdonald*, 16 Eq. 258.

And the presumption may be rebutted by evidence of intention on the part of the parent to confer a benefit on the son for services rendered; *e.g.*, by working as partner in the father's business: *Re Lacon, L. v. L.*, (1891) 2 Ch. 482, C. A.

A gift to a child, even by a father, will not adeem by anticipation a legacy to the child by the father's subsequent will: *Taylor v. Cartwright*, 14 Eq. 167; unless there be a contract by the child, or stipulation in which he has acquiesced, that it shall have that effect: *Upton v. Prince*, Ca. temp. Tal. 71; and see *Smith v. Crabtree*, 6 Ch. D. 591.

Satisfaction.—When a parent or person *in loco parentis* has engaged, on the marriage of a child, or some other occasion, to make a provision for its benefit, and afterwards provides for that child by will, the presumption arises that the gift by will is intended *pro tanto* as a satisfaction for extinguishment of the prior engagement: *Ld. Chichester v. Coventry*, L. R. 2 H. L. 71; 2 D. J. & S. 336; *L. Thynne v. E. Glengall*, 2 H. L. C. 131; *Lewin, Trusts*, 461 *et seq.*; 2 L. C. Eq. 366.

Although this presumption against double portions does not exist in Scotch law (*Kippen v. Darby*, 3 Macq. H. L. 203), legacies given by an English will

have been held a satisfaction of portions provided by a Scotch marriage contract: *Campbell v. C.*, 1 Eq. 383.

The following circumstances have been relied on as rebutting the presumption of satisfaction:—

(a.) A direction in the will for payment of debts: *Chichester v. Coventry*, L. R. 2 H. L. 71; 2 D. J. & S. 343; *Paget v. Grenfell*, 6 Eq. 7; *Glover v. Hartcup*, 34 Beav. 74; though it seems that such a direction is not *per se*, sufficient: *Edmunds v. Low*, 3 K. & J. 318; and the fact that a devise was made, “subject to charges and incumbrances,” did not prevent it from operating in satisfaction of an annuity charged by a previous settlement: *Montagu v. E. of Sandwich*, 32 Ch. D. 525, C. A.

(b.) Want of identity in the amount or subject-matter of gift, or in the nature of the two provisions: *Re Tussaud*, 26 W. R. 874; 9 Ch. D. 363; *Cole v. Willard*, 25 Beav. 568; *Smyth v. Johnston*, 31 L. T. 876; *Eastwood v. Vinks*, 2 P. Wms. 613; e.g., a difference in the times of payment of two anns: *Re Dowse, D. v. Glass*, 50 L. J. Ch. 285; *Re Horlock*, (1895) 1 Ch. 516; or in the persons to be benefited under the respective instruments: *M'Carogher v. Whieldon*, 3 Eq. 326; *Smith v. S.*, 3 Giff. 263; and see *Fairer v. Park*, 3 Ch. D. 309, 313; but slight differences between the limitations of the will and of the settlement (e.g., different powers of investment, different trustees, and variation in the power of appointment: see *Romaine v. Onslow*, 24 W. R. 899) will not, if the two provisions are substantially of the same nature, negative the general rule: *Russell v. St. Aubyn*, 2 Ch. D. 398; *Weall v. Rice*, 2 Russ. & M. 251; *Thynne v. E. Glengall*, 2 H. L. C. 131; *Atkinson v. Littlewood*, 18 Eq. 595; *Mayd v. Field*, 3 Ch. D. 587; *Bethell v. Abraham*, *Id.* 590, n.; and a gift to a son by taking him into partnership may be a satisfaction of a previous bond by the father in his favour: *Re Lawes, L. v. L.*, 20 Ch. D. 81, C. A.; or of a bequest of a share of residue by the father's will: *Re Vickers, V. v. V.*, 37 Ch. D. 525; and a covenant on a son's marriage to pay him an annuity may be satisfied by a subsequent legacy given by the father's will: *Montagu v. E. of Sandwich*, 32 Ch. D. 525, C. A.

(c.) The fact that the two documents were contemporaneous: *Horlock v. Wiggins, W. v. H.*, 39 Ch. D. 142.

And in the case of a debt, as distinguished from a portion, the presumption of satisfaction is more easily negatived: *Thynne v. E. Glengall*, 2 H. L. C. 131; and see *Bennett v. Houldsworth*, 46 L. J. Ch. 646; 6 Ch. D. 671.

Parol evidence of intention is admissible to rebut the presumption against double portions both in the case of a deed and a will: *Re Tussaud, T. v. T.*, 9 Ch. D. 363.

For form of inquiry as to advances under sect. 5 of the Statute of Distribution, *v. sup.* p. 1472.

ADVANCEMENT.

Sums given for the purpose of setting up a child in a profession or business (e.g., admission fees to an Inn of Court, premiums and payments on being articulated to a solr, and (before 1871) the money paid for purchase of a commission in the army), or given on his marriage, are advances by portion within the meaning of the Statute of Distribution (22 & 23 Car. 2, c. 10), s. 5, and must be accounted for; but mere casual payments, made at odd times without the definite purpose of establishing the child in life, are not advancements, even though necessary to maintain him in the position acquired by a previous advancement: see *Taylor v. T.*, 20 Eq. 155; *Boyd v. B.*, 4 Eq. 305; and see *Re Peacock*, 14 Eq. 236; *Watson v. W.*, 33 Beav. 574.

A gift to a child by annuity charged on land is not an advance by portion within the Statute of Distribution: *Chantrell v. C.*, 37 L. T. 220.

A gift by a father to enable a son to pay a debt was, on the death of the father intestate, held (dissenting from *Taylor v. T.*) to be an “advancement by portion” within sect. 5 of the Statute of Distribution: *Re Blockley, B. v. B.*, 29 Ch. D. 250.

Annuities paid by a father to his daughters pursuant to his covenant in a separation deed are not advancements, but allowances in the nature of maintenance: *Hatfield v. Minet*, 8 Ch. D. 136, C. A.

Sums transferred by a parent into the name of a child will, in the absence of rebutting evidence, be presumed to be advancements, and not to create a

resulting trust for the transferor: *Sayre v. Hughes*, 5 Eq. 376; *Hepworth v. H.*, 11 Eq. 10; *Fowkes v. Pascoe*, 10 Ch. 343; and this presumption is not limited to the case of father and son, but arises in the case of grandfather and grandchild, mother and child or son-in-law, aunt and nephew, and illegitimate children of the person making the advance, though not, it seems, as in the case of double portions, whenever the person advancing the money has placed himself *in loco parentis*: see *Tucker v. Burrow*, 2 H. & M. 515, 526; *Batstone v. Salter*, 10 Ch. 431; 19 Eq. 250; *Dyer v. D.*, 2 Cox, 95; 1 Watk. Cop. 221; 2 L. C. Eq. 803; Lewin, Trusts, 189, 190; but see *Bennet v. B.*, 10 Ch. D. 474 (following *Re De Vieme*, 2 D. J. & S. 17), that in the case of a mother the same presumption as in the case of a father does not exist.

In a settlement made by will a power of advancing the capital of a fund given for the "benefit and advancement in the world" of a person entitled to the income for life was interpreted to mean any purpose coming within the term "benefit": *Re Brittlebank*, *Coates v. B.*, 30 W. R. 99.

Where a father paid a sum to assist his son in purchasing a business, and joined with him in giving a promissory note to secure the balance, the case was held not one of advancement, but merely of suretyship: *Re Whitehouse*, *W. v. Edwards*, 37 Ch. D. 683.

Under a power to trustees to apply a fund in or towards the preferment or advancement of A. (an adult), or otherwise for his benefit, an application of the fund in payment of A.'s debts has been sanctioned: *Louthier v. Bentinck*, 19 Eq. 166; and see *Roper-Curzon v. R.*, 11 Eq. 452;

— and under a similar power money has been applied in establishing a married daughter in business on a covenant by the husband that the business shall be her separate property: *Talbot v. Marshfield*, 3 Ch. 622 (reversing *S. C.*, 4 Eq. 661);

— and in establishing a daughter's husband in business on his giving security for restoring the fund: *Kershaw's Trusts*, 6 Eq. 322; but not in paying the debts of a daughter's husband: *Talbot v. Marshfield*, *sup.*; and see *Molyneux v. Fletcher*, (1898) 1 Q. B. 648;

— or part of the trust funds may be paid to a daughter on her marriage: *Lloyd v. Cocker*, 27 Beav. 645.

A power under a will to expend money "for making a further provision for the advancement of A.," in purchasing a commission or obtaining his promotion in the army, has been distinguished from a similar direction in a settlement; the purpose having in both cases failed by the subsequent abolition of purchase in the army. Under the will, A. was held entitled to the money absolutely: *Palmer v. Flower*, 13 Eq. 251; under the settlement, the gift for his benefit failed entirely: *Re Ward*, 7 Ch. 727; and see *Re De Crespigny*, *De C. v. De C.*, W. N. (86) 24; *Simpson on Infants*, 328, 329, and cases there cited, showing that the distinction is to be drawn between cases where there is a discretion to apply money in a particular mode, which fails, and those where the gift is for the benefit of the legatee, and the discretion is merely as to the mode of its application.

Where the power of advancement has been improperly exercised, and the money lost, the trustee will be held responsible: *Simpson v. Brown*, 13 W. R. 312; 11 L. T. 593; *e.g.*, where the advancement was made with knowledge that the money would be used to pay a debt due from the husband of the *c. q. t.* to one of the trustees: *Molyneux v. Fletcher*, (1898) 1 Q. B. 648.

The Court has power to consent, on behalf of a lunatic husband, to the exercise of a power of advancement exercisable by trustees with consent of husband and wife: *Re Nevill*, 31 Ch. D. 161, C. A.; and see the Lunacy Act, 1890, ss. 120, 128.

An advancement to be made with consent of the tenant for life could not be made after the tenant for life had mortgaged his life interest, as he had thereby lost his power to consent: *Nottidge v. Green*, 33 L. T. 220.

And where the tenant for life was bankrupt, the power could only be exercised with the consent of his trustee in bankruptcy, acting under the directions of the Court in the bankruptcy: *Re Cooper*, *C. v. Slight*, 27 Ch. D. 265.

Where the settlement provides that an advancement by the parent in his lifetime shall be considered in part or full satisfaction of the portion, a gift of a share of residue by the parent is not an advancement within the provision: *Cooper v. C.*, 8 Ch. 813; nor is a share of a parent's property

under his intestacy a satisfaction of a portion: *Twisden v. T.*, 9 Ves. 413.

Semble, a power to make an advance out of a "presumptive" share cannot be exercised after the share has become vested: *Molyneux v. Fletcher*, *sup.*, per Kennedy, J.

Subsequent letters will not control a direction by will that sums advanced to sons are to be brought into hotchpot: *Smith v. Conder*, 9 Ch. D. 170.

As to bringing advances into hotchpot, *v. sup.* pp. 1511, 1512.

A direction by a will that an advance shall be charged against a legatee may be effectual, though the amount of the advance is erroneously stated: *Re Aird*, A. v. *Quick*, 12 Ch. D. 291.

(III.) EXECUTION OF POWERS.

1. *Defect in Execution of Power supplied.*

DECLARE that the second codicil to the will of A., dated &c. (*before 1 V. c. 26*), in the pleadings mentioned, is, notwithstanding the defect in the execution thereof, a valid execution of the power of appointment in favour of his children by H., his wife, given to him by the will of the testator W.; and that under such codicil the Plt, as the exor of Harriet M., in the said codicil named, is entitled to one-third part of the £— in the pleadings mentioned, and to the interest on such one-third part which has accrued since the death of the said Harriet M., subject to the payment thereof of one-third part of the costs hereinafter directed; And Declare that, according to the true construction of the said codicil, a joint tenancy was created between G., J., and M., in the said codicil named; And that the Defts, the exors of the will of the said J., who survived the said G. and M., are entitled to the remaining two-third parts which have accrued since the death of the said Harriet M., subject to the payment thereof of two-third parts of the said costs.—Directions for taxation and payment of costs in the above proportions.—*Morse v. Martin*, M. R., 28 Feb. 1865, B. 518; 34 Beav. 500.

For declaration that the will of B. was, notwithstanding the defect in the execution thereof, a valid execution of the power of appointment given to her by the will of A., and that under such will of B. her daughters, the Defts &c., were entitled absolutely to the fund in Court, see *Lucena v. Barnewall*, M. R., 26 April, 1842, B. 847; S. C., 5 Beav. 249.

For order giving effect, as an execution of a power under marriage articles, to a will not expressly referring to the articles, but purporting to be in exercise of a power of appointment generally, so as to make the appointment conformable to the terms of the articles, see *Bruce v. B.*, M. R., 17 Jan. 1871, A. 107; S. C., 11 Eq. 371.

2. *Defective Execution, by Document not sealed and delivered, of a Power to appoint by an Instrument to be sealed and delivered, &c., aided.*

DECLARE that the document in the pleadings mentioned, dated &c., and signed by M. K. (*donee of the power*), operated as an effectual appointment under the indenture, dated &c., in the pleadings

mentioned, of the property of M. K. comprised in that indenture, but that it did not pass the money deposited by (M. K.) the intestate in the iron safe, as in the pleadings mentioned; Let the following &c.—Usual inquiries, accounts, and directions for the admon of the intestate M. K.'s personal estate.—*Kennard v. K.*, M. R., 16 July, 1872, A. 2169; affirmed, L. JJ., 12 Dec. 1872, A. 3108; *S. C.*, 8 Ch. 227.

For declaration that a contract to sell to a railway co. by the donee of a general power of appointment, who died before execution of the conveyance, operated as an execution of the power in equity, see *Re Dyke's Estate*, M. R., 9 March, 1869, A. 703; 7 Eq. 337.

3. *Appointment set aside as a Fraud on Power.*

DECLARE, without prejudice to any question as to any further exercise of the power of appointment contained in the indenture of settlement dated &c. in the pleadings mentioned, that the two appointments in the pleadings mentioned, both dated &c., the one being of the annuity of £—, created by the indenture dated &c. in the pleadings mentioned, and the other being of the dividends, interest, and annual produce of the capital trust moneys, stocks, funds, and securities for the time being subject to the trusts of the said indenture of settlement, dated &c., are void; And that the Plt and the Deft B. are entitled in equal shares to the said annuity of £—, and to the dividends, interest, and annual produce of the said capital trust moneys, stocks, funds, and securities from the said — day of —, 1864; And it appearing that the whole of the said annuity and of the said dividends, interest, and annual produce has been paid to the said Deft B. since the — day of —, 1864, and that one moiety thereof has been invested by her, Let an account be taken of the moneys so paid and of the income produced by the investment of one moiety.—Directions for payment by Deft B., within one month after the certificate, to Plt.—*Topham v. Duke of Portland*, V.-C. J., 7 June, 1869, B. 1579; *S. C.*, on appeal, 5 Ch. 40.

4. *Declaration that Married Woman absolutely entitled on releasing Power.*

DECLARE that upon the true construction of the testator's will, and in the events which have happened, each of the Plts J. S. T. and E. M. S. will, on releasing their power of appointment under the said will and accepting a conveyance of the equity of redemption of the testator's freehold property situate at &c., be respectively absolutely entitled to a moiety of the testator's residuary estate and the estate, stocks, funds, securities and property representing the same.—See *Re Davenport, Turner v. King*, Kekewich, J., 15 Dec. 1894; A. 01059; (1895) 1 Ch. 361.

5. *Declaration as to Succession Duty—Appointment of Stock sufficient to raise a “Nett” Sum—Free from Duty.*

UPON motion &c., by counsel for the Plt by way of appeal from the judgment dated &c., And upon hearing &c., And upon reading &c., Vary the said judgment by omitting therefrom the declaration therein contained (which is set forth in the Schedule hereto), and in lieu thereof Declare that the duty on the sums of £—, £—, and £— (*the “nett” sums appointed*) in the said judgment mentioned and also the brokerage and other costs of raising the said sums are to be paid out of the residue appointed by E. A. S., widow in favour of H. E. S., in which the Defts The B. H. Ld., claim to be interested.

SCHEDULE.

DECLARE that the sums of £—, £—, and £— in the summons mentioned are not free from duty, but that duty on the said sums is payable thereout, but that brokerage and other costs of raising such sums are not payable out of the said sums, but out of the remaining trust funds subject to the said settlement.

See *Re Saunders, S. v. Gore*, C. A., 18 Nov. 1897, B. 4166; (1898) 1 Ch. 17, C. A.

6. *Declaration as to Limitation failing for want of Words of Inheritance.*

THIS special case stated &c. [Form 1, p. 365, Vol. I.], Declare that the appointment purported to be made by the deed poll dated &c., in the special case mentioned, “To the use of the said J. D. S. the younger, W. H. S. and M. E. S., and all other the child and children of the said J. D. S. the elder, who shall happen to be living at the decease of the survivor of the said D. S. and A. S. and to the heirs and assigns of such of them as shall attain the age of twenty-five years equally as tenants in common and not as joint tenants,” was not wholly invalid, but that the same was to the extent next hereinafter appearing a valid appointment and operated to create estates in the property the subject of this action in the following manner, that is to say: in J. D. S. the younger, W. H. S., the Defts M. E. D., A. P. H., L. J. W., F. J. S., and the Deft E. E. H. as tenants in common during their respective lives, with remainder as to one undivided seventh share to each of them, the said J. D. S. the younger, the said W. H. S. and the Deft M. E. D. in fee simple, and as to the remaining four undivided seventh shares to the said J. D. S. the younger, the said W. H. S., and the Deft M. E. D. as tenants in common in fee simple in equal thirds, and that subject to the several mortgages or incumbrances affecting the respective shares or interests hereinafter mentioned, each of them the Deft E. S. as devisee under the said J. D. S. the younger, the Deft F. E. S. as devisee under the said W. H. S., and the Deft M. E. D. is now entitled in fee simple in possession to one

equal seventh share and one equal third share of another equal seventh share in the said property; and that each of them the Defts A. P. H., L. J. W. and E. E. H. is now entitled in possession for her life to one equal seventh share in the said property; and that the Defts E. S., F. E. S. and M. E. D. are entitled as tenants in common in fee simple in equal thirds to the said three last-mentioned seventh shares in remainder expectant upon the deaths of the Defts A. P. H., L. J. W. and E. E. H. respectively, and that the Plt takes no interest in the said property under the said deed poll or the deeds dated &c., respectively in the special case mentioned; And this Court being of opinion that, having regard to the foregoing declaration, questions three and four submitted do not require to be decided; And all parties by their counsel so desiring, stay all further proceedings.—See *Symes v. S.*, North, J., 21 Dec. 1895, B. 4347; (1896) 1 Ch. 272.

For the case on former occasions, involving the same question, see 31 Beav. 525; 1 D. J. & S. 517; 11 H. L. C. 32.

NOTES.

Extinguishment of Power.—A power in a tenant for life to sell or consent to a sale, or to grant leases, is not extinguished by his bankruptcy, or by the alienation of his life estate, and may still be exercised with the assent of the assignees or alienee: *Alexander v. Mills*, 6 Ch. 124; *Holdsworth v. Goose*, 29 Beav. 111; *Eisdale v. Hammersley*, 31 Beav. 255; *Simpson v. Bathurst*, 5 Ch. 193; *Earl of Lonsdale v. Crawford*, (1900) 2 Ch. 687; without which a title cannot be made: *Re Bedingfield and Herring*, (1893) 2 Ch. 332; nor is a power of sale and exchange barred by a disentailing deed: *Hill v. Pritchard*, Kay, 394; *Re Wright and Marshall*, 28 Ch. D. 93.

And a power of advancement may be exercised with the consent of the trustee in bankruptcy acting under the direction of the Court: *Re Cooper*, C. v. *Slight*, 27 Ch. D. 565.

In *Hardaker v. Moorhouse*, 26 Ch. D. 417, it was held that a power of appointing new trustees could be exercised by the donee after assigning his interest without the assignee's concurrence; but see Lewin, 790; Sugd. Pow. 65, 895; Farwell, Pow. 15; *Re Bedingfield and Herring*, (1893) 2 Ch. 332, where it was held that a good title, under a trust for sale with consent of tenant for life, could not be made unless the consent of his incumbrancers and trustee in bankruptcy was obtained, as well as that of himself.

A power of sale is not extinguished until all the trusts of the settlement have been exhausted, and the estate vests absolutely: see *Brown's Settlement*, 10 Eq. 349; *Tait v. Swinstead*, 26 Beav. 525.

And although all the beneficiaries are *sui juris* the power may still be exercisable if an intention to that effect appears, and no rule against perpetuities is infringed: *Re Cotton's Trustees and School Board for London*, 19 Ch. D. 624; and so in case of a trust for sale, unless all agree to take as realty: *Biggs v. Peacock*, 22 Ch. D. 284, C. A.; *Re Tweedie and Miles*, 27 Ch. D. 315; and a power of sale given for the purposes of division may be exercised within a reasonable time after the death of the tenant for life, though the limitations have become absolute in persons *sui juris*: *Peters v. Lewis and East Grinstead Ry. Co.*, 18 Ch. D. 429, C. A. (but see *S. C.*, 16 Ch. D. 703); and see *Re Dyson and Fowke*, (1896) 2 Ch. 720; *Re Lord Sudeley and Baines*, (1894) 1 Ch. 334; and Lewin, 720.

A power of leasing vested in a tenant for life being a power of management, the Court will not readily adopt a construction which would make the donee lose the power on alienation: *Earl of Lonsdale v. Crawford*, (1900) 2 Ch. 687; and words referring to "possession" by the donee will be construed rather as referring to the possession of successive takers than to unincumbered bene-

ficial enjoyment: *S. C.*; *Long v. Rankin*, Sugd. on Powers, 8th ed. App. 895. As to powers and appointments thereunder being void for remoteness, *v. sup.* pp. 1607, 1608; *Lewin*, 104.

Fraud on Power.—A person having a power must execute it *bonâ fide* for the end designed; otherwise it is corrupt and void: *Aleyn v. Belchier*, 2 L. C. Eq. 308.

Collateral advantages to persons not objects of the power, or an attempt to exceed the limitations of the power by benefiting one of the objects, or the appointor, to the exclusion, or at the cost, of the other, will render an appointment invalid: *Topham v. Duke of Portland*, 5 Ch. 40; 1 D. J. & S. 517; 11 H. L. C. 32; *Marsden's Trust*, 4 Drew. 594; *Wellesley v. E. Mornington*, 2 K. & J. 143; *D'Abbadie v. Bizoin*, 1 R. 5 Eq. 205.

Thus, an appointment of a jointure upon a corrupt bargain with the jointress to provide thereout for a stranger, the appointor having no intention of benefitting the jointress, was void altogether, and not merely *pro tanto*: *Whelan v. Palmer*, 39 Ch. D. 648; and so an appointment to children on condition that they should purchase the appointor's life interest out of the appointed fund: *Duggan v. D.*, 7 L. R. Ir. 152.

But an appointment is not necessarily void because the appointor has, without corrupt or fraudulent intent, reserved to himself a remote contingent interest: *Cooper v. C.*, 5 Ch. 203; *Roach v. Trood*, 3 Ch. D. 429; *Askham v. Barker*, 17 Beav. 37; provided the whole intent and reason of the transaction was not the obtaining an exclusive advantage to himself: *Huish's Charity*, 10 Eq. 5; and see *Bruce v. B.*, 11 Eq. 371, where effect was given to a will as an execution of a power of appointment by deed, limiting the appointment to the objects and extent sanctioned by the deed containing the power: *Pares v. P.*, 33 L. J. Ch. 215; 10 Jur. N. S. 90; 12 W. R. 237.

And though appointments vesting portions in children of tender years, who die soon after, are viewed with suspicion, yet there must be some evidence of improper motive or object to induce the Court to set such an appointment aside or treat it as invalid: *Henty v. Wrey*, 21 Ch. D. 332, 359, C. A.; 19 Ch. D. 492; and a power to charge estates with a sum for interest on the expectant portions of the appointor's children may be validly exercised by an appointment of interest in favour of the children to be made payable to him as their guardian notwithstanding that he has means to support them: *Re De Hoghton, De H. v. De H.*, (1896) 2 Ch. 385.

So also an appointment to persons not objects, in conjunction with, or in succession to, persons who are objects of the power, is not of itself sufficient to invalidate the appointment (see *Roach v. Trood*, 3 Ch. D. 429, 440), which may be rectified if it has been made in error (*Daniel v. Arkwright*, 2 H. & M. 95), or if the invalid appointment (to strangers) is separable from the valid appointment (to objects of the power), in which case the appointment will be good to the extent warranted by the terms of the power (*Alexander v. A.*, 2 Vez. 640; *Rowley v. R.*, Kay, 242; *Re Farncombe*, 47 L. J. Ch. 328; *Viant v. Cooper*, 76 L. T. 768); provided there has been no fraud on the power (*Agassiz v. Squire*, 18 Beav. 431), or bargain or prior understanding by which interests under the appointment are reserved, directly or indirectly, to strangers (*Birley v. B.*, 25 Beav. 299; *Pryor v. P.*, 2 D. J. & S. 205; 11 W. R. 873; 12 Ib. 780; *Whelan v. Palmer*, 39 Ch. D. 648; *Re Crawshaw, C. v. C.*, 43 Ch. D. 615), and provided the whole transaction can be regarded as first an appointment to, and then a settlement by, an object of the power: see *White v. St. Barbe*, 1 V. & B. 399; *Fitzroy v. D. of Richmond*, 27 Beav. 190; *Pryor v. P.*, *sup.*; *Coffin v. Cooper*, 2 Dr. & S. 365; *Re Crawshaw, C. v. C.*, 43 Ch. D. 615.

Nor, under a non-exclusive power, is an appointment to the objects with an ultimate gift over to the survivor invalid: *Re Capon's Trusts*, 10 Ch. D. 484.

An appointment by will is not necessarily void because the appointor has entered into a bond to make such appointment: *Palmer v. Locke*, 15 Ch. D. 294, C. A. (and whether such a bond can have validity, *quære*: *S. C.*); and the mere existence of an antecedent contract between appointor and appointee for a re-settlement conferring benefits on a stranger will not invalidate the appointment, unless such contract was the reason inducing it: *Re Turner's Settled Estates*, 28 Ch. D. 205, C. A.

And an appointment under a general testamentary power, coupled with a

covenant not to revoke the will, was upheld: *Robinson v. Ommaney*, 21 Ch. D. 780.

A will being an ambulatory instrument, an appointment by will may become fraudulent and void by reason of a subsequent improper bargain involving a threat to revoke the will if the bargain is not carried out: *Re Kirwan's Trusts*, 25 Ch. D. 373.

Although any personal benefit to the donee is a fraud on the power, the onus of proof lies on the person impeaching the transaction: *Askham v. Barker*, 17 Beav. 37.

If, however, after an appointment has been set aside as fraudulent, a new appointment is made to the same person, the onus of proving that such new appointment is valid, and not tainted with the same fraudulent purpose, lies on the appointee: *Topham v. D. of Portland*, 5 Ch. 40; *Hutchins v. H.*, 1 R. 10 Eq. 453; and see *Humphrey v. Olver*, 5 Jur. N. S. 946; 7 W. R. 334; 28 L. J. Ch. 400.

In the absence of illegal purpose or improper motive, an appointment otherwise valid may be upheld by rejecting an invalid addition, or a condition which is not warranted by the power, e.g., a restraint on anticipation: *Fry v. Capper*, Kay, 163; *Teague's Settlement*, 10 Eq. 564; *Cunyngham's Settlement*, 11 Eq. 324; *Watt v. Creyke*, 3 Sm. & G. 362; *Whitby v. Mitchell*, 42 Ch. D. 494; *secus, semble*, where the condition being the sole motive for the appointment cannot be severed from it: *Re Perkins, P. v. Bagot*, (1893) 1 Ch. 283; and a limitation over on a contingency or act to be done by the appointee is good: *Stroud v. Norman*, Kay, 213; and see *Carver v. Richards*, 1 D. F. & J. 548, 566; 27 Beav. 488; *Morgan v. Gronow*, 16 Eq. 1.

Where a c. g. t. by means of a fraudulent appointment received the surrender value of a policy belonging to the trust, his estate was liable not merely for the sum so received, but for the sum which would have been received if the policy had been kept on foot: *Re Deane, Bridger v. D.*, 42 Ch. D. 9, C. A.

Release of Power.—By the Conveyancing Act, 1881 (44 & 45 V. c. 41), s. 52, a person to whom any power, whether coupled with an interest or not, is given may by deed release or contract not to exercise the power, whether created by an instrument coming into operation before or after the Act. But this does not apply to the case of a trustee who has a power coupled with a duty: *Re Eyre, E. v. E.*, 49 L. T. 259; and see *Saul v. Pattinson*, 55 L. J. Ch. 831; 54 L. T. 670; 34 W. R. 562; *Oceanic Steam Navigation v. Sutherland*, 16 Ch. D. 30, C. A. By virtue of this enactment a married woman may now by deed unacknowledged release her power over any property whether real or personal, and whether in possession or reversion, and whether she is restrained from anticipation or not: *Re Chisholm's Settlement*, (1901) 2 Ch. 82, citing *Farwell on Powers*, 2nd ed. p. 18.

The doctrines applicable to the fraudulent exercise of a power do not apply to the release of a power not coupled with a duty, and the release of a power by a tenant for life is valid, though the effect of it is to enable him, by surrendering his life estate, to obtain a transfer of his deceased child's share of the fund, or mortgage it for his own benefit: *Re Radcliffe, R. v. Bewes*, (1892) 1 Ch. (C. A.) 227 (reversing *S. C.*, (1891) 2 Ch. 66, and not following *Cunynghame v. Thurlow*, 1 R. & M. 436); *Re Somes, Smith v. S.*, (1896), 1 Ch. 250; and a release of a general power of appointment by a female tenant for life married since the Married Women's Property Act, 1882, and to whose exors, admors, or assigns the property is limited in default of appointment, will vest the absolute interest in her: *Re Davenport*, (1895) 1 Ch. 361, Form 4, p. 1742, *sup.*

In general, any dealing by the donee inconsistent with the exercise of the power (e.g., by concurring in an appointment though not as appointor *eo nomine*) operates as a release: *Foakes v. Jackson*, (1900) 1 Ch. 807.

Defective, Excessive, or Irregular Appointments.—In relieving against a defective execution of a power, the test is whether the intention to execute the power is sufficiently indicated by the informal instrument: see *Kennard v. K.*, 8 Ch. 227, Form 2, *sup.* p. 1741; *Garth v. Townsend*, 7 Eq. 220; *Proby v. Landor*, 28 Beav. 504; *Hawke v. H.*, 26 W. R. 93; *Re Kirwan's Trusts*, 25 Ch. D. 373, where it was held that an unattested codicil executed abroad, being intended as a testamentary instrument, could not be treated as

an imperfect appointment by deed, nor, in view of sect. 10 of the Wills Act, upheld as testamentary under 24 & 25 V. c. 114 (Wills Act, 1861); and this decision has been recently followed: *Hummel v. H.*, (1898) 1 Ch. 642; but see *Pouey v. Hordern*, (1900) 1 Ch. 492; *Re Price, Tomlin v. Latter*, (1900) 1 Ch. 442, *sup.* p. 1415.

If a power to appoint by will requires a particular formality (*e.g.*, attestation by two witnesses), a will not complying with the requirement cannot operate as an appointment, although valid as a will by the law of the domicile of the testator: *Barretto v. Young*, (1900) 2 Ch. 339.

For the cases in which a defective execution of a power will be aided in Equity, and for the nature and extent of this jurisdiction, see *Sugd. Pow.* 532, &c.; *Farwell*, 259, &c.; *Tollet v. T.*, 2 L. C. Eq. 289; and that the Court will not treat a covenant to execute a power as being a defective execution, see *Re Anstis, Chetwynd v. Morgan*, 31 Ch. D. 596, C. A.; explaining *Affleck v. A.*, 3 Sm. & G. 394.

Under a power to two and the survivor, a joint appointment may reserve a power of revocation to the survivor: *Dixon v. Pyner*, 55 L. J. Ch. 566; *Re Harding, Rogers v. H.*, (1894) 3 Ch. 315, C. A.; *secus*, where the power is joint: *Burnaby v. Baillie*, 42 Ch. D. 282.

Under a special power to appoint amongst children an appointment of shares with a clause of forfeiture on change of religion is not invalid on the ground of public policy: *Hodgson v. Halford*, 11 Ch. D. 959; *Wainwright v. Miller*, (1897) 2 Ch. 255; but as to children born after the creation of the power the clause was held void for remoteness: *Hodgson v. Halford, sup.*; but see *Wainwright v. Miller, sup.*, apparently holding the contrary; see, however, *Re Gage, Hill v. G.*, (1898) 1 Ch. 498.

Where the donee of a power expressly refrained from exercising it in order that the property might devolve in a manner which she indicated, which was not in accordance with the gift over in default of appointment, the property nevertheless went as unappointed: *Re Jack, J. v. J.*, (1899) 1 Ch. 374.

Where the donee of a power makes successive appointments to different persons at different times, the appointees *inter se* rank in order of date: *Re Lord Annaly*, 23 L. R. Ir. 481; *Stokes v. Bridgman*, 47 L. J. Ch. 759; *Gilbert v. Whitfield*, 52 L. J. Ch. 210; 43 L. T. 383; the principle of *Page v. Leapingwell*, 18 Ves. 463, whereby appointments out of a fund are regarded as gifts of aliquot portions, being applicable only where the appointments are contained in one instrument or in several instruments constituting one transaction.

If the donee of a special power appoints the fund to trustees, such trustees are not necessarily entitled to call for a transfer from the original trustees: *Busk v. Aldam*, 19 Eq. 16; *Von Brockdorff v. Malcolm*, 30 Ch. D. 172; *Lewin*; *Re Heathcote, Trench v. H.*, Form 6, *sup.* p. 1733; *Re Tysen, Knight-Bruce v. Butterworth*, (1894) 1 Ch. 56; but see *Scotney v. Lomer*, 29 Ch. D. 535; *S. C.*, 31 Ch. D. 380, C. A.; but the question must depend on the intention of the instrument creating the power: *Re Paget*, (1898) 1 Ch. 290; referring to *Kenworthy v. Bate*, 6 Ves. 793; and *Cowx v. Foster*, 1 J. & H. 30; and see *Lewin*, 840.

In Equity (though not at Law), before 1830, an appointment under a power to appoint to a class was liable to be invalidated unless a substantial, and not an "illusory," share was appointed to each object of the power: see *Sugd. Pow.* 449, 938.

By the Illusory Appointments Act, 1830 (1 W. IV. c. 46), appointments were rendered no longer invalid in Equity on the ground that an "unsubstantial, illusory, or nominal share only" was appointed to any one or more of the objects of the power, though a share, however small, was still required to be given to each of the objects of the power: *Bulteel v. Plummer*, 6 Ch. 160, 162.

As to what powers were and what were not held to be exclusive, see *Farwell*, 294, 295; *Chamberlain v. Napier*, 15 Ch. D. 614.

With regard to appointments since 30th July, 1874, it is now provided by the Powers of Appointment Act, 1874 (37 & 38 V. c. 37), that they shall no longer be invalid on the ground that any object of the power has been altogether excluded, but shall be valid and effectual notwithstanding any one or more of the objects shall not thereby, or in default of appointment, take a share or shares of the property subject to the power. Sect. 2 leaves unaffected provisions in a deed creating the power, which declare the amount of

the share from which no object shall be excluded, or from which some one object shall not be excluded.

The Act has not affected the rule whereby under a distributive power to appoint among "relations" of the appointor the class of relations is confined to next of kin: *Re Deakin, Starkey v. Eyres*, (1894) 3 Ch. 565.

A power to appoint amongst children in tail does not authorize an appointment to one for life: *Re Porter, P. v. De Quetteville*, 45 Ch. D. 179; but where the gift is to the use of the children of A. as he shall appoint, A. can appoint the legal estate to a trustee in trust to sell for the children's benefit: *Re Paget, Re Mellor, M. v. M.*, (1898) 1 Ch. 290.

Under a power to appoint among named persons, with a gift over to the same persons *nominatim* or their represes, the death of some objects during the life of the donee will not affect the power over the whole fund: *Re Warr, Cumberlege v. W.*, 37 W. R. 766.

Deficiency of Fund.—Where some appointees were rightly paid in part, and there was subsequently an unavoidable loss, the balance of the fund was held to belong to all the appointees in proportion to the unpaid amounts: *Re Bacon's Settlement, Hutton v. Anderson*, 42 Ch. D. 559.

Costs.—The costs of an action to administer the trusts of a settlement must be paid rateably out of appointed and unappointed shares: *Moore v. Dixon*, 15 Ch. D. 566; and so the account duty, in the case of a voluntary settlement, under the Customs and Inland Revenue Acts, 1881, 1889 (*v. sup.* pp. 1402 *et seq.*), must be borne by all appointees rateably, and not by the residuary appointee exclusively: *Re Croft, Deane v. C.*, (1892) 1 Ch. 652.

(IV.) SANCTIONING SALE OF LANDS OR MINERALS SEPARATELY; TRUSTEE ACT, 1893, SECT. 44, AND TRUSTEE ACT, 1893, AMENDMENT ACT, 1894, SECT. 3.

1. *Trustees empowered to sell the Surface, reserving the Minerals—and also to sell the Minerals separately.*

UPON the petition &c., Let the Petrs —, or other the trustees or trustee for the time being of the indenture of settlement dated &c., be at liberty from time to time to sell and dispose of the lands and hereditaments now subject to the uses and trusts declared by the said indenture, or any part thereof, with an exception or reservation of all or any of the minerals under the same, and of the rights or powers of or incidental to the working, getting, and carrying away of such minerals, and also to sell and dispose of all or any of the minerals under the said lands, and such rights and powers as aforesaid, separate and apart from the residue of the said lands and minerals.—*Re Earl Cawdor, V.-C. W.*, 8 July, 1864, A. 291; and see *Re Trevor-Roper, V.-C. W.*, 8 July, 1863, B. 1541; *Re Bowes' Estate Act, V.-C. W.*, 18 July, 1863, A. 1587.

For form of petition, see D. C. F. 1091.

2. *The like.*

"LET A. and B., or the survivor of them, or other the trustees or trustee of the indenture of settlement dated &c., be at liberty to exer-

cise all or any of the trusts, powers, and authorities of the said indenture, so as to dispose of the lands and hereditaments now held under and subject to the trusts of the said indenture, with an exception or reservation of the coals, mines, and minerals in and under the same, and with or without rights and powers of or incidental to the working, getting, or carrying away of such coals, mines, and minerals, and so as to dispose of all coals, mines, and minerals, with or without such rights or powers, separately from the residue of the land; and in either case without prejudice to any future exercise of the said trusts, powers, and authorities with respect to the excepted coals, mines, or minerals, or (as the case may be) the undisposed-of land."—*Re Willway's Trusts*, V.-C. W., 21 Feb. 1863, B. 364; and see *Re Brown's Trusts*, V.-C. S., 7 Nov. 1862, A. 2011; and *Re Skinner*, W. N. (96) 68, North, J., 6 June, 1896, B. 2312.

In the above forms the exercise of the power of reserving the minerals or reserving the surface is combined, but the separate reservation of either is sanctioned by the Trustee Act, 1893, s. 44.

3. *Mortgagee empowered to sell Minerals apart from the Surface.*

UPON the petition of A., B. and C. &c., and upon hearing counsel for the Petrs, Let A., his exors, admors, or assigns, or other the person or persons for the time being entitled to receive and give a discharge for all the moneys for the time being owing on the security of the said indenture dated &c., be at liberty to exercise the power of sale and other powers and authorities contained in the said indenture or any of them, so as to dispose of the coal, mines, and minerals in and under the messuages, lands, and hereditaments comprised in the said indenture, with or without rights and powers of and incidental to the working, getting, and carrying away of such coal, mines, and minerals separately from the residue of such messuages, lands, and hereditaments, and so as to dispose of the said messuages, lands, and hereditaments with or subject to an exception or reservation of the coal, mines, and minerals in and under the same, and with or without rights and powers of or incidental to the working, getting, or carrying away of such coals, mines, and minerals, and in either case without prejudice to any future exercise of the said powers and authorities with respect to the undisposed-of land or (as the case may be) the excepted coal, mines and minerals.—*Re Littlewood*, North, J., 22 Feb. 1890, B. 239.

NOTES.

By the Trustee Act, 1893 (56 & 57 V. c. 53), s. 44 (as amended by the Act of 1894), replacing the provisions of the Confirmation of Sales Act of 1862 (25 & 26 V. c. 108), "where a trustee or other person is for the time being authorized to dispose of land by way of sale, exchange, partition, or enfranchisement, the High Court may sanction his so disposing of the land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of the

minerals, or so disposing of the minerals, with or without the said rights and powers, separately from the residue of the land. Any such trustee or other person, with the said sanction previously obtained, may, unless forbidden by the instrument creating the trust or direction, from time to time, without any further application to the Court, so dispose of any such land or minerals. Nothing in this section shall derogate from any power which a trustee may have under the Settled Land Acts, 1882 to 1890, or otherwise." As to these powers, *v. inf.* pp. 1825 *et seq.*

The previous Act, which came into operation on 7th Aug. 1862, was held to include the case of mortgagees: see *Beaumont's Trusts*, 12 Eq. 86.

For observations upon the Act, which was retrospective, and seems to have arisen from the decision in *Buckley v. Howell*, 29 Beav. 546, that minerals could not be sold apart from the surface under an ordinary power of sale, see *Dart, V. & P.* 76, 1296; *Shelf. R. P. Stat.* 735 *et seq.*; and the cases collected, *Dan.* 1811; 6th ed. 2236.

The order for sale is made in general terms, without reference to any particular sale: see *Re Willway*, 32 L. J. Ch. 226, *sup.* Form 2; *Re Skinner*, W. N. (96) 68 (where a similar order was made authorizing sale of the copyhold interest in surface and minerals under settled copyhold land); *Re Wilkinson's Estate*, 13 Eq. 634; *Re Wynn*, 28 L. T. 615; 21 W. R. 695.

The beneficiaries ought to be made parties to an application under this Act: *Re Palmer's Will*, 13 Eq. 408; though entitled in remainder only: *In re Hardstaff*, W. N. (99) 256 (see, however, *Re Skinner*, W. N. (96) 68, where service on a beneficiary in remainder out of the jurisdiction, known to object to a sale, was dispensed with); and if not joined as petitioners should be served: *Re Brown's Trust Estate*, 11 W. R. 19; *Re Hardstaff, sup.*; and on a petition by mortgagees, the mortgagors should be served: *Re Hirst's Mortgage Trusts*, 45 Ch. D. 263.

Where the power of sale is exerciseable with the consent of the tenant for life, service upon the remainderman has been held unnecessary: *Re Pryce's Estates*, 10 Eq. 531; *Re Nagle's Trusts*, 6 Ch. D. 104; and see *Wynn's Estate*, 16 Eq. 237; *Re Wadsworth's Trusts*, W. N. (90) 163; 63 L. T. 217, where *Kay, J.*, dispensed with service on the beneficiaries.

And on petition by mortgagees, for a sale under the Act of the surface separately from the minerals, service of the petition on subsequent incumbrancers (see *Beaumont's Trusts*, 12 Eq. 86; 19 W. R. 767), and on the mortgagor (see *Wilkinson's Estate*, 13 Eq. 634), has been dispensed with.

SECTION IV.—TENANT FOR LIFE AND REMAINDERMAN.

(1.) TIMBER—REPAIRS—POSSESSION AND MANAGEMENT.

1. *Inquiry as to Timber cut by Tenant for Life or Trustees.*

ACCOUNTS of personalty; and inquiries as to realty—"An inquiry whether any and what timber and other trees standing and growing on the said real estate have been cut down by the Plt (*tenant for life*), or by the Defts, the trustees respectively, and what was the value thereof respectively; and whether any part thereof was ornamental timber, and in what manner the timber and other trees so cut down have been applied, sold, or disposed of; And if any part thereof has

been sold, an account of the proceeds of the sale.”—*Tucker v. Lovelidge*, V.-C. S., 8 Feb. 1858, B. 460.

2. *Inquiry as to Timber, in Suit by Tenant for Life impeachable for Waste.*

LET an inquiry be made whether there are any and what timber trees standing in the woods and plantations on the testator's estate, which are (not ornamental, and do not afford shelter to any mansion-house, and are) in a state of decay, and will not improve by standing, or the standing of which would be prejudicial to the other trees, and which it would be for the benefit of all parties interested in the estate to have felled and sold.—Adjourn &c.—*Tooker v. Annesley*, V.-C., 13 March, 1832, B. 925; 5 Sim. 237; *Tollemache v. T.*, V.-C. W., 8 March, 1842, B. 534; 1 Ha. 456, 573; *Bagot v. B.*, M. R., 8 June, 1863, A. 1479.

For inquiries as to coal and minerals as between tenant for life and remainderman, and consequent accounts and directions, see *Bagot v. B.*, Form 6, *sup.* p. 546.

And for inquiries as to ornamental timber, see *Ford v. Tynte*, Form 3, *sup.* p. 543.

For further order for sale of timber trees proper to be sold, deposits and balances to be paid to a person to be appointed to receive them and pay the charges of and incidental to the sales and of the surveys of the timber, and to pay the residue into Court, by instalments or otherwise, the purchasers giving security for the due payment; and the person appointed to receive the deposit and balances also to give security; and for taxation of costs of all parties as between solicitor and client, to be paid out of any cash in Court; the purchase-money or residue, after paying costs, to be laid out in Consols, to the credit of the cause, and the interest thereof to be paid to the tenant for life, see *Tollemache v. T.*, V.-C. W., 14 Feb. 1843, B. 381; *Tooker v. Annesley*, V.-C., 28 March, 1832, B. 1837.

3. *Declaration of Rights of Equitable Tenant for Life as to Timber, and Application of Proceeds.*

DECLARE that the Plt (*equitable tenant for life*) is, and during her widowhood will be, entitled to cut down all trees on the devised estate not being in the nature of timber, and not being trees planted or left standing for the ornament or shelter of the mansion-house on the said estates, or of the adjoining grounds, or for the protection or shelter of any sides or banks on the estate; and is, and will be, during her widowhood, also entitled to cut down all oaks, elms, ashes, and other timber-like trees, except as aforesaid, which are under twenty years of age (growth), and are proper to be cut down for the purpose of improving the growth or development of the surrounding timber or timber-like trees in the same wood or plantation; And that the Plt is, and will be, entitled to the proceeds of the sale of the trees so cut down for her absolute use and benefit; And Declare that the Plt is not entitled to

cut down any timber or timber-like trees of (the age of) twenty years growth and upwards, or, except for the purpose aforesaid, any trees under that age which, if over twenty years of age (growth), would be timber, without the leave of this Court; And that the Plt is only entitled to the income during her widowhood of the proceeds (if any) of the trees of the last preceding description, which have been or may hereafter be cut down with such leave; And Declare that the Plt is entitled during her widowhood to the dividends on the sum of £— Consols in Court to the credit of &c., "The proceeds of sale of timber." And Let the funds in Court be dealt with as directed in the Schedule hereto.—[*Add Payment Schedule, Form 9, Vol. I.*—See *Honywood v. H.*, M. R., 9 June, 1874, A. 2627; S. C., 18 Eq. 306.

4. *Investment of Proceeds of Timber cut in due course of Management by Tenant for Life impeachable for Waste—Payment of Income—Application of Capital.*

"DECLARE that the Deft J. N., as tenant for life of the farms, lands, and hereditaments comprised in the indenture of settlement, dated &c., is not dispunishable for waste."—Continue the injunction against felling timber.—"And Let W., R., and F. (*the trustees*), or any of them, be at liberty, on or before &c., to lodge the sum of £— (cash standing to their joint account in the L. and W. Bank) in Court to the credit of this action, *Lowndes v. Norton*, 1864, L. 506, 'The Timber Account,' as directed in the Lodgment and Payment Schedule hereto; And Let the Deft J. N., on or before &c., lodge in Court to the same credit the several sums of £— appearing by (the answer) of the Deft J. N. to have come to her hands in respect of the proceeds of the sale of timber, and timber-like trees, cut by her upon the farms and lands comprised in the indenture of settlement in the pleadings mentioned, dated &c., and amounting in the whole, after deducting therefrom the sum of £—, and the sum of £— for the expenses of the sales, to the sum of £—," as directed in the said schedule; And it is ordered that the funds so to be lodged be dealt with as directed in the said schedule.—Directions for taxation of costs of all parties as between solr and client; And the timber and timber-like trees so cut by the Deft J. N. not appearing to their Lordships to have been cut by her otherwise than in a due course of management of the farms, lands, and hereditaments comprised in the said indenture of settlement, dated &c., Let the interest as it accrues during the life of the Deft J. N. on the [New] Consols to be purchased as in the said schedule mentioned be, until further order, paid to the Deft J. N., as directed in the said schedule; And Let the said W., R., and F., or any of them, be at liberty to pay to the said J. N. the interest allowed by the L. and W. Bank on the said sum of £—.

LODGMET AND PAYMENT SCHEDULE.

In the High Court of Justice,
Chancery Division.

Date of Order, 8th July, 1864.

Lowndes v. Norton, 1864, L. 506.

Ledger Credit. As above. The Timber Account.

I.—Lodgment.

Particulars of Funds to be Lodged.	Person to make the Lodgment.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Cash	W. of &c., B. of &c., and F. of &c., the trustees of &c.		
Cash	Deft J. N.		

II.—Payment.

Funds to be dealt with. Funds to be lodged as above.

Particulars of Payments, Transfers, or other operations ordered.	Payees, Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.
		£ s. d.	£ s. d.
Pay costs to be taxed under this order.			
Invest residue of funds in [New] Consols.			
Pay interest as it accrues on such [New] Consols during life of payee or until further order.	Deft J. N. (<i>insert her description</i>).		

—See *Lowndes v. Norton*, L. JJ., 8 July, 1864, B. 2858; *S. C.*, 33 L. J. Ch. 583.

N.B.—This order has been redrawn to suit S. C. F. R. For further order upon the death of the tenant for life for a transfer of the invested proceeds, subject to succession duty, to the next tenant for life (*sans waste*) absolutely, see *Lowndes v. Norton*, V.-C. K., 8 June, 1877, B. 1582; *S. C.*, 6 Ch. D. 139.

5. *Application of Proceeds of a Larch Plantation which has been devastated by a Storm, in re-planting and keeping up the Plantation.*

LET the order of — be varied, and as varied be as follows, that is to say—Declare that the Defts B. D. H. and H. L. P., the trustees of

the said settlement, are at liberty, out of the proceeds of sale of the larches on the — acres of the H. estate &c., blown down, or which it may be necessary to remove, to expend what may be necessary in re-planting and keeping up the plantation of larch upon the said — acres, and to pay the costs of all parties of the application in Chambers, and of the adjournment thereof into Court and of this appeal, such costs to be taxed &c. as between solr and client; And Declare that the balance of the said proceeds of sale which shall remain after deducting what may be necessary for re-planting and keeping up the said plantation, and after payment of the said costs, ought to be invested by the said trustees in accordance with the trusts of the said settlement; And Declare that the income arising from the said — acres of larch plantation in the ordinary course of management, and also the income arising from the investment hereinbefore directed of the said proceeds of sale of the said larches, ought, subject as hereafter mentioned, to be paid to the Plt (*tenant for life*) during her life or widowhood: And Declare that if in any year the sum of such incomes shall exceed £—, the excess beyond that sum ought to be retained by the trustees for the time being of the said settlement, and invested as aforesaid; and if in any year the sum of such incomes shall fall short of £—, that the deficiency ought to be raised out of the said proceeds of sale or the said investments, and be paid by the said trustees to the Plt. But this is to be without prejudice to the right of the trustees to have recourse to the said investment or the income of the said larch plantation for the purpose of fresh planting of larch.—*In re Harrison, H. v. H.*, C. A., 17 Dec. 1884, A. 1783; 28 Ch. D. 220, C. A.

6. *Order in Chambers for Sale of Timber by Auction—Security—
Payment of Proceeds into Court.*

LET the timber and other trees upon the estates in question in these actions, in the counties of —, —, mentioned in the affidavit of &c., filed &c., be sold by public auction at &c., on &c., by A., of &c., subject to the particulars and conditions set forth in the exhibits marked &c., in the said affidavits referred to; And Let the purchase-moneys for such timber and other trees be received by D., of &c., upon his first giving security duly to account for the same; And Let the amounts due from the said D., in respect of such moneys, be from time to time certified by the Master; And Let the said D., within twenty-one days after the date of the Master's certificate, or respective certificates, from time to time lodge the amount or amounts which shall be so certified to be due from him in Court, as directed in the schedule hereto.—[*Add Lodgment Schedule, Form 4, Vol. I.*—See *Thellusson v. Woodford*, M. R. at Chambers, 7 Feb. 1856, B. 458.

7. *Declaration that Tenant for Life of Leaseholds not liable to Repair.*

DECLARE that the Plt as legatee for life under the testator's will [of the testator's leasehold property in the order mentioned] was and is under no obligation to repair or keep repaired, or to insure or keep insured the household furniture, chattels, and effects [therein].—*Re Betty, B. v. A. G.*, North J., 24 June, 1899, A. 1115; (1889) 1 Ch. 821.

8. *Inquiries as to Plate, Furniture, &c., and letting Mansions, renewing Leases, Repairs, keeping up Roads, and felling Timber.*

USUAL accounts of personalty—"An inquiry what plate, jewels, household furniture, and household utensils were at the time of the testator's death in the mansion-house at B., in the pleadings mentioned."—Direction for inventory to be made thereof [Forms 16—18, pp. 1614, 1615]; Inquiry what real estates testator died seised of; Account of rents and profits of testator's freehold, copyhold, and leasehold estates.—"An inquiry whether it is fit and proper that any and what renewal or renewals should be made of any and what lease or leases of the testator's leasehold estates, or any and what parts thereof, and if so, upon what terms, and what is proper to be done in respect of the same; An inquiry whether it is fit and proper, having regard to the directions contained in the testator's will, that the mansion-house situate at B., and the grounds belonging thereto, should be let for any and what term, and what is proper to be done with respect to the same; An inquiry whether any and what repairs are proper to be done upon or in respect of the said mansion-house at B., and the gardens and stables, buildings, offices, and grounds thereto belonging and usually held therewith, or any and which of them, having regard to the trusts of the testator's will; An inquiry whether any and what repairs are requisite, and fit and proper to be done on the estates subject to the trusts of the testator's will, or the farmhouse and buildings on the same, or any and what part thereof, having regard to the trusts of the said will; An inquiry whether the testator's estates, or any and what part thereof, or the trustees in respect thereof, are liable *ratione tenuræ*, or otherwise, and how, to the repair of any and what roads or road, and if so, what is proper to be done in respect of the same."—Inquiry as to timber [Form 2, p. 1751].—Adjourn &c.—*Consett v. Bell*, V.-C. K. B., 30 May, 1842, A. 1125; 1 Y. & C. C. 569.

For further order that repairs found proper be done by the trustees, and the expenses paid out of the rents, and that the trees found proper to be cut be cut by the trustees, and that such of the trees as are necessary for the repairs be used, and the remainder be sold by the trustees, and the proceeds applied by them according to the will, see *Consett v. Bell*, V.-C. K. B., 5 July, 1844, A. 1531.

For inquiry whether it would be fit and proper to make any and what yearly allowance for keeping the testator's mansion-house at —, and the

outbuildings and gardens thereto belonging, in good order and condition, according to the directions of his will, and in what manner the same should be done, and how the expense thereof should be borne, see *Ingilby v. Graham*, M. R., 15 June, 1771, A. 624.

For decree declaring that the timber and wood upon the estates ought from time to time to be used for repairing the houses thereon, or otherwise for the benefit and advantage of the estate, and that what from time to time is not so required ought to be sold, and the money applied as directed by the will; with account of timber and timber-like and other trees felled by Plts or Defts, the *cs. q. t.*; and inquiry whether such timber and trees were wanted for repairs, or for the benefit or advantage of the estate, and whether they were so applied, and whether, at the time of felling any not so applied, sufficient was left to repair from time to time, or for the benefit and advantage of the estates; and whether the same was proper to be cut in due course of management; and whether any timber was fit to be cut in due course of management, and wanted for repairs or otherwise for the benefit or advantage of the estates, see *Butler v. Borton*, V.-C., 1819, A. 2583, in *Silvester v. Bradley*, 13 Sim. 78, 79.

9. *Rents to be applied as a Whole in keeping down Annual Charges.*

DECLARE that as between the Deft the L. L. A. Society as assigns of E. F. the tenant for life, and the Plt as remainderman, the interest and annual charge in respect of the charges or incumbrances affecting the settled estates or any part or parts thereof, ought to be paid and kept down with or out of the rents and profits of the settled estates as a whole, and that any surplus of the said rents and profits ought to be dealt with and applied as directed by the will of T. F. deceased.—See *Frewen v. Law Life Assurance Society*, North, J., 25 June, 1896, A. 2999; (1896) 2 Ch. 511.

10. *Female Tenant for Life let into Possession on Terms.*

AND the Plts by their counsel undertaking:—1. To pay the several rents respectively reserved by the several leases whereunder the messuages and buildings subject to the trusts of the testator's will are respectively held, and to observe and perform all the lessee's covenants and conditions in the said leases respectively contained, and also the lessor's covenants in the underleases of the said messuages and buildings granted by the trustees of the testator's will. 2. To permit the trustees or trustee for the time being of the testator's will or their or his agents at all reasonable times to enter and inspect such part or parts of the said messuages or buildings as may be in the possession of the applicants, and from time to time to supply to the said trustees or trustee all such information as they or he may reasonably require with respect to the said messuages and buildings and each of them; and (3) so long as the applicants remain in possession or receipt of the rents and profits of the said messuages and buildings to keep the testator's estate indemnified against any liability and the said trustees or trustee indemnified against any personal liability by reason of the several covenants respectively contained in the said leases, and also to keep the trustees, the Defts H. E. B. and J. B. indemnified against any personal liability by reason of the several covenants contained in the underleases of the said messuages and

buildings to which they were respectively parties, and of any other covenant or obligation properly entered into or incurred by them as trustees in connection with the said messuages or buildings or any of them the said trustees or trustee so soon as they or he can supplying the applicants with information as to every such covenant, contract or obligation; And the said trustees by their counsel undertaking to permit the applicants or their solors at all reasonable times to inspect, examine and take extracts from or copies of any muniments of title in their possession relating to the said messuages or buildings or any of them, a schedule of such muniments to be delivered to the applicants; Let the applicants be let into possession and into receipt of the rents and profits of the said leasehold messuages or buildings.—*Re Newen, N. v. Barnes*, Kekewich, J., 12 May, 1894, B. 726; (1894) 2 Ch. 297.

11. *Tenant for Life let into Possession on Terms, he giving Security*
—*Settled Land Act*, 1882, s. 2 (5) & (7), s. 53, s. 58 (vi) (ix).

THIS Court doth declare that the Plt is a tenant for life of or a person having the powers of a tenant for life under the Settled Land Acts, 1882 to 1890, over or in relation to the above-mentioned estates under the settlement thereof created by the will of the above-named testator, W. M. K., and that the Plt is not precluded from exercising the powers of a tenant for life under the said Acts by reason of the term of 500 years limited by the said will to the trustees thereof in the said estates or some part thereof, or by reason of the trusts declared of such term, and that the proceeds of sale of any land or houses sold by the Plt under the powers conferred by the said Acts, or sold or to be sold by the trustees under the power of sale contained in the said will, ought to be applied at the direction or option of the Plt in paying off the incumbrances upon the said estates, and that when by such means or otherwise the two several mortgages of £— and £— in the said will mentioned shall have been fully discharged the said term of 500 years will cease and determine. And the Plt by his counsel undertaking in manner following, namely: (a) To insure and keep insured against loss or damage by fire in the names or name and to the reasonable satisfaction of the trustees or trustee for the time being of the said will all messuages or buildings upon the lands comprised in the said term of 500 years as may for the time being not be insured by the lessees or tenants thereof respectively in accordance with the provisions of their respective leases or agreements of tenancy; (b) from time to time to execute in connection with all or any of such messuages or buildings such repairs as may be necessary or proper; (c) to do all things which may be necessary or proper to keep such parts of the estates comprised in the said term as are for the time being unlet in a proper state of cultivation, and not to cut down any timber or timberlike trees growing on any part of the estates comprised in the said term not required for repairs without the consent in writing of the said trustees or trustee; (d) to pay all outgoings in

respect of the said estates comprised in the said term, and to keep down the interest on all charges or incumbrances thereon or any part thereof; (e) to account on the — day of —, 19—, and on the — day of — in each succeeding year until further order to the said trustees or trustee for all receipts and payments in respect of the rents and profits of the said estates comprised in the said term, and to pay over to them or him within one calendar month thereafter the balance appearing to be due from the applicants in such accounts; (f) not to part with any policy of insurance effected as hereinbefore provided, or any receipt for the payment of any premium in respect thereof, or any of the muniments of title hereinafter mentioned without the written consent of the said trustees or trustee upon all reasonable occasions; (g) to permit the said trustees or trustee, or their or his agents, at all reasonable times to [enter and] inspect such parts of the estates comprised in the said term as may be in the possession of the applicant, and from time to time to supply to the said trustees or trustee all such information as they or he may reasonably require with respect to the same; (h) so long as the applicant remains in possession or receipt of the rents and profits of the estates comprised in the said term to keep the said trustees indemnified against any personal liability by reason of any covenant, contract, or obligation properly entered into or incurred by them as such trustees as aforesaid in connection therewith, the said trustees so soon as they can supplying the applicant with information as to any such covenant, contract, or obligation, and also by his counsel undertaking to pay such occupation rent (if any) for any lands comprised in the term of 500 years which may for the time being be in hand and unlet, as the Judge shall direct, and forthwith to give security to the satisfaction of the Judge for the performance of his undertaking to account for the rents; This Court doth order that the Plt be let into immediate possession of the estates comprised in the said term; And it is ordered that such of the title deeds relating thereto as are in the possession of the trustees be delivered up to the Plt; And it is ordered that the costs of the Plt and Defts of the said application be taxed by the taxing master.—The costs of the Defts C. S. M. K. and R. E. P. to be taxed as between solr and client and be paid out of the sum of £— in the hands of the trustees, and any of the parties are to be at liberty to apply as they may be advised.—*Re Money Kyrle's Settlement*, *M. K. v. M. K.*, Cozens-Hardy, J., 18 July, 1900, B. 2817; (1900) 2 Ch. 839.

12. *Equitable Tenant for Life let into Possession on Terms.*

AND the applicant by his counsel undertaking in manner following:—

1. To insure and keep insured &c. [Form 11, *sup.* (a)]: (a) Plate, pictures, furniture, and household effects comprised in the inventory to be signed by him as hereinafter provided; (b) Plate &c. (as above) comprised in the inventory mentioned in the order dated &c.; (c) All messuages and buildings erected or to be erected on the testator's C. H. and B. P. estates, or either of them other than such messuages or buildings as may for the time being be insured by their

lessees or tenants; 2. From time to time to execute &c. [Form 11, *sup.* (b)]; 3. To do all necessary or proper things to keep such parts of the said estates as are for the time unlet in a proper state of cultivation, and not to cut down &c. [Form 11, *sup.* (c)]; 4. To pay all outgoing and keep down the interest on all charges and incumbrances on the said estates except any interest for the time being payable on the capital sum by the testator's will charged on all the estate and interest of the applicant or his issue under the said will and in the order dated &c. referred to as the "Granddaughter's charge"; 5. Not to part with any policy of insurance &c. [Form 11, *sup.* (f)], and to produce such policies and receipts and muniments to the trustees on all reasonable occasions; 6. To permit the said trustees &c. [Form 11, *sup.* (g)]; 7. To purchase from the trustees the live and dead stock belonging to the trustees on the farms now being carried on by them at a valuation to be made by some person to be agreed on between the trustees and the applicant; 8. So long as the applicant shall remain in possession &c. [Form 11, *sup.* (h), *down to and including* "information as to any such covenant, contract, or obligation"]; Let the applicant be let into possession and into receipt of the rents and profits of the said estates; And Let the respondents, the trustees, deliver to the applicant the plate, pictures, furniture, and household effects by the said will settled upon trusts corresponding with those declared of the said C. H. estate (an inventory thereof being first signed in duplicate by the applicant, and one copy thereof, so signed, being delivered to the trustees), and also all muniments of title relating to the said estates, or either of them, including the counterparts of the current leases and agreements for leases or tenancies, but not including the probate of the said will, a schedule of the muniments to be delivered being first signed by the applicant and delivered to the trustees; Trustees to retain the interest on the charge out of the income, and pay costs out of the corpus of the applicant's share.—*Re Wythes, W. v. W., Keke-wich, J.*, 4 March, 1893, B. 449; (1893) 2 Ch. 369.

13. *Another Order—Clause as to Mining Leases.*

[Undertakings *mutatis mutandis* as in Form 12, *sup.* 1 (c), 2, 3, 4, 5, 6, 8.] Let the Plt F. A. M. B. be let into possession and into receipt of the rents and profits of all the lands comprised in the said settlement until further order, And this Court being of opinion that in the event of any mining lease being granted by the applicant F. A. M. B. of any of the said lands under the Settled Land Act, 1882, no part of the rent or royalty secured by such lease is to be set aside as capital money, Let the said F. A. M. B. be at liberty until further order to exercise all the powers of a tenant for life under and in accordance with the Settled Land Acts, 1882 to 1890, except the powers of sale and exchange; Liberty to apply as to resumption by the trustees or trustee of possession of the said lands or any part thereof, or as to any other matter arising under or in connection with this order.—*Re Bagot, B. v. Kittoe, Chitty, J.*, 7 Dec. 1893, A. 1665; (1894) 1 Ch. 177.

14. *Declaration as to Construction of "Outgoings."*

DECLARE that, according to the true construction of the testator's will, the tenants for life of the several estates by the said will devised in settlement are respectively entitled to the arrears of rent remaining due from the tenants at the time of the testator's death, and the rents accruing due at that date without any apportionment in favour of the testator's estate, and that the outgoings of the devised hereditaments properly chargeable against such arrears and proportions include all such expenses due and remaining unpaid at the time of the testator's death as in the ordinary course of management as carried on by the testator would, at the time of his death, come into charge against such arrears and proportions of rents accruing due at the time of his death, treating each estate as a whole; And that the rates, taxes, tithes, and agent's salary, the repairs commenced and completed before the death of the testator, ordinary repairs from time to time carried on upon the hereditaments by the said will devised to the Deft F. W. F. during his life, and the wages of workmen employed on the said estates, being items &c. of the summons, ought to be deducted from the arrears and proportions of rent of the estate so devised to the Deft F. W. F. and that so much of the repairs commenced before but not completed at the death of the testator and for execution of which an agreement had been entered into with a new tenant, and a date of completion either had or had not been fixed; repairs commenced before but not completed at the testator's death, and for which there had been no contract with any tenant, and repairs for which a contract with a builder had been entered into by the testator, being items &c. of the said summons, as in accordance with the contracts under which the repairs therein mentioned were executed was due and owing at or prior to the death of the testator, and then remained unpaid ought also to be deducted, but that so much thereof as was not in accordance with such contracts payable until after the testator's death ought not to be deducted. Liberty to apply.—*Re Duke of Cleveland, Wolmer v. Forester*, C. A., 30 Nov. 1893, A. 1699; (1894) 1 Ch. 164, C. A.

15. *Successive Tenants for Life of Minerals—Right to Royalties on Working—Compensation for Stoppage of Working.*

DECLARE as follows, namely: (1.) That the Deft C. D., as executor of E. F., the late tenant for life of the estate devised by the will of X., is entitled to £—, being so much of £— paid by G. and H. for royalties as represents royalties paid for coal gotten by them under the said estate during the life of the said E. F., and that the Deft K. L., the present tenant for life in possession of the said estate, is entitled to £—, the balance of the said £—. (2.) That the Deft K. L. is, as such tenant for life, entitled to £—, being the compensation paid by the N. E. Rail. Co. for stopping the working by the leasees

of certain minerals under the said estate.—*Re Barrington, Gamlen v. Lyon*, Kay, J., 3rd July, 1886, A. 1007; 33 Ch. D. 523; followed in *Re Earl of Bradford, E. of B. v. Bridgman*, Kekewich, J., 8 August, 1892, A. 1305.

16. *Tenant for Life let into Possession on giving Security—Delivery of Specific Effects.*

LET the Plt, upon giving security, to be approved of by the Judge, be let into possession of the estates in the counties of &c., devised by the will of W., in trust for the Plt for his life, and into the receipt of the rents and profits thereof; And Let, upon the Plt also giving security, to be approved by the Judge, the furniture, books, pictures, plate, linen, wines, live and dead stock, and other personal estate and effects whatsoever, which were in and about the testator's manor or mansion-house at U. at the time of his death, and which were delivered over by the Defts, the trustees and exors, to O., at the instance and request of the Plt, be delivered by the said Defts, or by the said O., to the Plt for his own use and benefit; And Let the Deft O. deliver to the Plt the service of plate described by the testator's will as &c., to be enjoyed by him as an heirloom.—*Clarke v. Ormonde*, L. C., 5 April, 1821, A. 1297; 9 Jac. 108; and see *Cardigan v. Curzon-Howe*, M. R., 8 March, 1870, A. 639, Form 11, p. 1613.

17. *Leave for Tenant for Life to occupy Mansion—Notice to Quit.*

LET J. L. (*tenant for life*) be at liberty to occupy the mansion-house, gardens, and premises, called &c., in pursuance of the provisions and upon the terms mentioned in the will of Sir T. L., the testator &c.; And Let the receiver &c. give to the present tenant a proper notice to quit, and deliver possession of the said mansion-house &c.—*Lethbridge v. L.*, V.-C. S., at Chambers, 15 Jan. 1859, B. 741.

By a further order in this case, the construction put upon the words "mansion-house, garden, and premises" was extended, and on the petition of the tenant for life he was declared entitled to the occupation of the park, including the orchard, without paying any rent or compensation for the same, and without being at any expense other than paying rates and taxes. The receiver was ordered to deliver up possession of the park and orchard to the Petr, and to pay him the ascertained amount of the profits of the park and orchard since the Petr was let into possession of the mansion-house, and the trustees of the will were ordered to pay the expense of keeping the gardens at the park in a proper state and condition: see *Lethbridge v. L.*, L. JJ., 15 March, 1861, B. 710; S. C., 3 D. F. & J. 523.

For further order refusing an application by the tenant for life for leave to occupy the testator's home-farm, and declaring that he was not entitled (without paying rent or compensation) to the right of sporting over any portion of the estates except that of which he was in actual possession under the above orders, but that such right of sporting, except as aforesaid, belonged to the trustees for the benefit of their testator's estate, see *Lethbridge v. L.*, L. JJ., 22 March, 1862, B. 898; S. C., 4 D. F. & J. 35.

18. *Trustee ordered to deliver Title Deeds of the Settled Property to the Tenant for Life.*

UPON the petition of the Defts H. S. (*tenant for life*), and G. and H., infants, by X., their next friend &c.; Let the Deft J. H., as the trustee of the indenture of settlement dated &c., on or before the — day of — deliver up to the Petr H. S., on oath, if required, all the deeds, documents and muniments of title relating to the W. estate in the petition mentioned, and the trust property generally, which are now or ever have been in his possession, custody, or power as such trustee as aforesaid, except the deed of indemnity given to the said J. H. on the purchase of the W. estate, the Petr H. S., by his counsel, undertaking (previously to such delivery) to indorse on the indenture dated &c., being the conveyance to him of the W. estate in the petition mentioned, a memorandum expressing that the W. estate has been conveyed to the uses of the said indenture of settlement dated &c.—*Straker v. Hamilton*, V.-C. S., 19 Nov. 1869, B. 3095.

19. *Trustees of Settlement authorized to raise a Sum by Mortgage for the Purpose of rebuilding the Mansion-house.*

AND the Plt (*tenant for life*) by her counsel submitting to bring into settlement the lands and hereditaments purchased by her and mentioned &c., and to pay or make up any sum required over and above the £5,000 and costs, to be raised by mortgage as hereinafter mentioned, and submitting to concur in such mortgage to the extent of her life interest under the indentures of settlement dated &c. in the pleadings mentioned; Declare that it is for the benefit of the persons interested, or to become interested, under the said indentures of settlement dated &c., that the Defts C. and L., the trustees of the said settlement, should be at liberty to raise by mortgage of the lands and hereditaments subject to the trusts of the said settlement such a sum, not exceeding £5,000, as may be required for the purpose of removing and rebuilding the messuage in the pleadings called H., and to apply such sum in the expenses of and incidental to such removal and rebuilding, and adjudge the same accordingly; And Declare that it is also for the benefit of all persons interested, as well under the said settlement as under the will of F., that the Defts G., L. and W., the trustees of the same will, should be at liberty to convey to the Defts C. and L., trustees of the said settlement, the parcels of land mentioned &c., purchased by the testator and omitted by him to be settled upon the trusts of the said settlement, to be held by the Defts C. and L. upon the trusts of the said settlement; And Let the Defts G., L. and W., make such conveyance accordingly.—Tax costs of Plt and Defts as between solr and client, including in such costs the costs of raising the said £5,000; And Let the said C. and L. be also at liberty to raise by such mortgage, in addition to the sum of £5,000, the amount of the

said costs, and to apply the same, when so raised, in payment of such costs.—*Liberty to apply.—Frith v. Cameron*, V.-C. M., 27 June, 1871, A. 1782; S. C., 12 Eq. 169; and see *Re Barrington*, 1 J. & H. 142.

For inquiry as to what repairs of houses, part of the infant's property, are absolutely necessary to be done, see *Re Jackson, J. v. Talbot*, 21 Ch. D. 786.

20. *Trustees authorized to sell (1) Building Lease by Auction ;
(2) Reversion by Auction or Privately.*

DECLARE that in order to effect a sale of the land and buildings situate in A. F., in the city of L., forming the unsold part of the testator's estate, to the best advantage, the Defts as trustees of the testator's will may carry out the sale directed by such will in the following manner, that is to say: By first putting up the said land and buildings to public auction on the terms of granting to the highest bidder a proper building lease for (80) years at a rent to be determined by the bidding at the auction and subject to such proper covenants and provisions being inserted in the proposed lease, such auction being made subject to a proper deposit being made, such deposit either to be a premium or a payment of rent in advance, and also subject to a proper reserved bidding or rent being fixed previous to the auction, and by, secondly, selling either by public auction or private contract the said land and the buildings to be erected thereon subject to the said proposed lease when granted.—*Re James, J. v. Gregory*, C. A., 15 June, 1895, A. 2432; 64 L. J. Ch. 686, C. A.

21. *Trustees of Settlement authorized to advance Sum to Tenant for Life on his Bond and Undertaking.*

LET the Plts, as trustees of the will of X., be at liberty, out of the residuary personal estate of the said X., to advance to A. B., the tenant for life under the said will, £— on the security of his bond securing the repayment thereof to the Plts E. and F. as trustees as aforesaid, the said A. B. by his counsel undertaking to expend the said £— in stock- ing, farming, and cultivating the farm, called &c., to the satisfaction of the Plt E.—*Re Household, H. v. H.*, Bacon, V.-C., 5 Aug. 1884, A. 1274; S. C., 27 Ch. D. 553.

22. *Life Estate declared not Forfeited—Costs charged on Life Estate.*

THIS special case, stated for the opinion of this Court pursuant to O. XXXIV. 1, coming on &c., Declare that the Plt has complied with the provisions contained in the will of X., and has not forfeited his life estate under the will of the said testatrix.—Tax costs of Plt and Deft; Declare, pursuant to the 47th section of the Settled Land Act, 1882, that the said costs will be a charge upon the real estates devised by the will of X. to the Plt for life, with remainders over.—*Austen v. Collins*, Chitty, J., 28 June, 1886, A. 1058.

NOTES.

TENANT FOR LIFE AND REMAINDERMAN—RIGHTS AND LIABILITIES.

Waste, Timber, &c.—Estates for life are usually limited without impeachment of waste so as to enable the tenant for life (subject to the rule in equity as to equitable waste, see Vol. I., *sup.* pp. 549 *et seq.*) to fell timber and open mines and quarries and appropriate the produce for his own benefit: see *Dav. Conv.* vol. iii. 279.

In the case of an executory settlement, the *prima facie* rule appears to be that the tenant for life is to be made impeachable for waste: *Lewin, Trusts*, 577; *Davenport v. D.*, 1 H. & M. 775, 779; *Stanley v. Coulthurst*, 10 Eq. 259; but where a larger estate than for life is given in the first instance, and is afterwards cut down by directions for a strict settlement, the estate will be without impeachment of waste: *Davenport v. D.*, *sup.*; and see Form 10, *sup.* p. 1721; *Sackville West v. V. Holmesdale*, L. R. 4 H. L. 543; and see cases cited, *Lewin*, 578.

For the distinction between legal and equitable waste; the effect of the Jud. Act, 1873, s. 25 (3) upon this distinction; and the extent of the rights and liabilities of tenant for life, with or without impeachment of waste, as between himself and those entitled in remainder: viz. (1) what is waste, and in what cases and to what extent it will be restrained; and (2) what relief, in addition to that by injunction, will be granted, see Vol. I., *sup.* pp. 549 *et seq.*

For a consideration of the doctrine of waste generally, and in particular of the exception in *Honywood v. H.* (18 Eq. 309, 310), in favour of owners of timber estates, see *Dashwood v. Magniac*, (1891) 3 Ch. 306, C. A.

The proceeds of sale of larch trees (not being timber), blown down by extraordinary gales, did not belong to the equitable tenant for life, but she was entitled to receive a fixed annual sum, equal to the average income which would have accrued if no gales had occurred, such sum if necessary to be made up out of the capital of the invested proceeds: *Re Harrison's Trusts*, *H. v. H.*, 28 Ch. D. 220, C. A., Form 5, *sup.* p. 1753.

Mines.—As to the right of tenant for life in respect of mines—that he cannot open, but may work mines already opened, see Vol. I., *sup.* p. 551; and that in general a tenant for life of open mines is not “impeachable for waste in respect of minerals” within the meaning of sect. 11 of the Settled Land Act, 1882, see *Re Chaytor*, (1900) 2 Ch. 804, and *inf.* p. 1833.

In the case of a brickfield opened by a testator which his trustees, with a discretion to sell, had allowed to be worked out, the tenant for life was held entitled to the royalties absolutely, and not merely to the income which the royalties if invested would have produced: *Miller v. M.*, 13 Eq. 263.

And a tenant for life under a will, though impeachable for waste, is entitled to the rents and royalties under a lease granted by him in pursuance of a contract entered into by his testator: *Re Kemeys-Tynte, K.-T. v. K.-T.*, (1892) 2 Ch. 211.

Compensation moneys paid by a railway co. for minerals, of such an extent that they could have been gotten during the life of the tenant for life, belonged to him: *Re Barrington, Gamlen v. Lyon*, 33 Ch. D. 523; but see *Re Robinson's Settlement*, (1891) 3 Ch. 129.

As to the circumstances under which a quarry is to be deemed to be opened, and that the incidence of the onus of showing when it was first opened depends upon a consideration of all the facts, see *Elias v. Snowdon Slate Quarries Co.*, 4 App. Ca. 454; and upon the question what is a separate unopened mine, and the effect of the intervention of a strip of land held in separate ownership, see *Re Maynard's Settled Estate*, (1899) 2 Ch. 347.

Leasing Power.—A written contract for a lease by a tenant for life with leasing power is binding on the remainderman: *Shannon v. Bradstreet*, 1 Sch. & Lef. 52; and trustees, with a power of leasing after his death, may effectuate his contract by executing the lease: *Davis v. Harford*, 22 Ch. D. 128.

Tenant in tail with limited powers of leasing under a statute, having purport to grant a lease without complying with the provisions of the Act, such lease was held not to be binding on the issue in tail even as an agreement for a lease: *Osborne v. D. Marlborough*, 14 W. R. 886; 12 Jur. N. S.

559; 14 L. T. 789; and a parol agreement by tenant for life, though coupled with part performance by the lessee, will not bind the remainderman who has not acquiesced: *Hope v. L. Cloncurry*, 1 R. 8 Eq. 555; *Morgan v. Milman*, 3 D. M. & G. 24; and see Sugd. Pow. 555.

The reservation of an increasing rent is not authorized by a power to grant ordinary leases: *Hallett to Martin*, 24 Ch. D. 624.

An unrestricted power of leasing includes a building lease: *Re James, J. v. Gregory*, 64 L. J. Ch. 686, C. A. (where upon proof that the real estate could be most profitably realized by first putting it up for auction to be let on a building lease, and then selling the reversion, and that the ground rent would be not less than the existing rent, the Court authorized that mode of realization).

Though there is power to grant an option of purchase, yet if the lease be outside the power, the option must fall with the lease: *Hallett to Martin*, 24 Ch. D. 624.

The words "person or persons" in a power to lease justify a lease to a corporation: *Re Jeffcock's Trusts*, 51 L. J. Ch. 507; *Pharmaceutical Society v. London Supply Assoc.*, 5 App. Ca. 851; 5 Q. B. D. 310; and see *Hirst v. W. Riding Union Bkg. Co.*, 70 L. J. K. B. 828; 85 L. T. 3; 49 W. R. 715.

In a lease under a power a covenant to renew at the expiration of the term may be enforced if, when the time arrives, it appears that the lease would then be a proper execution of the power: *Gas Light and Coke Co. v. Towse*, 35 Ch. D. 519.

As to the sufficiency of notice to trustees of the intention of a lessee to exercise his right of renewal, and that such a notice may be good, though served upon one only of several trustees, see *Nicholson v. Smith*, 22 Ch. D. 640.

A lease not containing a covenant to build is not a "building" lease, and the defect cannot be remedied, under the Leases Act, 1849 (12 & 13 V. c. 26), by turning a lease of one kind into a contract to grant a lease of another kind: *Hallett to Martin*, 24 Ch. D. 624; and so a lease by a tenant for life under the Settled Land Act, which affected to grant a right of way over the lands of the mansion-house, and was not *bonâ fide*, and invalid, could not be treated as a valid contract for a lease without the easement: *Sutherland v. S.*, (1893) 3 Ch. 169.

A lease providing that the lessee was "to do the necessary repairs," was held to be a repairing lease within the meaning of a power of leasing: *Truscott v. Diamond Rock Boring Co.*, 20 Ch. D. 251, C. A.

A tenant for life unimpeachable for waste, with power to grant such mining leases as should seem reasonable and proper, was held entitled to bind the inheritance by a lease for 99 years at a peppercorn rent by way of mortgage: *Taylor v. Mostyn*, 23 Ch. D. 583, C. A.

As to leases under the powers of the Settled Land Acts, *v. inf.* pp. 1832, 1833; and as to leases by mortgagor or mortgagee, *v. inf.* pp. 1968, 1969.

Repairs and Permanent Improvements.—Independently of the powers given by statute (*v. inf.* pp. 1849, 1850), a tenant for life cannot charge repairs and permanent improvements upon the estate, nor will an inquiry be directed on the subject: *Caldecott v. Brown*, 2 Ha. 144; *Dunne v. D.*, 3 Sm. & G. 22; 7 D. M. & G. 207; except with respect to sums laid out in the completion of a mansion or works commenced by the settlor, or in keeping a mine at work to prevent a forfeiture: see *Dent v. D.*, 30 Beav. 363; 10 W. R. 375; *Gilliland v. Crawford*, 1 R. 4 Eq. 40; nor will sums laid out by the trustees with his concurrence be allowed as a charge upon the inheritance: *Harris v. H.*, 10 W. R. 826; and generally all sums expended for repairs and improvements fall upon the particular tenant for life or his estate: see *Re Leigh's Estate*, 6 Ch. 887; even where expended by order of the Court during the minority of successive tenants for life: *Floyer v. Banks*, 8 Eq. 115.

And though the estate of a tenant for life is not chargeable in respect of permissive waste (*v. sup.* Vol. I. p. 552), it is liable for an omission to repair in breach of an obligation imposed by the will under which his life estate was derived: *Re Williams, Andrew v. W.*, 52 L. T. 41; and see *Woodhouse v. Walker*, 5 Q. B. D. 404; and so in respect of neglect to repair copyhold tenements according to the custom of the manor: *Blackmore v. White*, (1899) 1 Q. B. 293.

So, also, money held under the trusts of a settlement or will, for invest-

ment in land; or the proceeds of settled property which has been taken under the Lands Clauses Consolidation Act, or sold under the Settled Estates Act, cannot in general be laid out in repairs or permanent improvements which do not place new buildings on the land: *Drake v. Trefusis*, 10 Ch. 364; *Brunskill v. Cuird*, 16 Eq. 493; *Speer's Trusts*, 3 Ch. D. 262; the principle being that placing new buildings on land is equivalent to acquiring land, and not mere improvement: *Vine v. Raleigh*, (1891) 2 Ch. 13, *per* Chitty, J.; *Drake v. Trefusis*, *sup.*; and see *Re Mason, M. v. M.*, (1891) 3 Ch. 467; *Re Gardiner, G. v. Smith*, (1901) 1 Ch. 697.

Rebuilding a mansion-house which has become ruinous or been pulled down has been treated as an augmentation of the estate, and the expense has been allowed to the tenant for life out of the accumulations for twenty years of the personal estate: *Donaldson v. D.*, 3 Ch. D. 743; and see *Frith v. Cameron*, 12 Eq. 169, Form 19, *sup.* p. 1762.

Where farms were untenanted, or could not be let, the Court has, in a special case, sanctioned the expenditure of money, subject to the same settlement, in repairs as necessary to the preservation of the estate: *Conway v. Fenton*, 40 Ch. D. 512; and see *Hurst v. H.*, 29 L. R. Ir. 219; and Settled Land Act, 1890, s. 13 (ii); or authorized an advance to the tenant for life, who was also trustee, on his undertaking to expend it in stocking, taking, and cultivating the farms to the satisfaction of his co-trustee: *Re Household, H. v. H.*, 27 Ch. D. 553, Form 21, *sup.* p. 1763; but there is no jurisdiction to charge the interest of an infant tenant for life in remainder with the costs of rebuilding or repairing the mansion to be inhabited by the existing tenant for life: *Re De Tessier's Trusts, De T. v. De T.*, (1893) 1 Ch. 153; see also *Hurst v. H.*, 29 L. R. Ir. 219; and generally the Court has no jurisdiction, in the absence of special circumstances and in cases not amounting to salvage, to raise money out of a settled estate and apply the money in pulling down and rebuilding houses on the estate: *Re Montagu, Derbyshire v. M.*, (1897) 2 Ch. 8, C. A. On the principle of salvage, costs of establishing by action that a right of fishery formed part of the settled estate (being not recoverable from the unsuccessful Defts) were made a charge on the inheritance: *Hamilton v. Tighe*, (1898) 1 I. R. 123; and as to the right of a tenant for life, who has paid costs, charges, and expenses for the purpose of protecting the estate against foreclosure by mortgagees, to a charge on the estate, and to have the amount raised by a mortgage, see *Moore v. M.*, 60 L. T. 627; 37 W. R. 414.

A direction to keep buildings in good repair will not be satisfied by keeping them in the same state of bad repair as they were in when the testator died: *Cooke v. Cholmondeley*, 4 Drew. 326; *Re Bradbrook, Lock v. Willis*, 56 L. T. 106. But a tenant for life under a will of leaseholds left in disrepair by the testator is not, unless specially directed so to do, bound to put them in repair so as to comply with the covenants in the leases: *Re Courtier, Coles v. Courtier*, 34 Ch. D. 136, C. A.; distinguishing *Re Fowler*, 16 Ch. D. 723.

An equitable tenant for life of leaseholds under a will is bound, during the continuance of his interest, to perform the tenant's continuing obligations under the lease, but he is not, in the absence of special direction in the will, liable for repairs necessary at the commencement of his interest or in respect of breaches of covenant committed before the testator's death: *Re Betty, B. v. A. G.*, (1899) 1 Ch. 821, Form 7, p. 1755; *Re Courtier, Coles v. Courtier*, 34 Ch. D. 136, C. A.; *Re Gjers, Cooper v. G.*, (1899) 2 Ch. 54 (not following *Re Tomlinson*, (1898) 1 Ch. 232, and see previous cases in Lewin on Trusts, 255); *Re Smith, Bull v. S.*, 84 L. T. 835; and as between tenant for life and remaindermen the position is the same whether the property is sub-let at a rack rent or at an improved ground rent: *Re Copland's Settlement*, (1900) 1 Ch. 326.

Under a will directing tenant for life to keep in repair the mansion-house grounds and appurtenances, she was not bound to clean out an ornamental lake: *Dashwood v. Magniac*, (1891) 3 Ch. 306.

Where trustees of a term are authorized to raise money for improvements by mortgage, "or" out of the rents and profits, the tenant for life is entitled to have income applied in permanent improvements raised out of *corpus*: *Re Marquis of Bute, B. v. Ryder*, 29 Ch. D. 196.

Drainage improvement expenses under the Public Health Act, 1848, rightly paid by trustees as "owners" of settled messuages, must, as between tenant for life and remainderman, be regarded as capital and treated as a

charge upon the messuages: *Re Barney, Harrison v. B.*, (1894) 3 Ch. 562; and so necessary repairs on real estate purchased in accordance with a power in a testamentary settlement of personalty, by the direction or with the consent of the tenant for life, to invest in land to be held as personal estate: *Re Freman, Dimond v. Newburn*, (1898) 1 Ch. 28; but the costs of complying with a sanitary notice under the Public Health (London) Act, 1891 (54 & 55 V. c. 76), and a dangerous structures notice under the London Building Act, 1894 (57 & 58 V. c. cxxiii), are chargeable against income: *Re Copland's Settlement*, (1900) 1 Ch. 326.

As to when a trust to expend surplus income in improvements amounts to an accumulation within the Thellusson Act, see *Vine v. Raleigh*, (1891) 2 Ch. 13, C. A.; and that a trust to apply rents of leaseholds in keeping up a policy for replacement of their value is not an accumulation, see *Re Gardiner, G. v. Smith*, (1901) 1 Ch. 697. As to accumulations of income in the purchase of land only, see the Accumulations Act, 1892 (55 & 56 V. c. 58).

Independently of the Settled Land Act, the Court has power to sanction the payment by trustees of costs properly incurred by the tenant for life for the protection of the estate, whether as Plt or Deft, or in parliamentary proceedings: *Re Earl de la Warr's Estates*, 16 Ch. D. 587; 51 L. J. Ch. 407; *Re Lord Rivers' Estate*, 16 Ch. D. 588; *Re Ormrod's Estate*, (1892) 2 Ch. 318.

Evidence of modern usage as to the mode of cultivation of property was held admissible in construing a devise: *Dashwood v. Magniac*, (1891) 3 Ch. 306, C. A.

Interest.—Tenant for life of property subject to a charge, whether created by himself or previously existing, must keep down, out of the rents and profits, the interest which accrues during his tenancy, and the right may be enforced against him by the remainderman: *Makings v. M.*, 1 D. F. & J. 355; *Whitbread v. Smith*, 3 D. M. & G. 741; *Dixon v. Peacock*, 3 Drew. 288; but he is not liable for the arrears of interest which have accrued during a previous life tenancy: *Sharshaw v. Gibbs, Kay*, 333; *Kirwan v. Kennedy*, 1 R. 4 Eq. 499.

This obligation to keep down interest exists only as between tenant for life and remainderman; and the incumbrancer has no right as against the tenant for life or his estate for back rents which have been received by him, but were not employed in keeping down interest: *Re Morley, M. v. Saunders*, 8 Eq. 594.

If, in keeping down the interest, the tenant for life has himself made good the deficiency of the rents for that purpose, he is not entitled to charge upon the inheritance his payments in excess, without intimation to the remainderman that the rents are insufficient, or that he intends so to charge them; and his legal pers. represes have no better right: *Kensington v. Bouverie*, 7 H. L. C. 557; and see *Shore v. S.*, 4 Drew. 501; *Lindsay v. E. Wicklow*, 1 R. 7 Eq. 192. And where the interest of mortgages exhausted the rents, a tenant for life and annuitant were entitled to have part of the estates sold to pay them off: *Cooke v. Cholmondeley*, 4 Drew. 244.

Possession.—Where an accumulation was directed for paying off mortgages, and the mortgagees sold under powers of sale, the tenant for life was entitled to be let into possession: *Norton v. Johnstone*, 30 Ch. D. 649; and as to the right of a c. g. t. to possession, see *Lewin*, 824 *et seq.*

Since the Settled Land Act, 1882, the Court has more freely exercised its discretion in favour of an equitable tenant for life, and has treated him as entitled, if the estate and trustees can be adequately protected, to be let into possession and management of the land: *Re Wythes, West v. Wythes*, (1893) 2 Ch. 369 (Form 12, p. 1759, *sup.*); and see *Re Hunt, Pollard v. Geake*, W. N. (00) 65; W. N. (01) 144, C. A. (where see form of undertakings); *Re Richardson, R. v. R.*, (1900) 2 Ch. 778; *Re Wilkinson, Lloyd v. Steel*, 85 L. T. 43 (settlement of ground-rents); and the discretion may be so exercised although the estate is subject to a term for securing incumbrances: *Re Richardson, sup.*; *Blake v. Bunbury*, 1 Ves. Jr. 194; *Tidd v. Lister*, 5 Mad. 429; the tenant for life in such a case being put upon an undertaking to pay the net income over to the trustees: *Re Money Kyrle's Settlement*, (1900) 2 Ch. 839 (Form 11, p. 1757, *sup.*); and where trustees held freehold land on trust for sale, with power to postpone sale, and with extensive powers of management, the Court exercised its discretion by allowing the tenant for life to go into possession, and to exercise all the powers conferred by the Act except the power of sale and exchange, with power for the trustees to apply to resume possession in case they should decide to sell: *Re Bagot's Settlement, Bagot*

v. *Kitcher*, (1894) 1 Ch. 177 (Form 13, p. 1759, *sup.*); *q. v.* as to the general principles governing the exercise of its discretion by the Court; and see *Lewin*, 827.

Where the application for possession was by the assignee of a bankrupt tenant for life, he was ordered to pay the costs of the remaindermen who had been served by direction of the Master, and had rendered valuable assistance: *Re Hunt, Pollard v. Geake*, W. N. (00) 65 (not following *Re Newen*, (1894) 2 Ch. 297, 369, on this point), but not the costs of the bankrupt; *S. C.*

Title Deeds.—A legal tenant for life is entitled to the custody of the title deeds: *Leathes v. L.*, 5 Ch. D. 221; *Garner v. Hannington*, 22 Beav. 627; unless there will be risk of loss by leaving them in his custody: *Jenner v. Morris*, 1 Ch. 603; or unless, from the pendency of litigation affecting the estate, the custody of the trustees is more convenient: *Stanford v. Roberts*, 6 Ch. 307; and see *Warren v. Rudall*, 1 J. & H. 1.

He can recover possession of them from a contingent remainderman: *Allgood v. Heywood*, 1 H. & C. 745; but may be ordered to produce them at the instance of a remainderman whose title is clear: *Pennell v. E. Dysart*, 27 Beav. 542.

An equitable tenant for life of leaseholds is also entitled to possession of the title deeds on giving security: *L. Langdale v. Briggs*, 8 D. M. & G. 391; 3 Sm. & G. 225; and where he is let into possession the custody of the title deeds will in general be committed to him; *Re Wythes, West v. Wythes*, (1893) 2 Ch. 369; but mortgagees of the life estate are entitled to insist on the retention of the title deeds by the trustees: *Re Newen*, (1894) 2 Ch. 297.

And a person entitled in remainder to one-eighth had a *prima facie* right to production of the title deeds in the absence of circumstances which would justify the trustees in withholding them: *Re Cowin, C. v. Gravett*, 33 Ch. D. 179; *Re Burnaby's Settled Estates*, 42 Ch. D. 621.

Where a married woman is legal tenant for life, but not for her separate use, the trustee in her husband's bankruptcy has no absolute right to the custody of the title deeds during the coverture, but the Court has a discretion: *Exp. Rogers, Re Pyatt*, 26 Ch. D. 31, C. A.

Where title deeds relating to two estates were deposited by the owner with her solicitor, and on her death the two estates went the one to the Plts and the other to her heir, who could not be found, the Court refused to order possession of the deeds to be given to the Plts, but ordered them to be deposited in Court, with liberty to the Plts to inspect and make extracts: *Wright v. Robotham*, 33 Ch. D. 106.

Apportionment.—By the Apportionment Act, 1870 (33 & 34 V. c. 35), the principle of the former Acts, the Distress for Rent Act, 1737 (11 Geo. II. c. 19), and the Apportionment Act, 1834 (4 & 5 W. IV. c. 22), has been greatly extended. By sect. 2 of the Act of 1870, all rents, annuities, and dividends (as interpreted by sect. 5), and other periodical payments in the nature of income, whether reserved or made payable by an instrument in writing or otherwise, shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

Under the former Acts rents reserved by parol (*Cattle v. Arnold*, 1 J. & H. 651; *Mills v. Trumper*, 4 Ch. 320) and royalties in mining leases (not being payments coming due at fixed periods, *St. Aubyn v. St. A.*, 1 Dr. & Sm. 611), were not apportionable.

So also payments under an order of Court, *e.g.*, of dividends in respect of proceeds of settled property sold under the Settled Estates Acts or taken under the Lands Clauses Consolidation Act: see *Re Lawton Estates*, 3 Eq. 469; *Longworth's Estates*, 1 K. & J. 1; even when the property was held under an instrument subsequent to the Act: *Jodrell v. J.*, 7 Eq. 461; and dividends declared by joint stock companies: *Maxwell's Trusts*, 1 H. & M. 610.

The right to apportionment now exists in all these cases whether the instrument came into operation before or after the passing of the Act (1st August, 1870): *Re Cline's Estate*, 18 Eq. 213; *Capron v. C.*, 17 Eq. 288; *Hasluck v. Pedley*, 19 Eq. 271; and where the will is before and the codicil after the Act: *Constable v. C.*, 11 Ch. D. 681; subject only, it seems, to the question whether in a will or instrument made before the Act the particular words used exclude an apportionment: *Jones v. Ogle*, 8 Ch. 192; and see

Roseingrave v. Burke, 1 R. 7 Eq. 186; or where it shall be expressly stipulated that no apportionment shall take place: s. 7.

The Act does not alter the date at which rent becomes due, so that the landlord of a co. cannot obtain a winding-up order in respect of rent for the current quarter: *Re United Club and Hotel Co.*, 60 L. T. 665; *W. N.* (89) 67; 1 *Megone*, 180; and it is not applicable to rent payable in advance and accrued due, nor so as to enable the represves of a person who has made a payment in advance to recover back an apportioned part: *Ellis v. Rowbotham*, (1900) 1 Q. B. 740, C. A.; *Trevalion v. Anderton*, 76 L. T. 642, C. A.

And the Act does not apply to the case of a purchase of stock between two dividend days, so as to deprive the tenant for life of any part of the next dividend: *Re Clarke, Barker v. Perowne*, 18 Ch. D. 160; but where investments which, by the terms of a will ought to have been transferred to the beneficiaries, were sold "cum dividend" under an order of the Court made in the absence of the represves of the deceased tenant for life, they were held entitled to recover an apportioned part representing profits earned in her lifetime: *Bulkeley v. Stephens*, (1896) 2 Ch. 241.

The Act applies in the case of the death, subsequently to the Act, of a tenant for life under the will of a testator who died before the Act: *Lawrence v. L.*, 26 Ch. D. 795.

The Act applies to specific as well as to residuary gifts: *Hasluck v. Pedley*, 19 Eq. 271; *Pollock v. P.*, 18 Eq. 329, explaining *Whitehead v. W.*, 16 Eq. 528; and generally to every species of income from whatever source derived: *Clive v. C.*, 7 Ch. 433; *Re Thacker*, 21 W. R. 285; 28 L. T. 56; but not to the profits of a newspaper business: *Re Cox's Trusts*, 9 Ch. D. 159; *Wms. Exors*, 9th ed. p. 729.

The word "dividends" includes a quinquennial bonus declared by a life assurance society under their deed of settlement: *Re Griffith, Carr v. G.*, 12 Ch. D. 655; and every co. registered under the Cos. Act, 1862, is a public co. within sect. 5 of the Act: *Lysaght v. L.*, (1899) 1 Ch. 115, C. A.

A bequest of shares in a limited co. with a declaration that the shares shall "carry the dividend," operates as an exclusion of the Act: *Lysaght v. L.*, *sup.*; and so where there is a direction that the tenant for life is to have the "whole income": *Re Meredith*, *W. N.* (98) 48; 67 L. J. Ch. 409.

Copyholds.—Fines on copyholds for lives received in the customary mode of enjoyment of the manor by the tenant for life as lord, are income and belong wholly to him: *Re Medows, Norie v. Bennett*, (1898) 1 Ch. 300, and *v. inf.* p. 1781.

Capital and Income.—As between tenant for life and remainderman, dividends declared before, but not made payable till after his death, form part of the tenant for life's estate as being a debt due to him at his death: *De Genère v. Kent*, 4 Eq. 283; *Wright v. Tuckett*, 1 J. & H. 266.

But there is no right to dividends in an incorporated co. until they have been declared: *Clive v. C.*, *Kay*, 600; and therefore (independently of the Apportionment Act, 1870, ss. 2, 5) dividends, earned before but not declared until after a testator's death, go as income to his legatees for life, and do not form part of the *corpus* of his estate: *Bates v. Mackinley*, 31 Beav. 280; 10 W. R. 241; *Broune v. Collins*, 12 Eq. 586; and see *Re Hopkins' Trusts*, 18 Eq. 696.

If the profits have, by resolution of the co., or under a power to that effect in the partnership deed, been capitalized, they form *corpus*, and not income as between the tenant for life and those entitled in remainder: see *Straker v. Wilson*, 6 Ch. 503; *Barton's Trust*, 5 Eq. 238; *Baring v. Ashburton*, 16 W. R. 452.

A bonus declared out of profits by a co. which has no power to increase its capital must be regarded as income of the tenant for life: *Irving v. Houston*, 4 Paton, Sc. App. 521; and see *Paris v. P.*, 10 Ves. 185; *Brandon v. B.*, 4 Ves. 800; *Plumbe v. Nield*, 8 W. R. 337; 6 Jur. N. S. 529; 29 L. J. Ch. 618; *Hollis v. Allan*, 14 W. R. 980; 12 Jur. N. S. 1638; *Dale v. Hayes*, 19 W. R. 299; 40 L. J. Ch. 244; 24 L. T. 12; but where the co. has power to determine whether profits shall be distributed as dividends or added to capital, if they show an intention to appropriate them to capital the tenant for life is not entitled to the bonus: *Re Bouch, B. v. Sproule*, 12 App. Ca. 385, reversing

S. C., 29 Ch. D. 635, C. A.; and see *Re Bramley*, 55 L. T. 145; *Re Alsbury*, *Sugden v. A.*, 45 Ch. D. 237; *Re Armitage*, (1893) 3 Ch. 337, C. A.; *Re Northage*, *Ellis v. Barfield*, 60 L. J. Ch. 488; 64 L. T. 625, where a declaration of bonus dividends and issue of new shares were treated as separate transactions, so as to entitle a tenant for life to the bonus; and the mere fact that the profits are carried to reserve fund does not necessarily stamp them as capital: *Re Alsbury*, *sup.*

Where a co. sold its undertaking for a sum exceeding the paid-up capital the surplus was held to be income: *Lubbock v. British Bk. of S. Africa*, (1892) 2 Ch. 198.

Expenses of drainage works under the Metropolis Management Act, 1855, were included in "outgoings" which were directed to be deducted from the income of the tenant for life under a will: *Re Crawley*, *Acton v. C.*, 28 Ch. D. 431; and see *Re Leonard Field*, W. N. (88) 36.

Payments agreed to be made by the testator to a tenant for unexhausted improvements are payable as in the nature of outgoings by the tenant for life under the will: *Mansel v. Norton*, 22 Ch. D. 769, C. A.

(II.) IMPROVEMENT OF LAND AND LIMITED OWNERS' RESIDENCES ACTS, 1864, 1870, 1871, 1899 (27 & 28 V. c. 114; 33 & 34 V. c. 56; 34 & 35 V. c. 84; 62 & 63 V. c. 46); BOARD OF AGRICULTURE ACT, 1889 (52 & 53 V. c. 30).

For orders appointing a guardian for the purpose of consenting on behalf of an infant remainderman upon an application under the Improvement of Lands Act, 1864 (27 & 28 V. c. 114), and the Limited Owners' Residences Act, 1870 (33 & 34 V. c. 56), see *Re Blundell*, M. R. at Chambers, 3 July, 1871, A. 1768, Form 13, *sup.* p. 994; *Re D. of Manchester*, M. R. at Chambers, 17 December, 1870, B. 3215.

1. Order under these Acts authorizing the Board of Agriculture to proceed.

UPON the application of B. (*tenant for life*), Let the Board of Agriculture be authorized to entertain and proceed with the application which has been made to them by the said K. B. for their sanction to proposed improvements to the estates in the petition mentioned, by the erection of an additional room, to be used as a ball-room and a billiard-room, at the mansion-house called &c., for the accommodation of the applicant and his successors in title as owners thereof, and of the said estates, under the provisions of the above-mentioned Acts, notwithstanding that the applicant is tenant for life under the settlement of the said settled estates dated &c., and is the father of the said infant, who is the tenant in tail of the said estates, subject to the life-interest of the applicant therein; And Let the costs of and relating to this application be deemed part of the expenses of and incidental to the application for the proposed improvements.—See *Re Blundell*, M. R. at Chambers, 5 July, 1871, A. 1785.

2. The like.

UPON the application of C. (*tenant for life*); And the costs of this application, and of the application of the infant D. for the appointment of a guardian having been ascertained at £—, the Judge doth authorize the Board of Agriculture to entertain an application of the

said C. for their sanction to an expenditure not exceeding £— on additions and improvements to the manor-house of L. standing on the said settled estates, notwithstanding the infancy of the said A., the tenant in tail in remainder expectant on the decease of the said C.; And Let the said sum of £— be deemed to be part of the expenses of and incidental to the application to the Board for the proposed improvements, and be included in such sum of £—.—See *Re Papillon*, M. R. at Chambers, 26 July, 1875, B. 1438.

For the like order, see *Re St. Aubyn*, V.-C. H. at Chambers, 28 April, 1876, B. 791.

For the like order on the application of tenant for life that the Inclosure Commrs for England and Wales may be authorized to entertain his application for their sanction to an expenditure of not exceeding £— on additions and improvements to the manor-house standing on the settled estate, notwithstanding the infancy of the tenant in tail in remainder, see *Re Papillon*, M. R. at Chambers, 21 July, 1875, B. 1398.

For form of application, see D. O. F. 1152.

NOTES.

By sect. 2 of the Board of Agriculture Act, 1889 (52 & 53 V. c. 30), the powers and duties of the Land Commrs for England and Wales under the Improvement of Land Act, 1864 (27 & 28 V. c. 114), and the Limited Owners' Residences Act, 1870 (33 & 34 V. c. 56), and the Limited Owners' Residences Act, 1871 (34 & 35 V. c. 84), are transferred to the Board of Agriculture.

By the Improvement of Land Act, 1864 (27 & 28 V. c. 114), the Inclosure Commrs for England and Wales, now the Board of Agriculture (and as regards lands in Ireland the Commrs of Public Works in Ireland), are authorized, on the application of landowners (see sect. 8), to sanction proposed improvements in land (as specified in sect. 9) in manner provided by sects. 10—17, and to charge the sums laid out on the lands so improved.

By sect. 21, in case of dissent by any persons interested, or where the landowner's infant children interested in reversion or remainder are to be protected, the landowner desiring such improvements may, by summons in Chambers, apply for an order authorizing the Commrs (the Board) to entertain and proceed with the application for such improvements.

Sect. 22 provides for the case of a dissenting party out of the jurisdiction; and by sect. 23, the costs of applications under sects. 21, 22, shall be in the discretion of the Court or Judge who shall hear such applications, and, if so directed, such costs shall be deemed to be part of the expenses of and incidental to the application for the proposed improvements.

By sect. 24, husbands, guardians, committees, &c., shall have the same rights and powers as their wives or the persons they represent would have had if free from disability, and shall not be compelled to dissent.

By the Limited Owners' Residences Act, 1870 (33 & 34 V. c. 56), the Improvement of Land Act, 1864, is incorporated. By sect. 3, the erection of mansion-houses and usual and necessary buildings, outhouses, and offices, &c., and the completion and improvement of and addition to mansions already erected, or the conversion of houses already erected into mansion-houses, shall be improvements within the Improvement of Land Act, 1864, s. 9.

By sect. 4, the sum charged on any estate under settlement in respect of mansion and other buildings shall not exceed two years' rental of the estate after deducting public charges and interest of debts, &c. affecting the inheritance after the death of the limited owner, or, in the case of different estates settled to the same uses, after deducting from the rental of the estates charged with the cost of erecting mansion-houses, &c. so much of the debts, &c. affecting the whole of the estates as shall bear to the whole of such debts the same proportion as the rental of the estates to be charged shall bear to the rental of the whole of the estates.

The Limited Owners' Residences Amendment Act, 1871 (34 & 35 V. c. 84),

repeals sect. 3 of the Act of 1870, and defines improvements within the meaning of the Improvement of Land Act, 1864, which under that Act may be charged upon the estate, as "the erection of a mansion-house and such other usual and necessary buildings, outhouses, and offices as are commonly appurtenant thereto and held and enjoyed therewith, and the completion of any mansion-house and appurtenances as aforesaid, and the improvement of and addition to any mansion-house, &c. already erected, and the improvement and addition to any house which is capable of being converted into a mansion-house suitable to the estate on which the same stands, so as such improvement and addition be of a permanent nature; provided that every such mansion-house so erected and enlarged or converted is suitable to the estate on which it stands as a residence for the owner of such estate."

By the Settled Land Act, 1882 (45 & 46 V. c. 38), s. 30, the enumeration of improvements contained in sect. 9 of the Improvement of Land Act, 1864, is extended so as to comprise, subject to and according to the provisions of that Act, but only as regards applications to the Board of Agriculture after the passing of the Act of 1882, all improvements authorized by the Act of 1882. As to these improvements, *v. inf.* pp. 1849, 1850.

By the Improvement of Land Act, 1899 (62 & 63 V. c. 46) (which came into operation on Jan. 1st, 1900), s. 1, the period for the repayment of a rent-charge for improvement of land is to be "such period, not exceeding forty years, as the Board of Agriculture, having regard in each case to the character and probable duration of the improvement, determine." Other land may, with the sanction of the Board, be comprised in the charge together with the land improved. Powers to authorize advances, by resolution passed by three-fourths of the shareholders, are conferred on improvement companies, and the provisions of the Limited Owners' Residences Acts of 1870 and 1871 are to apply to a charge for securing an advance under the section for the purpose of an improvement mentioned in those Acts. The order creating any such charge is to be in such form as the Board of Agriculture determine, and the Board are empowered to extend the term of repayment of rent-charges created in respect of the planting of woods or trees.

By sect. 3, the remedies provided by sect. 44 of the Conveyancing Act, 1881 (44 & 45 V. c. 41), are extended to rent-charges under the Improvement of Land Acts, and by sects. 4 and 5 provisions are made facilitating procedure under special improvement Acts, and for the closing of the register of land improvement orders at the office of the Land Registry, and except under an order of the High Court no entry or search is to be made in any register kept at that office under sect. 56 or sect. 69 of the Act of 1864.

(III.) RENEWING LEASES—ADMISSION TO COPYHOLDS—CONTRIBUTION.

1. *Inquiries as to Leaseholds, Renewal, and Receipt of Rents.*

LET the following &c.: 1. An inquiry what leasehold estates the testator was possessed of or entitled to at the time of his death, and upon what leases, determinable upon what lives, or for what terms of years, such leasehold estates were respectively holden by the testator at the time of his death, and under what leases the same are now respectively holden; 2. An inquiry whether any of such leases are now renewable, and upon what terms, and when they respectively became renewable, and whether it would be for the benefit of the estate of the testator that the same, or any and which of them, should be renewed, and upon what terms, and out of what fund; 3. An inquiry by whom the rents and profits of such leasehold estates of the testator have been received since his death.—*Cooper v. Wicks*, V.-C. E., 29 April, 1842, A. 1022.

For order for trustees to renew leases from time to time, according to the

usual course of renewal, and for that purpose to retain so much of the rents as will be sufficient, and when Plts or other persons shall become entitled to an assignment, they to be at liberty to apply, see *Wallace v. W.*, M. R., 24 March, 1832, B. 1686.

For declaration that Plts were entitled to the grant of a new lease in conformity with the covenants contained in, and to a perpetual renewal from time to time for ever upon the terms stated in, a lease of 1750, with a direction for the trustees to execute such lease (containing a recital of the declaration of the Court) to be settled, &c., see *Hodges v. Blagrove*, M. R., 19 July, 1853, A. 1670; *S. C.*, 18 Beav. 404.

For order for Plt and Deft, or either of them, to be at liberty to renew the lease and surrender the existing lease, the new lease to be taken in the name of a trustee or trustees; the parties paying the fine and charges to be considered as incumbrancers on the estate for the same; and interest to be computed at 5 p. c. per ann. on the money advanced, see *Birkhead v. Manaton*, L. C. 1748, A. 308; 2 Vez. 571; 3 Atk. 809.

For leave for mortgagee to renew, such renewal to be for the benefit of such persons as the Court should decree to be entitled thereto, the money advanced on such renewal, and the expenses thereof, to be a lien on the premises in priority to the other claims thereon, see *Long v. E. Macclesfield*, 28 Nov. 1796.

2. *Inquiry as to future Management of Leasehold Estate.*

An inquiry what plan, if any, will be fit and proper to be adopted for the overlooking and management of the said leasehold estates, and for ensuring the payment of the (ground or superior) rents thereout, and keeping up the necessary insurances thereof against fire, and performance of the other covenants of the leases thereof.—*Wilmot v. Warren*, M. R., 2 March, 1860, B. 629.

3. *Inquiry as to Leases renewed—Tenant for Life to contribute—Security.*

LET the following &c.—1. An inquiry what renewals have been made of the testator's leasehold estates respectively, and when, and by whom and out of what funds the fines, fees, and expenses attending such renewals, and each of them, have been paid; And Declare, that the Deft J., as tenant for life of the said estates, ought to contribute to such renewals, and to the fines, fees, and expenses attending the same, in proportion to such benefit as he has derived or may derive from such renewals, and every or any of them; 2. Let an inquiry be made what sum ought to be paid, or secured to be paid, by the said Deft J. in respect of such his proportion, and what security he ought to give in respect thereof; but this direction as to such security is to be without prejudice to the question whether the Deft J. may not ultimately be liable to pay more or less than the sum for which it shall be certified that such security ought to be given; costs of action as between solr and client to be taxed and paid out of the *corpus* of the settled estates and property.—Adjourn &c.—*Jones v. J.*, V.-C. W., 30 May, 1846, A. 1849; 5 Ha. 440.

For inquiry, what was the proper amount required for the fines and fees for the renewal, and in what manner and out of what fund the same ought

to be raised and paid, and to approve of a new life to be put in, and what security, if any, and to what amount, ought to be given by the tenant for life for the amount he might be liable to contribute, see *Hudleston v. Whelpdale*, 9 Ha. 775; and for further inquiry and order, *Ib.* 789.

For declaration, that the parties successively in possession under the will were alone to pay the expenses of renewing leaseholds made necessary by the will, see *E. Shaftesbury v. D. Marlborough*, 2 M. & K. 123.

For orders and inquiries where leaseholds were devised for persons in succession, to be renewed from rents or by mortgage, and the trustees had renewed out of the personal estate, and insured the amount on the lives of the *cs. q. vic.*, and as to future renewals, see *Greenwood v. Evans*, 4 Beav. 44; *Bull v. Birkbeck*, 2 Y. & C. C. 449.

And for decree where leaseholds were so devised, and the trustees had also renewed; on filling up two of four lives, of which one fell in the life of the first tenant for life, who died insolvent; the other seven years after the next tenant for life came in; and for mortgaging the estate for the amounts payable, so far as chargeable on the *corpus*, see *Wadley v. W.*, 2 Col. 11, 18.

4. *Liability of Tenant for Life's Estate for Loss occasioned by not keeping the Leasehold and Copyhold Estates renewed.*

"DECLARE that the estate of P. (*tenant for life*) is liable to make good for the benefit of the Plts, and such other person or persons, if any, as may become, or otherwise might have become, entitled to the leasehold and copyhold estates comprised in the will and codicils of &c. the amount of the loss or diminution in the value of the leasehold and copyhold estates at &c. in the pleadings mentioned at the death of the said P., occasioned by his having omitted to keep fully estated for three lives such of the same leasehold and copyhold estates as could have been kept so fully estated, together with interest at the rate of 4 p. c. per ann. on the amount of such loss or diminution in value from the death of the said P."—An inquiry what was the amount of such loss or diminution, with direction to compute interest at the rate of 4 p. c. per ann. on that amount from the death of P.—Adjourn &c. —*Blake v. Peters*, L. JJ., 3 March, 1863, A. 796, varying decree of V.-C. K., 1862, A. 2308; S. C., 1 D. J. & S. 345.

5. *Payment of Fine on Renewal by Tenant for Life—Period of ascertaining Proportion repayable.*

DECLARE that the Deft A. H. (*tenant for life*) is not entitled during his life to make any claim in respect of the sum advanced by him for the purposes and under the circumstances in the Master's certificate dated &c. mentioned (*in part payment of a fine on renewal of a lease for lives of copyhold property*); but after his death any of the persons interested in respect of the said sum, or in the trust premises, are to be at liberty to apply as they may be advised as to the sum to be paid to or by the estate of the said Deft as such tenant for life, for or on account of the said sum of £—, or for or on account of the moneys paid out of the *corpus* of the trust premises in or about the

renewal of the life or lives for which the copyholds were held.—See *Harris v. H.*, M. R., 16 July, 1862, A. 1945; 10 W. R. 826.

For order on petition after the death of A. H., who predeceased the original *c. q. vie*, for sale of so much of the fund in Court as would raise the necessary amount, and payment to the Petrs, the exors of A. H., tenant for life, in satisfaction of the sum of £— paid and advanced by A. H. towards payment of the renewal fine of £— under the circumstances in the certificate dated, &c. mentioned, see *S. C.*, M. R., 21 Feb. 1863, A. 420; 32 Beav. 333; 11 W. R. 451.

6. *Apportionment of Expenses of Renewal paid by Deceased Tenant for Life—Compound and Simple Interest.*

LET the order dated &c. be varied; And Declare that the proportion to be paid by the Plt for and in respect of the fines and expenses of renewal in the pleadings mentioned, must be ascertained by reference to the actual enjoyments under the renewal grants and leases in the pleadings mentioned by H., the late tenant for life of the estates comprised in such renewal grants and leases, and by E., the testator's widow, and to the value to be set upon the life of G., the *c. q. vie*, at the death of the said H., and having regard to the agreement to have a value set upon the life of the said G. at the death of the said H.; And Declare that compound interest ought to be computed at the rate of 4 p. c. per ann., with annual rests, on the proportion of such fines and expenses payable by the Plt, as the person entitled to nine-fortieth shares of the reversionary interest from the times of the several payments thereof, up to the day of the death of the said H., and that simple interest ought to be computed at the rate of 4 p. c. per ann. on the total amount of such proportion, and interest from the death of the said H. until payment to the Defts (*his legal pers. represves*).—No costs on either side.—*Bradford v. Brownjohn*, L. JJ., 11 July, 1868, A. 1999; *S. C.*, 3 Ch. 712 (following *Nightingale v. Lawson*, 1 Bro. C. C. 440).

7. *Tenant for Life to procure Admission to Copyholds—Fines—Costs of appointing New Trustees, &c., to be raised out of Corpus by Sale or Mortgage—Tenant for Life to contribute and give Security.*

“LET the Deft S. procure herself to be admitted to the copyhold hereditaments held of the manor of K., in the pleadings mentioned, upon the trusts of the will of H., deceased, the testator, &c.; And Declare that the amount payable for the fines, fees, and expenses of the admittance of the Deft S., and of the Plts (if necessary) to the testator's copyhold estate, and for the costs and expenses of, and relating to, the appointment of Plts as trustees of the testator's will, and the costs of all parties of this action, ought to be raised out of the *corpus* of the testator's real and personal estate; 1. And Let an inquiry be made

what is the amount of such fines, fees, and expenses, and of the costs and expenses of, and relating to, the appointment of the Plts as such trustees, distinguishing the amount of the fines, fees, and expenses relating to the copyhold estate."—Direction to tax the costs of all parties, those of the trustees as between solr and client; 2. Any parties to be at liberty to carry in proposals before the Judge for raising the amount of the fines, fees, and expenses, and costs and expenses of the said appointment of the Plts as trustees, and the costs of suit, by sale or mortgage [Form 18, *sup.* p. 1456]; If by mortgage, the interest to be kept down by the tenant for life for the time being—"And Let the Plts, as such trustees, be at liberty, out of the rents and profits of the said trust estate, to retain and pay such interest; And Declare that the Deft S., as the tenant for life of the testator's copyhold estate, ought to contribute to the amount to be raised for the fines, fees, and expenses relating to the admittance of herself, and to the admittance (if necessary) of the Plts, to the said copyhold estate, in proportion to such benefit as she may derive therefrom; 3. And Let an inquiry be made what sums ought to be paid, or secured to be paid, to raise the same, by the Deft S., in respect of such proportion; And Let a proper security to be given by her in respect thereof, be approved by the Judge."—Adjourn &c.—*Carter v. Sebright*, M. R., 31 Jan. 1859, A. 978; 26 Beav. 374.

For inquiry what proportion of the amount of the fines and fees payable to the lord of the manor, on the admission of the Petr to the devised copyholds, ought to be borne by the Petr as tenant for life of the said estates, and what proportion by the parties entitled in remainder, and paid out of the *corpus*, see *Re Burnett*, V.-C. K., 25 June, 1852, A. 1123.

8. *Ecclesiastical Lease no longer renewable—Application of Renewal Fund and Proceeds of Sale—Income only given to Tenant for Life—Ecclesiastical Commissioners Act, 1860 (23 & 24 V. c. 124).*

REVERSE the order dated &c., with consequent directions as to costs; "And Declare that from the last renewal of the leasehold rectory, glebe lands, and tithe rent-charge of H. and S. at E. in the petition mentioned, which took place as from the 29th September, 1866, the annual sum of £100 ought to be set aside out of the said tithe rent-charge and invested in Consols until the sale of the share of the testator M. in the said leaseholds hereafter directed; And Declare that the said leasehold share of the E. rectory, glebe lands, and tithe rent-charge (hereinafter called the E. tithes share) ought to be sold, and the proceeds thereof, and the investments of the said annual sum treated as *corpus*, for the purpose of answering the disposition made by the will of the testator of the E. tithes share; And it appearing by &c. that £856 Consols, part of the sum of £1,003 Consols, represents the annual sum of £100 to be invested out of the said E. tithes share, and

the investments thereof from the year 1866, up to and inclusive of the year 1874, Let the Plt and W., as the present trustees of the testator's will, on or before —, transfer the said sum of £856, part of the said £1,003 Consols standing in their names &c. into Court to the credit of this action &c., 'The account of the E. tithes share' as directed in the Lodgment Schedule hereto; And Let the Plt and W., on or before the same day, out of the cash in their hands received in respect of the said E. tithes share, lodge in Court to the same credit, as directed in the said schedule, the sum of £100, to answer the investment of £100 for the year 1875; And Let the Plt and W., on or before the same day in every succeeding year until the sale of the said tithes as hereafter directed, lodge the annual sum of £100 out of the moneys received from the said E. tithes in Court to the same credit, as directed in the same schedule; And Let the Plt and the said W., as such trustees as aforesaid, sell £147 Consols, the residue of the said £1,003 Consols, so standing in their names as aforesaid, and divide the proceeds into five equal parts, and pay the same in manner hereinafter mentioned, that is to say &c. (*directions for payment to the persons entitled*); And Let the Plt and the said W. during the life of F. (*tenant for life*), or until further order, divide the surplus of the income from the said E. tithes share, after such annual deductions thereout as aforesaid, until the sale thereof as hereinafter directed, and also divide any dividends to be received on the said £1,003 Consols before the transfer and sale hereinbefore directed into five equal shares, and pay the same during the life of F. in like manner as the proceeds of the sale of the residue of the £1,003 Consols."—"And Let the said share of the leasehold rectory tithe rent-charge, and also of the glebe lands of the rectory of E., granted by the two several leases, dated &c., be sold with the approbation of the Judge, and the money to arise by such sale be paid into Court to the credit of &c. subject to further order.—And all persons interested in the proceeds are to be at liberty to apply in Chambers as to the costs of and attending such sale, and as to the application of the proceeds and of the income thereof."—[*Add Lodgment Schedule, directing lodgment in Court of Consols, and of annual sums of £100 and investment.*].—See *Maddy v. Hale*, C. A., 11 July, 1876, B. 2352; *S. C.*, 3 Ch. D. 327, C. A.

For inquiry whether an arrangement (under 23 & 24 V. c. 124), mentioned in the chief clerk's certificate—by which the Ecclesiastical Commrs, who declined to grant any further renewal, offered to sell to the trustees part of the leasehold property and tithe rent-charge on a surrender of the existing lease in the remainder, and payment of £2,620 (which exceeded the renewal fund by £1,580) by way of equality of exchange—was proper and beneficial to be entered into by the trustees, having regard to the value of the leaseholds, and to the right of the remaindermen to succeed on the death of the tenant for life to the enjoyment, as nearly as might be, of the *corpus* of the property, or whether any and what modifications to which the Commrs were willing to agree should be made therein, with the further inquiry as to raising the money necessary in addition to the funds accumulated for renewals and available for that purpose (£1,040), see *Hollier v. Burne*, L. C. for M. R., 23 May, 1873, A. 2985; *S. C.*, 16 Eq. 163.

9. *The like—Renewal Fund to be returned to Tenant for Life—Leave to sell Leasehold Interest in the Tithe, and purchase Reversion in Fee of the Glebe from the Ecclesiastical Commissioners.*

“AND it appearing that a renewal cannot be obtained of the lease, dated &c., of the glebe and tithe at U., in the county of G., in the pleadings mentioned, which lease is now subsisting and vested in the Plts, as the trustees of the settlement, dated &c., in the pleadings mentioned, Declare that the Deft H., as the tenant for life of the said leasehold premises under the said settlement, is entitled to the portion of the rents and profits of the said leasehold premises retained by the Plts to meet the expense of the fines and fees which would have been payable on a renewal of the said lease if a renewal could have been obtained.”—Direction to raise and pay costs out of £—Consols standing in the Plts’ names, which had arisen from the investment of the rents so retained by them, and for transfer of the residue to H.—“And Let the Plts be at liberty to sell to the Ecclesiastical Commrs for England the leasehold interest in the said tithes now vested in them, as such trustees, under the said lease, dated &c., and, as such trustees, to purchase the reversion in fee of the said glebe expectant on the termination of the said lease, and of the tithe rent-charge thereon; And Let the Plts be at liberty to lay proposals before the Judge for that purpose; And Let the said Ecclesiastical Commrs be at liberty to pay the money which will be coming from them, upon the balance of the purchase-money to be respectively received by and paid to them upon the said transaction, to the Plts as such trustees as aforesaid; And Let all proper parties join in a proper assignment of the said leasehold interest to the said Ecclesiastical Commrs, such assignment to be settled by the Judge in case the parties differ; And Let the Plts’ and Deft’s costs of and incident to the said sale and purchase, and of and relating to the assignment and conveyance to complete the same respectively, be taxed by the taxing master as between solr and client, and be paid and retained by the Plts out of the money to be paid to them by the Ecclesiastical Commrs as aforesaid.”—Directions to invest the residue in the trustees’ names, on the subsisting trusts of the settlement;—“And Let the Plts, as such trustees as aforesaid, take a conveyance of the reversion in fee of the said glebe, and of the tithe rent-charge thereon, when so purchased as aforesaid, and stand possessed of the same upon the trusts by the said settlement declared, or referred to, respecting the said leasehold glebe and tithe at U. aforesaid, or upon such of them as shall be then subsisting undetermined and capable of being carried into effect, such conveyance to be settled by the Judge in case the parties differ about the same.”—Liberty to apply.—*Morres v. Hodges*, M. R., 16 Jan. 1860, B. 163; 27 Beav. 625.

The payment of the renewal fund to the life tenant in this case has been explained on the ground that there was no express paramount trust to renew, but merely a direction for the trustees to use their utmost endeavours to renew, and to raise the fines out of the rents and profits, or by mortgage or

other disposition : see *Maddy v. Hale*, 3 Ch. D. 327 ; *Wood's Estate*, 10 Eq. 572 ; Lewin, 430.
For form of petition, see D. C. F. 1147.

10. *Enfranchisement of a Rectorial Manor, Glebe, and Demesnes, held by Testator on Lease for Lives.*

"AND this Court, being of opinion that the conditional contract, dated &c., entered into between the Estates Committee of the Ecclesiastical Commrs for England, by C., their agent, of the one part, and A. and B. of the other part, for the surrender and enfranchisement of parts of the hereditaments held by the testator S., by indenture of lease, dated &c., in the order dated &c. mentioned, is fit and proper, and for the benefit of the parties interested under the will of the testator, doth order that the same be carried into effect ;"—Consent by an annuitant to release his annuity for the purpose of the enfranchisement ;—" And upon the execution by the said A. and B. of the indenture of surrender intended to be made between &c., and by the said Ecclesiastical Commrs of the indenture of conveyance intended to be made between, &c., the engrossments whereof have been settled and approved by &c., and are identified &c. as proper deeds for carrying the said contract into effect, and for vesting the reversion in four undivided fifth parts of such of the premises held under the said indenture of lease as are agreed to be enfranchised by the said contract in the said B., the sole trustee of the will of the testator, upon the trusts in the said order dated &c., referred to, such execution to be certified (*or verified by affidavit*) ; Let the fund in Court be dealt with as directed in the schedule hereto, the sum of £— cash thereby directed to be paid to the said Ecclesiastical Commrs being in satisfaction of the four undivided fifth parts payable by the said B., as representing the estate of the said testator, to the said Ecclesiastical Commrs of the purchase-money, value of timber, and interest under the terms of the said contract."—Direction that the lands enfranchised and the proceeds of sale thereof shall stand charged with the payment of the annuity released by the order.—[*Add Payment Schedule.*]

PAYMENT SCHEDULE
(*Containing directions as under.*)

	£	s.	d.	£	s.	d.
Upon the execution by A. and B. of the indenture of surrender intended to be made between &c., and by the Ecclesiastical Commrs of the indenture of conveyance intended to be made between &c., the engrossments whereof are respectively identified by the signature of Master (<i>name</i>) in the margins thereof respectively, being certified (<i>or verified by affidavit</i>)—						
Pay cash				The Ecclesiastical Commrs for England and Wales.		

—See *Smith v. S.*, M. R., at Chambers, 4 Aug. 1860, B. 1881.
N.B.—This Form has been re-drawn to suit S. C. F. R.

NOTES.

OBLIGATION TO RENEW.

The provisions of 23 & 24 V. c. 145, ss. 8, 9, as to the renewal of leases by trustees under instruments executed since 28th August, 1860, were repealed by the Settled Land Act, 1882 (45 & 46 V. c. 38), s. 64, but substantially re-enacted by the Trustee Act, 1888 (51 & 52 V. c. 59), now replaced by the Trustee Act, 1893 (56 & 57 V. c. 53), which provides, by s. 19, sub-s. 1, that a trustee of leaseholds for lives or years which are renewable from time to time, either under any covenant or contract, or by custom or usual practice, may, if he thinks fit, and shall, if thereto required by any person having any beneficial interest, present or future or contingent, in the leaseholds, use his best endeavours to obtain from time to time a renewed lease on the accustomed and reasonable terms, and may surrender and do all requisite acts; but where by the terms of the instrument the person in possession for his life or other limited interest is entitled to enjoyment without any obligation to renew or to contribute to the expenses of renewal, the section is not to apply unless the consent in writing of such person is obtained to the renewal. By sub-s. 2, trustees are empowered to apply, for the purpose of renewal, any money in their hands in trust for the persons beneficially interested in the lands, and raise the money required by mortgage of the lands renewed, or other lands held on the same trusts.

These provisions are for the protection of trustees, and do not alter the law as between tenant for life and remainderman: *Re Baring, Jeune v. B.*, (1893) 1 Ch. 61.

In the absence of express provision, there is no obligation on a tenant for life to renew renewable leaseholds (see *Stone v. Theed*, 2 Bro. C. C. 247; *White v. W.*, 9 Ves. 561; *Capel v. Wood*, 4 Russ. 500), but he may be compelled to surrender the lease for the purpose of renewal: *White v. W.*, 4 Ves. 27, 36.

If he renews, not being bound to do so, the renewed lease is subject to the trusts, and enures for the benefit of the persons entitled to the benefit of the original lease: *Palmer v. Young*, 1 Vern. 276; *Rowe v. Chichester*, Amb. 715; *Pickering v. Fowles*, 1 Bro. C. C. 197; *Brookman v. Hales*, 2 V. & B. 45; *Keach v. Sandford*, 1 L. C. Eq. 46, and cases there cited; and this rule applies equally to a purchase of the reversion: *Phillips v. P.*, 29 Ch. D. 673, C. A.; *Re Lord Ranelagh's Will*, 26 Ch. D. 590 (where the assignee of tenant for life having purchased was held a trustee, but entitled to be recouped his purchase-money); but not unless the leaseholds are customarily renewable: *Longton v. Wilsby*, 76 L. T. 770, following *Randall v. Russell*, 3 Mer. 197.

Where a lessee, having assigned the lease by way of settlement, without disclosing such settlement, took a new lease for a longer term on a surrender of the old one, the new lease was bound by the settlement: *Re Lulham, Brinton v. L.*, 53 L. J. Ch. 928; 32 W. R. 1013; *S. C.*, affirmed on appeal, 33 W. R. 788; 53 L. T. 9.

EXPENSES OF RENEWAL.

According to the old rule, the tenant for life was bound to pay one-third, and the remaindermen two-thirds, of the fines: see *Verney v. V.*, Amb. 88; 1 Ves. 428; but this rule was abandoned by Lord Thurlow in *Nightingale v. Lawson*, 1 Bro. C. C. 440; *White v. W.*, 9 Ves. 557; and it is now settled that where no provision for meeting the expense has been made by the settlor or testator, the tenant for life and remaindermen must contribute in proportion to their actual enjoyment under the renewal: *Jones v. J.*, 5 Ha. 440; *Bradford v. Brownjohn*, 3 Ch. 711; *Hudleston v. Whelpdale*, 9 Ha. 775, 786; and see *Lewin, Trusts*, 432 *et seq.*; *Re Baring, Jeune v. B.*, (1893) 1 Ch. 61, where the enjoyment was to be ascertained by actuarial valuation.

If the tenant for life pays the renewal fine, although he will not be entitled during his life to repayment, as the actual benefit derived by him cannot be ascertained until his death (*Harris v. H.*, 10 W. R. 826, Form 5, *sup.* p. 1774), his representatives will be entitled to repayment of the proportion of what he has paid, to be ascertained by reference to his actual enjoyment,

with compound interest at 4 p. c. down to his death, and simple interest afterwards: *Bradford v. Brownjohn*, 3 Ch. 711, Form 6, *sup.* p. 1775; *Nightingale v. Lawson*, 1 Bro. C. C. 443.

He will not be charged prospectively with fines for a renewal, of which he may not live to get any benefit: *Isaac v. Wall*, 6 Ch. D. 706; and if, owing to his death during the existence of the original lives, he has derived no benefit from the renewal, his representatives will be entitled to the whole sum which he has paid: *Harris v. H.*, 32 Beav. 333, Form 5, *sup.* p. 1774; but their claim must be made without delay: *Ainslie v. Harcourt*, 28 Beav. 313.

If the expenses of renewal have been directed by the settlor or testator to be raised by sale or mortgage of the estate itself or of another estate, the tenant for life loses the rent of the part sold, or has to keep down the interest in case of a mortgage: *Ainslie v. Harcourt*, 28 Beav. 313; *Playters v. Abbott*, 2 My. & K. 97.

If the expenses of renewal have been directed to be paid out of the rents and profits, the burden is thrown on the tenant for life entirely (even where the rents applicable for fines have been misapplied by the trustees): *Sulley v. Wood*, 29 Beav. 482; see also *Bradford v. Brownjohn*, *sup.*

And if under a trust to renew and pay the expenses from rents and profits the trustees or the tenant for life fail to renew, the remainderman is entitled to an inquiry with a view to charging the trustees or the estate of the tenant for life with what would have been a reasonable fine at the proper time for renewal: *L. Montfort v. L. Cadogan*, 19 Ves. 635; 17 Ves. 485; *Colegrave v. Manby*, 2 Mad. 72, 87; *S. C.*, 2 Russ. 238.

These rules apply to leases for lives as well as for years: *Jones v. J.*, 5 Ha. 440; *Bradford v. Brownjohn*, 3 Ch. 711; and also to leases for lives of copyholds (see *Harris v. H.*, 32 Beav. 333, *sup.* p. 1775; *Playters v. Abbott*, 2 My. & K. 97); and the fines, fees, and expenses payable on the admission of new trustees to copyholds are payable by the tenant for life and remaindermen in proportion to the value of their respective interests: *Carter v. Sebright*, 26 Beav. 374.

But the lord is entitled to a fine in respect only of a transmission of the legal estate, and not in respect of the equitable interest where the legal estate remains in the tenant admitted on the roll: *Hall v. Bromley*, 35 Ch. D. 642, C. A.

As between the tenant for life of the reversion and remaindermen, fines and heriots received for renewals are casual profits payable to tenant for life: *Brigstocke v. B.*, 8 Ch. D. 357.

ECCLIASTICAL LEASES—23 & 24 V. c. 124.

In the case of church leases (now no longer renewable) trustees and others with power to raise money for procuring a renewal were authorized by the Ecclesiastical Commrs Act, 1860 (23 & 24 V. c. 124, amending and extending 14 & 15 V. c. 104; 17 & 18 V. c. 116), to raise money for purchasing the reversion of the property, or, having no power to sell, they might, with the consent in writing of the person beneficially interested, or if such person were unwilling or incompetent to consent, with the approbation of the Court, to be obtained on petition, sell the estates held under the lease and hold the purchase-money upon the same trusts as the leaseholds would, if not sold, have been subject to: ss. 20, 24, 25, 35—38.

If there was no absolute paramount trust for renewal, the Court refused to sanction, to the prejudice of the tenant for life, whose income would be thereby diminished, an agreement under this Act for the purchase by the trustees of the reversion of church leaseholds which could no longer be renewed: *Hayward v. Pile*, 5 Ch. 214; and has given him the accumulated fund: see *Morris v. Hodges*, 27 Beav. 625; *Tardiff v. Robinson*, *Ib.* 629, n.; *Richardson v. Moore*, 6 Madd. 83, n. (cases favourable to the interests of tenant for life).

But if the instrument, by containing an absolute trust for renewal, shows the paramount intention of the settlor or testator that the remaindermen should succeed to the enjoyment as nearly as may be of the *corpus* of the property, to the income of which the tenant for life is entitled, the Court will carry into effect the arrangement, notwithstanding the opposition of the tenant for life, and give him the income only of the invested purchase-

money: *Maddy v. Hale*, 3 Ch. D. 327, C. A. (reversing V.-C. M.), Form 8. p. 1776; *Hollier v. Burne*, 16 Eq. 163; *Wood's Estate*, 10 Eq. 572; *Re Barber's Settled Estates*, 18 Ch. D. 624; *Re Lord Ranelagh's Will*, 26 Ch. D. 590.

Where the tenant for life is of unsound mind not so found, an order under 23 & 24 V. c. 124, s. 38, sanctioning a sale is made by the Chancery Division, and not in lunacy: see *Re Cheshire*, 7 Ch. 50.

An underlessee of church lands, of which his lessors have purchased the reversion under 23 & 24 V. c. 124, is entitled not to a perpetual renewal, but to be allowed to purchase the reversion from his lessors on the terms of paying them a due proportion of the purchase-money and expenses incurred in their purchase, regard being had to his existing interests under his lease: *Postlethwaite v. Leathwaite*, 2 J. & H. 237.

(IV.) PRODUCTION OF CESTUI QUE VIE—CESTUI QUE VIE ACT, 1707
(6 ANNE, c. 18).

1. *Order to produce Cestui que Vie at Church Porch*—6 Anne, c. 18.

UPON motion &c. by counsel for A., who alleged that the said A. is entitled to the immediate reversion of — after the death of B., who, the said A. hath good reason to believe, is dead, and that his death is concealed by C., as by affidavit appears; And upon reading the said affidavit, this Court doth order that the said C. do produce and show the said B. to &c., at the door of the parish church of —, in the county of —, on the — day of —, between the hours of — and — of the clock in the forenoon of the same day, according to the Cestui Que Vie Act, 1707.—*Exp. Best*, L. K., 12 June, 1760, A. 333; *Re Lingen*, 12 Sim. 104; *Re Clossey*, V.-C. S., 20 Jan. 1854, A. 780; 2 S. & G. 46; *Re Owen*, V.-C. H., 21 Dec. 1878, B. 2266; 10 Ch. D. 166.

For forms of application, &c., see D. C. F. 1138 *et seq.*

2. *To produce before Commissioners, or the Court.*

WHEREAS by an order, dated &c. [*Recite former order*].—Now, upon motion &c., who alleged, that it appears by the affidavit of &c. [*State service of the last order, attendance at the place therein mentioned, and the non-production of the person*], and upon reading the said order and affidavits, this Court doth order that the said A., having personal notice hereof, do produce the said B., *If before Commrs*, before C. of — and D. of —, at &c. —, on the — day of —, between the hours of — and — o'clock in the forenoon of that day [*If before the Court*, at the bar of this Court, at the sitting of this Court the — day of —], according to the said statute.—*Exp. Best*, L. K., 13 Nov. 1760, A. 10; *Exp. De Trafford*, V.-C. W., Nov. 1845, A. 15; *Re Clossey*, *sup.*

For the like order for the assignees of the life estate to produce the tenant for life on evidence that, when last seen, he was hopelessly ill, see *Re Dennis*, V.-C. S., 18 July, 1860, A. 1539; S. C., 8 W. R. 649; 7 Jur. N. S. 230.

3. *Final Order—Cestui que Vie not being produced in Court.*

WHEREAS &c. [*Recite former order*].—Now, upon motion &c., who alleged that the said W. and I. have been personally served with the

said order, as by affidavit now produced and read appears, and the said W. and I. not producing the said M. (*c. q. vie*) in Court, pursuant to the said order, and no one attending for the said W. and I., this Court doth declare, that the said M. ought to be deemed and taken to be dead, according to the said statute, and doth order the same accordingly.—*Re Lingen*, V.-C., 1 May, 1841, B. 535; *Exp. Childs*, L. C., 18 Jan. 1723, A. 85.

For an alternative order to produce before Commrs or the Court, see *Exp. St. Aubyn*, 4 May, 1799, B. 319.

For orders—for leave for claimants to send over the Commrs at their own charge to Brussels, to view person there, see *Lennard v. E. Sussex*, L. C., 14 Oct. 1708, B. 507; and to produce him before same Commrs at the Middle Temple Hall, or in default the party to be taken to be dead, *Id.* 605.

NOTES.

PRODUCTION OF CESTUI QUE VIE UNDER 6 ANNE, c. 18.

By the Cestui Que Vie Act, 1707, s. 1, persons claiming after the death of *c. q. vie*, upon affidavit of title, and of their belief that *c. q. vie* is dead, and his death concealed, may once a year, upon application by motion (which is to be made *ex parte*: see Dan. 1887), obtain an order for his production, at such time and place as the Court shall direct, on personal or other due service of the order, to the persons therein named, not exceeding two—in default the Court may order production in Court or before Commrs—in default (if before Commrs, the return to be filed), the *c. q. vie* is to be taken to be dead, and the claimant may enter; by sect. 2, on affidavit that *c. q. vie* is beyond seas, claimant may, at his own charge, send over the persons named to view, and on their return of non-production, to be filed as before, may enter; by sect. 3, provision is made for re-entry, if *c. q. vie* is alive; by sect. 4, tenant *pur autre vie* showing he is alive, but cannot be produced, may continue in possession; by sect. 5, a person holding over is to be deemed a trespasser, and liable for damages.

Where *c. q. vie* is to be produced to Commrs, and their return is filed, no further order is necessary: see, however, Dan. 1887.

In *Re Lingen*, 12 Sim. 104, where the second order was to produce in Court, and so there was no return to be filed, the V.-C. thought that an entry in the registrar's minute-book would be sufficient, but an order was drawn up: see also *Exp. Childs*, Form 3, *sup.*; and this seems the proper course: and see *Re Clossey*, 2 S. & G. 46.

In *Re Isaacs*, 4 M. & C. 11, the tenant *pur autre vie* was not allowed the costs of production under the first order, the Act being silent as to such costs; but the Act appears to give the costs of production before the Court or Commrs.

The M. R. had no jurisdiction under this Act: *Meyrick v. Lawes*, 23 Beav. 449; 5 W. R. 746; but since the Jud. Acts the jurisdiction is no longer vested only in the L. C., Lord Keeper, or Commrs for the custody of the Great Seal, but has been transferred to the High Court of Justice: see Jud. Act, 1873, ss. 16, 17; Jud. Act, 1875, s. 3.

A devisee of land, in case of the death of another without leaving issue, is a person who has a claim in expectancy to an estate after the death of a person within sect. 1: *Re Pople, Exp. Baker*, 40 Ch. D. 589.

The assignee of a tenant for life is within the Act: *Exp. Castledine*, 44 L. T. 469; 29 W. R. 521; and a person having a mere interest determinable on a life, *e.g.*, a wife left in possession of the rents by her absentee husband, the tenant for life, as his agent: *Re Stevens*, 31 Ch. D. 320.

The order may be made in the absence of satisfactory proof that the *c. q. vie* is living: *Re Clossey*, 2 Sm. & G. 46; and on evidence that when last seen he was hopelessly ill: *Re Dennis*, 8 W. R. 649; 7 Jur. N. S. 230; and also when

the person in possession who has been applied to makes no answer to the application: *Re Owen*, 10 Ch. D. 167.

On reasonable evidence of the existence of *c. q. vie*, and belief that he is concealing himself, the time for his production may be enlarged: *In re St. John's Hospital*, 16 W. R. 670; 18 L. T. 112.

The order was made on the affidavit of one of the reversioners, the other being an ambassador resident abroad: *Exp. Dashwood*, W. N. (88) 139.

(V.) DISENTAILING UNDER FINES AND RECOVERIES ACT, 1833
(3 & 4 W. IV. c. 74).

1. *Consent by Court as Protector in case of Felony and limited to letting in Mortgage—Sects. 33, 48, 49.*

DECLARE that G., the tenant for life, having been convicted of felony, as in the petition mentioned, this Court hath, for the purposes of the said Act, become the protector of the settlement made by the indentures of lease and release dated &c., and by the recovery suffered in pursuance of the agreement contained in the said indenture of release; And Declare, that this Court, as such protector, consents to bar the estate of the Petr as tenant in tail in remainder expectant on the determination of the life estate of the said G., of and in the several lands, tenements, and hereditaments mentioned and comprised in the said settlement, so far as may be necessary to enable the Petr to raise the sum of £—, upon mortgage thereon, subject nevertheless to all prior incumbrances affecting the said lands &c., together with the costs (charges and expenses) of this application (and incident thereto) and consequent thereon, and also of the said mortgage (and incident thereto) and consequent thereon; And Let a proper deed, for the purpose of barring the said estate, be settled by the Judge.—*Re Gravenor*, V.-C. K. B., 22 Dec. 1847, A. 584; and for form of petition and evidence in support, see 1 D. & S. 700.

On the question whether the power of the Court to act as protector, where the protector of the settlement shall be convicted of felony, has been affected by the Forfeiture Act, 1870 (33 & 34 V. c. 23), see notes, *inf.* p. 1787.

For order in Lunacy, and under the 3 & 4 W. IV., c. 74, where lunatic was tenant in tail in possession, consenting to first tenant in tail in remainder barring the subsequent limitations, see *Re Blewitt*, 6 D. M. & G. 187.

For form of petition, see D. C. F. 1144.

2. *Inquiry as to Legal Estate—Infant—Protector—Beneficiaries—Sects. 33, 48.*

LET an inquiry be made in whom the legal estate in the hereditaments in the petition mentioned is vested, and whether such person is or is not an infant, and who is the protector of the (settlement of the) said hereditaments under the will of the testator in the petition named, and who is or are beneficially entitled thereto under the said will, and for what estates respectively.—*Re Toms*, M. R., 24 May, 1836, B. 630.

For inquiry whether, under the limitations in the settlement, the stock in question was subject to be laid out in land, and upon what use, and who

would be entitled thereto if so laid out; and whether a lunatic, if of sound mind, would be the protector of the settlement within the meaning of the Act, and for the further order, see *Grant v. Yea*, 3 M. & K. 246.

3. *Order without previous Inquiry—Infant—Money—Land—*
Sect. 71.

UPON reading the said petition, the (probate of the) will of F., dated &c., the judgment dated &c., &c., the indentures dated &c., the indenture of assignment, dated &c., duly enrolled in this Court, an affidavit of —, filed &c., of the execution of the said deed [*Enter proof of age*], an affidavit of —, filed &c., of no charge or incumbrance affecting the fund in question, and the certificate of the fund, Let the funds in Court be dealt with as directed in the schedule hereto.

PAYMENT SCHEDULE
(Containing the following).

		£ s. d.	£ s. d.
Transfer New Consols	Petitioner A.		

—See *Fitzherbert v. Bateman*, M. R., 17 Feb. 1834, A. 638; *Woodgate v. Kinlside*, M. R., 23 Jan. 1840, B. 313.

N.B.—This Form has been redrawn to suit S. C. F. R.

4. *Inquiry who is entitled, and as to Charges.*

LET an inquiry be made whether (how and in what manner) the Petr is, under and by virtue of the Act of &c (*Fines and Recoveries Act*) entitled to the £— &c. in the petition mentioned; And whether there are any, and what, charges or incumbrances affecting the same.—Adjourn &c.—*Exp. Stratton*, V.-C., 2 June, 1834, B. 1029; *Exp. Bushnell*, M. R., 25 June, 1834, A. 1011.

5. *Further Order.*

LET the £— Consols standing &c. in the names of &c. be transferred by F., as the legal pers. represve of the testator, into the joint names of the Petrs (*protector of the settlement and remainderman who had concurred in executing a disentailing deed*), or be otherwise disposed of as they shall direct or appoint, discharged from the trusts of the will and codicil of the testator (*creating the entail*).—*Exp. Fullerton*, V.-C., 28 Jan. 1837, A. 227.

6. *Declaration of Title, under Disentailing Deed, to Past and Future Rents and Personal Estate to be invested, &c.—Sect. 71.*

DECLARE that the Plts J. and N. are the persons now entitled under the will of G., the testator &c., and under the disentailing deed dated &c., to the beneficial interest in the rents and profits of the real estate now subject to the trusts of the will of the testator, and to the beneficial interest in his residuary personal estate, and to the possession of those estates respectively; And Let the Defts E. and F. (*trustees of the will*) deal with and dispose of the said estates as the Plts shall direct.—Account of moneys received and payments made by Defts E. and F., or by any other person &c. since the death of the testator in respect of his real and personal estate and the rents and profits thereof.—Directions for taxation and payment of costs.—*Fordham v. F.*, M. R., 6 Dec. 1864, A. 2443; *S. C.*, 34 Beav. 59; 13 W. R. 197.

7. *Point of Law—Declaration that Estate Tail under Shifting Limitation barred.*

THE question of law directed to be set down and argued &c. Declare that on the assumption that the proviso in the will of W. H., the first Duke of C., deceased, and set out in para. — of the statement of claim in this action, was originally good in point of law, the same proviso was not in operation on the death of M. W. V. M. in the year —, the said proviso having been defeated by the disentailing assurance dated &c., referred to in the several defences of the Defts, and which operated so as to bar any estate or interest which the Plt might otherwise have taken under the said proviso, and order and adjudge the same accordingly.—*Milbank v. Vane*, Kekewich, J., 18 Jan. 1893, B. 36; *S. C.*, C. A., 22 March, 1893, B. 451; (1893) 3 Ch. 79, C. A.

NOTES.

By the Fines and Recoveries Act, 1833 (3 & 4 W. IV. c. 74), ss. 15—21, 38, 39, power is given to disentail in fee, or for a less estate or a limited purpose, or enlarge base fees, and voidable estates are confirmed, subject as there mentioned.

By sect. 22, the owner of the first existing estate under a settlement prior to the estate tail under it is to be the protector: see *Re Dudson*, 8 Ch. D. 628, C. A.

By sect. 33, where the protector is lunatic or of unsound mind the L. C., &c., or the other person or persons for the time being entrusted with the care of lunatics (see Jud. Act, 1875, s. 7), or where the protector shall be convicted of treason or felony, or an infant, or his existence cannot be ascertained, the (Chancery Division) shall be the protector of the settlement.

By sect. 47, the Court is in effect prevented from making an agreement to execute a disentailing deed equivalent to a deed by aiding its defective execution, but the section does not prevent the Court from granting specific performance of such agreement: *Bankes v. Small*, 36 Ch. D. 716, C. A.; or exercising its ordinary jurisdiction to rectify a deed enrolled on the ground of mistake: *Hall-Dare v. H.*, 31 Ch. D. 251, C. A.

By sect. 48, in cases within sect. 33, the L. C., &c., may on motion or petition in a summary way by a tenant in tail consent to dispositions under the Act by a tenant in tail, and make any necessary orders; but if any other person shall be joint protector the disposition is not to be valid without his consent in the manner in which the consent of the protector is by the Act required to be given; and by sect. 49, the order of the L. C., &c., or the Court (Chancery Division) in cases where he or the Court shall be protector, shall be sufficient evidence of consent to the disposition by the tenant in tail under the settlement.

In the case of the death of one of the protectors of a settlement appointed by the settlor or testator the office (like that of testamentary guardian: see *Eyre v. C. Shaftesbury*, 2 L. C. Eq. 633) survives, and the estate tail may be effectually barred by the survivor: *Bell v. Holtby*, 15 Eq. 178.

All the trustees under a will, who were thereby appointed protectors, having died, the tenant for life becomes protector, and not the new trustees appointed by the Court: *Clarke v. Chamberlin*, 16 Ch. D. 176.

A married woman entitled to her separate use for life is protector: *Keer v. Brown*, Joh. 138; as also a widow entitled to call for the legal estate: *Buttanshaw v. Martin*, Joh. 89; and that the person beneficially entitled to the rents is protector, as being the owner of the estate prior to the estate tail: see *Re Dudson*, 8 Ch. D. 628, C. A.; *Re Ainslie, A. v. A.*, 54 L. J. Ch. 8; 51 L. T. 780; 33 W. R. 148.

A restraint on anticipation will not prevent a married woman from barring the entail, nor will her husband's bankruptcy prevent his concurrence in the disentailing deed under sect. 40: *Cooper v. Macdonald*, 7 Ch. D. 288.

A disentailing assurance by a *feme covert* equitable tenant in tail of copyholds must be entered on the Court rolls within six months: *Green v. Paterson*, 32 Ch. D. 95, C. A.; *Honywood v. Foster*, 30 Beav. 1.

As to the acknowledgment by a married woman of deeds executed by her for the purposes of the Act, see Chap. XXXVII., Sect. II., *sup.* pp. 931, 935, 936; Shelf. R. P. S. 299—311.

A declaration of trust of copyholds by a married woman tenant on the rolls of the manor, by a deed acknowledged under the Fines and Recoveries Act, 1833, is a "disposition" within the meaning of sect. 77 of the Act, and will effectually bind the copyholds as against her customary heir. Such a case is not within the proviso to the section: *Carter v. C.*, (1896) 1 Ch. 62.

If tenant in tail in possession is a lunatic, the L. C. can consent to the remainderman barring the subsequent entails in a proper case: *Re Blewitt*, 6 D. M. & G. 187 (overruling *S. C.*, 3 My. & K. 250); *Re Wood*, 3 My. & C. 266; *Louton v. L.*, 5 Ves. 11 n.; or bar the estate of the lunatic, but the jurisdiction will be so exercised as not to affect the rights of remaindermen: *Re Pares, Lillington v. P.*, 12 Ch. D. 333, C. A.

The Court, as protector of the settlement, will not concur in barring the entail where the application is not for the benefit of the lunatic's estate, but of one collateral only: *Re Tharp*, 3 Ch. D. 59, C. A.; but the Court in lunacy consented as protector to the tenant in tail barring the entail to the extent of letting in a charge for sums allowed to him out of the personal estate of the lunatic tenant for life: *Re Sparrow*, 20 Ch. D. 320, C. A.

That consent may be given to enlarging a base fee of land in England, the tenant for life being a lunatic so found in Ireland and there resident, see *Re Graydon*, 1 Mac. & G. 655.

The right of a tenant in tail to enlarge his estate into a fee is a right inherent in the estate tail, and cannot be restricted by any expressions of desire to the contrary by a testator donor of the estate: *Dawkins v. Lord Penrhyn*, 4 App. Ca. 51.

A tenant in tail who has created a base fee and conveyed it away can nevertheless enlarge it into a fee simple absolute under sect. 19: *Bunkes v. Small*, 36 Ch. D. 716, C. A. (see sects. 1, 38).

Upon conviction for felony of the husband of a married woman tenant, the Court became protector: *Re Wainwright*, 2 Ph. 258.

And see the Forfeiture Act, 1870 (33 & 34 V. c. 23), ss. 9, 10, 12, under which the Crown may appoint an admor in whom all the real and personal property of a convict shall vest for all the estate and interest of the convict therein (sect. 10); and the admor shall have "absolute power to let, mort-

gage, sell, convey, and transfer any part of such property as to him shall seem fit" (sect. 11).

It is not expressly enacted, and it does not appear to have been decided, that since this Act the admor appointed by the Crown, and not the Court, would become the protector of a settlement of which the convict was protector.

A disentailing deed in the form of a grant of the property, discharged from all estates tail of the grantor, to trustees in trust for him, does not, if the trustees have not executed and have formally disclaimed all interest, operate as a disentailing assurance: *Peacock v. Eastland*, 10 Eq. 17.

By sect. 71, where the money to arise from the sale of lands of any tenure is subject to be invested in the purchase of lands to be entailed, and where money is subject to be invested in like manner, the previous clauses of the Act shall with certain variations apply to such lands and money. Under this section a disentailing deed affects not only rents already raised and liable to be invested, but future rents subject to the same trust: *Fordham v. F.*, 34 Beav. 59; 13 W. R. 197; and as to the application of the section to money to be invested *in futuro*, see *Re Harvey, H. v. H.*, (1901) 2 Ch. 290.

As to the necessity of a disentailing deed on payment out of Court to the persons capable of disentailing of money representing an entailed estate which has been sold under the Settled Estates Act, or taken under the Lands Clauses Act, the cases were conflicting, but in the latest instances execution of a disentailing deed before payment has been required: see *Re Reynolds*, 3 Ch. D. 61, C. A.; *Re Broadwood's Estate*, 1 Ch. D. 438; *Re Butler's Will*, 16 Eq. 479; *Re Limerick Ry. Co., Exp. Smyth*, 10 Ir. R. Eq. 66. In *Stead v. Harper*, W. N. (96) 46, a small sum in Court was paid out to a tenant in tail without a disentailing assurance.

A power of sale at request of a tenant for life in possession was held not to be extinguished by a disentail and resettlement to uses in restoration of the uses of the will: *Re Wright and Marshall*, 28 Ch. D. 93.

A disentailing deed bars, under sect. 15 of 3 & 4 W. IV. c. 74, all estates taking effect in defeasance of it, and this includes estates arising by virtue of a shifting limitation defeating the estate tail in a particular event, which happens during the life of the tenant for life, protector of the settlement: *Milbank v. Vane*, 68 L. T. 725; 62 L. J. Ch. 629; Form 7, *sup.* p. 1786; *Doe v. Earl of Scarborough*, 3 A. & E. 2, 897; and see *Cardigan v. Curzon-Howe*, 49 W. R. 715.

As to the effect of an enfranchisement deed in barring an estate tail in copyholds, see *Exp. School Board for London*, 41 Ch. D. 547; 58 L. J. Ch. 752; 37 W. R. 61.

SECTION V.—SETTLED ESTATES ACT, 1877 (40 & 41 V. c. 18).

Although this Act has not been repealed, the jurisdiction and procedure under it have now greatly fallen into disuse by reason of the more comprehensive and convenient provisions of the Settled Land Acts. Indeed, the case of an infant being contingently entitled appears to be the only one in which the provisions of the Act of 1877 have not practically been superseded. The Forms under the Act of 1877, which were omitted from the 5th edition, have, however, been reinserted in the present edition from the 4th edition to meet the views of many members of the Bar and others who considered that, as the Act of 1877 has never been formally repealed, it would be convenient still to retain the Forms thereunder. Forms 12 and 13, pp. 1805, 1806, which were inserted in the 5th edition, have been again inserted here. The notes to the Forms in the 4th edition have, however, not been reprinted here, and will be found in the 4th edition, pp. 1475 *et seq.*, and the notes which are here appended may be taken as merely supplementary to those.

(I.)—PRELIMINARY ORDERS AND PROCEEDINGS.

1. *Order on Summons appointing Guardian to Infant to make or consent to an Application—Sect. 49—Settled Estates Act Orders, 1878, 5, 6, 8, 9, 10, 12.*

UPON the application of A. &c. the Petrs in this matter, and upon hearing the solr for the Applicants, and for C. the father [*or mother, or testamentary guardian, or guardian appointed by the Court; or, where an infant is tenant in tail, the person proposed to be appointed guardian of the infant B., if so, who is tenant in tail of the estates mentioned in the petition on the — day of — preferred by the said A. &c. unto this Court under the provisions of the said Act*]; And upon reading the said petition [*or And upon reading the petition on the — day of — preferred &c.*], an affidavit of &c., filed &c. [*O. 10 and 12*] [*if so, and the consent in writing of the said C. to act as the guardian of the said infant*] the Judge doth hereby appoint the said C. guardian of the said infant B., for the purpose of making [*or consenting*] on behalf of the said infant [*to*] the application proposed to be made by the said petition [*if the infant is tenant in tail, add: And it is ordered that the said C. do make or consent to*] such application accordingly].

If the guardian makes an affidavit in support under O. 10 or 12, his consent may be expressed therein, and no other formal consent is necessary; and as to dispensing with service of the summons on the parent, &c., *v. Seton*, 4th ed. p. 1480.

2. *Order on Summons appointing Guardian to Infant to be served with Notice, or to make a Notification under sects. 26, 49—O. 5—10, 12.*

UPON the application &c. [*Form 1, sup.*] the Judge doth hereby appoint the said C. guardian of the said infant B., for the purpose of being served with notice requiring him, on behalf of the said infant, within — days from the service thereof, to notify whether he assents to, or dissents from, the application proposed to be made by the said petition, or submits the said infant's rights or interests so far as they may be affected by such application to be dealt with by the Court, and for the purpose of making such a notification accordingly.

If the infant is tenant in tail: And it is ordered that the said C. do within &c. notify that he, on behalf of the said infant B., assents to, or dissents from, the said application, *or* submits the said infant's rights or interests, so far as they may be affected by such application, to be dealt with by the Court.

3. *Order on Summons authorizing Committee on behalf of Lunatic Tenant in Tail to make or consent to Application, or notify his Assent, Dissent, or Submission—Sect. 49—O. 6—9.*

UPON the application of A. &c., the Petrs in this matter, and upon hearing the solr for the applicants, and for C. the committee of B., a

lunatic (O. 9), who is tenant in tail of the estates mentioned in the petition preferred by the said A. &c. [Form 1, p. 1789], and upon reading the said petition, the order dated &c. made in the matter of the said lunatic by &c. (*see* O. 11), whereby it appears that the said Judges are of opinion that it is proper and consistent with a due regard for the interest of the said lunatic that the said C. should make [or consent to, or dissent from] the application intended to be made by the said petition [or submit his rights and interests so far as they may be affected by the application proposed to be made by the said petition to be dealt with by the Court], an affidavit of &c., filed &c. [*if so*, and an affidavit of &c., filed &c., of service of the summons on C., the committee of B. a lunatic, who is tenant in tail &c., *v. sup.* &c.] It is ordered that the said C. do on behalf of the said lunatic B. make [or consent to] such proposed application [or notify that he, on behalf of the said lunatic B., assents to, or dissents from, such proposed application, or submits his rights or interests so far as they may be affected by such application to be dealt with by the Court].

4. *Order for Service of Notice on Person of Unsound Mind, or out of the Jurisdiction—Sect. 26—O. 4.*

UPON the application of A. &c., the Petrs in this matter, and upon reading an affidavit of &c., filed &c., It is ordered that notice of the application intended to be made by the petition preferred by &c., under the provisions of the said Act, requiring B., who is a person of unsound mind [or who resides at — out of the jurisdiction of this Court] as by the said affidavit appears, within — days after service of such notice, to notify whether he assents to, or dissents from, this application, or submits his rights or interests, so far as they may be affected by such application, to be dealt with by the Court, be given by delivering such notice together with a copy of this order [*if of unsound mind*, to the said B. at &c., and to D., the person under whose care the said B. is residing; *if out of the jurisdiction*, by delivering such notice, together with a copy of this order, to the said B. at &c., or state the particular mode in which in each case service is to be effected].

5. *Order dispensing with Service of Notice—Sect. 27.*

UPON motion &c. [or the application of] A., the Petr in this matter, and upon reading an affidavit of &c., filed &c., and it appearing by the said affidavit that the concurrence or consent of B., who is required to be served with notice pursuant to the 26th section of the said Act, of the application intended to be made by the petition preferred by the said A. &c. under the provisions of the said Act has not been obtained, and that the said B. cannot be found [or that it is uncertain whether he be living or dead, or and it appearing to the Court that such notice cannot be given by the said B. without expense disproportionate to the

value of the subject-matter of such application], this Court doth hereby dispense with notice of such application to the said B.

The effect of dispensing with notice under sect. 27 is that the person is to be deemed to have submitted his rights and interests to be dealt with by the Court. The mode of making the application is not pointed out, but it seems that the order may either be made before or at the hearing. In *Re Welbourne*, V.-C. H., 17 Jan. 1879, it was made at the hearing and incorporated in the order vesting the powers, and this will probably be found the more convenient course, see Form 1, *inf.* p. 1793.

6. *Order for Leave to Appear after Advertisement of the Application—Sect. 31—O. 19.*

UPON motion &c. by counsel for B. of &c., and upon hearing counsel for [or upon reading an affidavit of &c., filed &c., of service of notice of the said motion on] A. the Petr in this matter [*enter any evidence*], This Court doth order that the said B. be at liberty to appear and be heard in opposition to [or support of] the application intended to be made by the petition preferred unto this Court by the said A. on the — day of — under the provisions of the said Act [*add terms as to costs or otherwise; or if the application is ex parte*, subject to such order as the Court shall think fit to make as to costs].

Where the application is made on notice the Court may permit the applicant to appear on such terms as to costs or otherwise, and in such manner as it shall think fit: sect. 31; but if the application is made *exp.*, the leave, if given, is to be subject to the direction of the Court as to costs: see O. 19.

7. *Order on Ex parte Summons for Examination of a Married Woman—Sects. 50, 51—O. 13, 14.*

UPON the application of A. &c., the Petrs in this matter, and upon reading the petition on the — day of —, preferred by the said A. &c. [*if so*, and an affidavit of &c.], The Judge doth hereby appoint [*if within the jurisdiction*, B. of &c. a solr of the Supreme Court, *if abroad*, B. of &c. and C. of &c., or either of them] to examine (the Petr) D. the wife of (the Petr E.) touching her knowledge of the nature and effect of the application intended to be made to this Court by the said petition, and to ascertain whether she freely desires to make [*or consent to*] such application.

Where the married woman is resident abroad, two names at least should be inserted in the order to guard against failure; and see Seton, 4th ed. p. 1483.

(II.) LEASING POWERS.

1. *Order vesting Powers of granting Building, Agricultural or Occupation Leases.*

Preliminary recitals.—UPON the petition of A. &c. on the — day of —, preferred &c., and upon hearing counsel for the Petrs [*If so*, and for B., C. and D., the trustees of the will &c., or indenture of settlement dated &c. in the petition mentioned; *name any other person*

appearing in support or opposition], and upon reading the said petition [an affidavit of &c., filed &c., of service of notice of this application on &c.; *Name the trustees or other persons, if any, served under sect. 30 and not appearing*, and of service of notice of this application on &c. *Name the persons served under sect. 26, and O. 4, and not appearing*, and enter the evidence showing the title, and who are the persons interested under the will, or settlement, and the nature, value, and circumstances of the estate, and the terms and conditions on which leases thereof ought to be authorized, s. 11; and why, and on what grounds, it is proper and consistent with due regard for the interests of all parties that the powers should be exercised, O. 15, and whether any notification has been received from the persons to whom notice has been given, and the purport thereof, O. 24]; An affidavit of the Petr A., filed &c., whereby it appears that no application to Parliament for an Act to effect the object of the said petition or a similar object has ever been made [*if so*, and rejected on its merits, or reported against by the Judges, O. 17];

If advertisements have been directed to be made, state the newspapers wherein they were so directed, sect. 31—each containing a notice of this application, pursuant to the direction of the Court;

If a married woman interested has been examined—the certificate of J., who, by direction of the Judge [*or if so*, by the order dated &c.] was appointed to examine (the Petr) K., the wife of L., apart from her said husband, touching her knowledge of the nature and effect of this application, whereby it appears he has examined the said K. apart from her said husband, and is satisfied that she is aware of the nature and effect of this application, and freely desires to make [*or consent to*] the same; the examination of the said K.; an affidavit of M., filed &c., verifying the signatures of the said K. and of the said J. to the said examination and certificate respectively; sects. 50, 51, 52;

If order has been already made dispensing with notice to any person—the order, dated &c., dispensing with notice of this application to &c., *see sect. 27, and O. 24*;

If an infant be a party—the order, dated &c., appointing F. guardian of the said infant E. [*if so*, who is tenant in tail of the settled estates in the petition mentioned] for the purpose of making or consenting to, this application, or of being served with notice requiring him within — days &c., on behalf of the said infant to notify whether he assents to or dissents from this application, or submits the said infant's rights or interests, so far as they may be affected by this application, to be dealt with by the Court, and of making such a notification accordingly; *if the infant is tenant in tail, add*, and directing the said F. to make a notification that he, on behalf of the said infant, assents &c., *state the alternative*;

If a lunatic tenant in tail be a party—directing the said G., the committee of the lunatic H., who is tenant in tail &c. (*as above*) on behalf of the said lunatic to make [*or consent to*] this application [*or to make a notification that &c., state the alternative*];

If any persons consent at the hearing—and N. and O. &c., by their counsel, consenting to this order ;

If a married woman be examined in Court at the hearing. And the Petr K. [or K. in the petition named], the wife of L. being present and examined apart from her husband by the Court touching her knowledge of the nature and effect of this application, and whether she freely desires to make [or consent to] such application, and stating that she freely desires to make, or consent to, the same ;

If any persons have submitted, or are to be deemed to have submitted, their rights &c.,—and the said &c. [name persons who have submitted] having submitted [or, and the said &c., name any persons served, who have not notified, or notice to whom has been dispensed with by order, being persons who are to be deemed to have submitted] their rights or interests, so far as they may be affected by this application, to be dealt with by the Court.

Dispensing with Notice at the Hearing under sect. 30.—And this Court dispensing with notice of this application to W. and X. the trustees &c. *The like under sect. 27* ; And it appearing by the said affidavit of &c. that the concurrence or consent of &c. [name the person or persons] who is or are required to be served with notice of this application pursuant to the 26th section of the said Act has not been obtained, and that the said person or persons cannot be found, or that it is uncertain whether he or they be living or dead, or and it appearing to the Court that such notice cannot be given without expense disproportionate to the value of the subject-matter of this application, this Court doth dispense with notice of this application to the said [names] ; and such person or persons being therefore to be deemed to have submitted his or their rights or interests &c., to be dealt with by the Court ;

Directions vesting powers.—And this Court being of opinion that it is proper and consistent with a due regard for the interests of all parties entitled under the said will of &c., [or the said indenture of settlement, dated &c.,] that building [agricultural or occupation] leases of the hereditaments described in the [schedule or plan annexed to the] said petition, situate &c., being (part of) the settled estates devised by the will of the said A. [or comprised in the said indenture of settlement] should be authorized, subject as hereinafter mentioned, and that it is expedient that general powers of granting such leases [If so, and of entering into preliminary contracts for that purpose] should be vested in the trustees or trustee of the said will [or indenture of settlement] for the time being, [If so, where concurrence or consent not obtained or refused, under sect. 28, and having regard to the number of persons who concur in or consent to this application, or have submitted or are to be deemed to have submitted their rights or interests to be dealt with by the Court, and to the estates and interests such persons have or claim to have in the said estate, notwithstanding the consent or concurrence of &c. [name the persons], has not been obtained, or has been refused,] Let powers of granting building [agricultural, or occupation] leases of the said hereditaments in conformity with the provisions of the said

Act [*if so*, and of entering into preliminary contracts for that purpose] vest in B., C., and D., the trustees of the said will [*or*, of the said indenture of settlement], and the survivors or survivor of them, or other the trustees or trustee for the time being of the said will [*or* indenture], and such powers are to be exercised with the consent of the tenant for life, if any, for the time being in possession of the said estates, who has attained the age of twenty-one years, or if there shall not be any such tenant for life, then without such consent; And the leases so to be granted are to be subject to the conditions required to be observed by the said Act [*if so*, and in addition thereto are to contain a covenant, *or* condition, *or* stipulation, *or* covenants, conditions, and stipulations, use the word or words applicable to the case, to the following effect, that is to say &c. *or* to the effect set forth in the — paragraph of the said petition, *or* in the schedule to this order, *or* such covenants, conditions, and stipulations, as the Judge shall approve, and, only if so specially ordered, and are to be settled by the Judge; sects. 5 and 14, O. 25].

If any person's rights are reserved—sect. 29—O. 24.—And this order is to be subject to, and is not to affect the rights, estates, or interests of &c. in the said settled estates.

Notice of Order.—And Let notice of this order be indorsed on the probate of the will of the said A. [*or* on the said indenture of settlement]; [*If the lands are in a register county or district, and it is so ordered*; And Let a memorial of this order be registered in the Registry of Deeds for the county or district of &c.; *or, if so*, and it appearing to this Court that it is impracticable or inexpedient that a notice of this order should be recorded as mentioned in sect. 33 of the said Act, no such record need be made (O. 23)].

If so ordered as to costs.—And Let the costs and expenses of the Petrs and of all parties appearing of and incident to this application be taxed by the taxing master, and be retained and paid by the said trustees out of any fund for the time being in their hands subject to the trusts of the said will [*or* indenture of settlement]; [*If so*, And be raised by sale or mortgage of a sufficient part of the said hereditaments with the approbation of the Judge &c.—Usual directions for sale or mortgage; *or, if so*, be paid by &c. out of the rents and profits of the said hereditaments; *if so*, And Let in the meantime and until such payment the said hereditaments stand charged with the amount of the said costs with interest thereon at the rate of £4 p. c. per ann. (sect. 41)].

The recitals in this form are equally applicable to orders for sale, and have been framed in compliance with the requirements of O. 24, which directs that every order (under the Act) shall state, in addition to the names of the Petrs, the names of the persons other than the Petrs who concur or consent, or to whom notice of the application has been given, or who (under O. 19), may have obtained leave to be heard in opposition to or in support of the application, and whether any notification was received from the persons to whom notice has been given, and if any has been received the purport thereof; and also the names of the persons, if any, notice to whom has been dispensed with, and whether the order is made subject to any and what rights, estate, or interest of any person whose concurrence or consent has been refused, or who

shall not, or shall not be deemed to have, submitted his rights or interests to be dealt with by the Court, or whose rights or interests ought, in the opinion of the Court, to be excepted.

For the form of notice to be served on persons whose concurrence or consent is required under sect. 26 and O. 4, see Orders, 1878, App. Form 4.

And for the form under sect. 30 of notice to trustees, see *Id.* Form 12. Although Form 12 does not state when the petition is appointed to be heard, this should, it seems, be mentioned in the notice.

For form of advertisement, see *Id.* Form 13.

The words "subject to the provisions and restrictions of the said Act," which have been frequently inserted in orders for vesting powers of leasing under sect. 4 (and the corresponding sect. 5 of 19 & 20 V. c. 120), are intended to limit the jurisdiction of the Court, which has no power to make any order not subject to these provisions, and should therefore not be inserted in the order, as it must be presumed that the Court has acted within its jurisdiction. The better course is to follow the language of sect. 10, and vest the powers "in conformity with the provisions of the Act."

For order sanctioning on behalf of the persons interested in one moiety of the estate a lease of the entirety, the persons interested in the other moiety concurring, and the costs to be a charge on the settled moiety, see *Re Moor*, V.-C. M., 7 April, 1876, B. 731.

For order on petition of the committee to discharge a former order vesting powers of leasing in the tenant for life in possession, who had become lunatic, without prejudice to any leases already granted under it, and vesting such powers instead in the trustees of the will, see *Wheeler v. Tootell*, V.-C. M., 31 July, 1878, B. 3145.

For order that trustees (the Petrs) be at liberty to apply to Parliament for an Act to enable them to carry into effect the testator's contracts for granting leases and for sales, the Court being of opinion that the provisions of the Settled Estates Act could not safely be resorted to for that purpose, see *Cust v. Middleton*, 3 D. F. & J. 33, 36; and for a declaratory decree that it would be fit and proper, &c., that an application should be made to Parliament to extend the powers of leasing contained in the testator's will, see *Savile v. Bruce*, 29 Beav. 557, 1861, A. 694.

2. *Reservation of Rights of Class of Absent Persons on vesting Leasing Powers—Sect. 29.*

[RECITALS, as in Form 1, p. 1791].—But this order is to be subject to, and so as (is) not to affect, the rights (estates) and interests (if any) of any person or persons claiming under the ultimate limitation of the said settled estates to the right heirs of the (testator), other than the persons appearing on this application.—See *Re Shaw*, M. R., 15 Dec. 1860, B. 2553; *Re Legge*, 6 W. R. 20; *Re Parry's Will*, 34 Beav. 462, in which cases a great number of pecuniary legatees being interested in the estate, the order was made subject to their rights, without serving them.

3. *Order vesting Power to grant Mining Leases—Sects. 4—15.*

Upon the petition &c. [Recitals as in Form 1, p. 1791], and this Court [if so, dispensing &c. see Form 1, p. 1791, and] being of opinion that it is proper and consistent with a due regard for the interests of all parties entitled under the said will of &c. [or the said indenture of settlement, dated &c.], that leases of the &c. [*mention the earth, coal,*

stone, or mineral to be demised] lying within, under, or upon the Y. estate described in the [schedule or plan annexed to the] said petition being (part of) the settled estates devised by the said will [or comprised in the said settlement], and situate &c., should be authorized, subject as hereinafter mentioned, and that it is expedient that general powers to grant such leases [if so, and to enter into preliminary contracts for that purpose], should be vested in the trustees of the said will [or settlement] for the time being [if so, and having regard &c., Form 1, p. 1791]; Let power to grant such leases of the said earth &c., in conformity with the provisions of the said Act [if so, and to enter into preliminary contracts for that purpose], vest in the said A. and B. (and the survivor of them) and other the trustee or trustees for the time being of the said will [or settlement], such powers to be exercised with the consent of the tenant for life, if any, &c. [see Form 1, p. 1791]. But the leases so to be granted are to be subject to the conditions required to be observed by the said Act [if so, and in addition thereto are, to contain a covenant, or condition, or stipulation, or covenants, conditions, and stipulations, *use the word or words applicable to the case* to the following effect, that is to say &c., or to the effect set forth in the — paragraph of the said petition, or in the schedule to this order, or such covenants, conditions, and stipulations as the Judge shall approve; and, *only if so specially ordered*, and are to be settled by the Judge; sects. 5, 14, O. 25].

Money set aside out of rents to be paid to trustees and invested in stock, sects. 4, 34, 36; And Let all money to be set aside out of the rents or payments to be reserved on any such leases, as directed by the said Act, be paid to the said &c. [*name the trustees*] or other the trustees or trustee for the time being of the said will [or settlement] [*If so, or to the persons hereby appointed or directed to be appointed, for the purpose of receiving such money*]; And Let, until such money can be applied to one or more of the purposes mentioned in the said Act, the same be from time to time invested by such trustees or trustee in some or one of the investments in which cash under the control of the Court is authorized to be invested [*or, if so ordered, in New Consols &c., specify the particular investment, if any, directed*] in their or his names or name.

If paid into Court and invested, sect. 34.—And Let all sums of money to be set aside &c. [*see above*], be from time to time within &c., after &c., paid by the said [*name trustees*] or other the trustees &c. [*see above*] into Court &c., *Exp.* the Petr A., in the matter of the Settled Estates Act, 1877, “money set aside out of the rents reserved on the leases of the settled estates” &c.; And Let until the same can be applied to some one or more of the purposes mentioned in the said Act, the said sums when so respectively paid into Court be invested in &c. to the same credit.

Payment of Income, sect. 36.—And Let the interest and dividends as they accrue due during the life of the Petr. A. [*the person who would have been entitled to the rents and profits*] on such investments be paid

to the said Petr A. until further order. For directions for the indorsement of the order and as to costs, see Form 1, p. 1791.

4. *Direction to Appoint Trustees to exercise Leasing Powers, or receive Rents Reserved—Sects. 13, 34.*

*In addition to the evidence mentioned in Form 1, enter—*THE exhibits marked X. and Y. being the consents in writing of M. and N. to act as trustees, for the purpose of exercising the power of leasing [*or receiving the money, to be set aside out of the rents or payments to be reserved on the leases to be granted as hereinafter mentioned*], an affidavit of —, filed &c., verifying the signatures of the said M. and N. to the said exhibits; an affidavit of — and an affidavit of —, filed &c., as to the fitness of the said proposed new trustees.—Directions as in Forms 1, 3, pp. 1791—1795; And this Court doth hereby appoint the said M. and N. trustees for the purpose of exercising such powers of leasing [*or receiving the money to be set aside out of the rents or payments to be reserved on the leases to be granted as aforesaid*], and any of the persons interested in the said hereditaments, or the trustees or trustee for the time being, are to be at liberty from time to time to apply in Chambers for the appointment of a new trustee or new trustees as there shall be occasion.

5. *Order approving preliminary Contract for Building Leases and vesting Powers.*

UPON the petition of &c. [Form 1, p. 1791], And this Court [*if so, dispensing with &c., Form 1, p. 1791, and*] being of opinion that it is proper and consistent with a due regard for the interests of all parties entitled under the will of &c., that building leases of the land situate &c., should be authorized, and that the agreement dated &c., is a proper preliminary contract for granting such leases [*if so, and having regard &c., Form 1, p. 1791*], Let the same be carried into effect; And Let general powers of granting building leases of the said land in conformity with the provisions of the said agreement and of the above-mentioned Act, vest in the Petrs (*trustees*).—Costs and expenses to be taxed and paid and retained by the trustees out of the trust funds in their hands, representing purchase-moneys of part of the estate settled by the same will on the same limitations.—*Re Warner's Will*, M. R., 9 March, 1878, B. 492.

For like order approving of a particular lease, and vesting in the trustees general powers of granting occupation leases, and of making preliminary contracts to grant such leases in conformity with the Act, such powers to be exercised with the consent of any tenant for life for the time being in possession who has attained twenty-one, see *Re Roberts*, V.-C. H., 26 July, 1878, B. 1517.

For order vesting in the trustees powers of granting building leases for

any term not exceeding ninety-nine years, and the costs of the application to be raised by sale or mortgage of the estate, see *Re Harrison*, V.-C. W., 9 April, 1872, A. 1354.

6. *Contract for a Particular Lease approved—Sects. 5, 10, 12—O. 25.*

AND this Court being of opinion that it is proper and consistent [Form 1, p. 1791] &c., that the contract for a lease dated &c. in the petition mentioned should be carried into effect subject as hereinafter mentioned; Let the said contract be carried into effect accordingly. But the lease to be granted in pursuance of such contract is to be subject to the conditions required to be observed by the said Act [*if so, and in addition thereto is to contain a covenant, or condition, or stipulation, or covenants, conditions, and stipulations, use the word or words applicable to the case*, to the following effect, that is to say &c. or to the effect set forth in the — paragraph of the said petition, or in the schedule to this order, or such covenants, conditions, and stipulations as the Judge shall approve, and *if so specially ordered*, is to be settled by the Judge]; And Let the Petrs A. and B. execute such lease as the lessors.

For order approving of agreements for granting mining leases, and directions that they be settled by the Judge in the terms above, with directions as to the application of the rents reserved, see *Re Bolton Estates*, V.-C. W., 22 April, 1872, A. 1203. •

For order approving of an agreement for a lease of land, with liberty to dig and get brick-earth, but varied by inserting a covenant by the lessee not to occasion a nuisance to the owners and occupiers of neighbouring lands, and a covenant to indemnify the trustees against all actions, claims, and demands in respect of any nuisance, see *Wheeler v. Tootel*, V.-C. M., 31 July, 1878, B. 3145.

7. *Order varied by omitting the Direction for Settlement of the Leases in Chambers—Sect. 15.*

UPON motion &c., Let, pursuant to the 15th section of the Settled Estates Act, 1877, notwithstanding the said order dated &c., the Petrs, and in future the trustees for the time being of the indenture of settlement dated &c. in the said order mentioned, be at liberty to exercise the general powers of leasing vested in them by the said order without such leases being settled by the Judge.

In *Re Hoyle's Trust*, L. C., 12 W. R. 1125, an order containing a direction that all leases thereby authorized should be granted with the approbation of the Judge in Chambers was, after the passing of 27 & 28 V. c. 45, amended by substituting for the above direction a statement that this condition was not to be inserted; and see *Re Dorning*, 14 W. R. 125.

8. *New Lease to be granted on Surrender of the old Lease, on Terms and Conditions set forth in the Petition.*

UPON petition &c. [Form 1, p. 1791]; And this Court being of opinion that it is proper and consistent &c. [Form 1, p. 1791], that a

lease should be authorized of the hereditaments in the petition mentioned being part of the settled estates subject to the trusts of the said settlement upon the terms and conditions set forth in the — paragraph of the said petition [*if so*, and having regard &c., Form 1, p. 1791]; Let, upon a proper surrender of the lease dated &c., being executed by the Petrs A. and B. (*lessees*), to the Petrs T. and F. as trustees of the said settlements, power be vested in the said T. and F. with the consent of the Petrs M. and N. (*beneficiaries*) to grant a new lease of the said hereditaments to the Petr A. for the term of — years from the — day of —, at the yearly rent of £—; but such lease is in addition to the conditions in the said Act contained to contain a covenant by the Petr A. to expend the sum of £— at the least upon permanent improvements, and all other proper covenants and conditions.—Costs of all parties to be taxed and raised by mortgage of the property remaining subject to the trusts.—See *Re Monteith*, V.-C. B., 5 Feb. 1876, B. 231.

For order vesting powers to grant a particular lease, and authorizing a lease of coals, &c., under the Settled Estates Act, and also under the 1 W. IV. c. 65, s. 17, one-sixth of the estate being settled, and the other five-sixths being vested in infants in fee, see *Re Edwards*, V.-C. M., 18 May, 1877, A. 1645.

(III.) SALES AND RE-INVESTMENTS.

1. *Order for Sale of Estates—Sect. 16.*

UPON the petition &c. [*for the necessary preliminary recitals, see Form 1, p. 1791*], And this Court being of opinion that it is proper and consistent &c., that a sale should be authorized of the Y. estate situate &c., in the county of —, being (part of) the settled estates devised by the said will [*or subject to the trusts of the said indenture of settlement, or of the timber mentioned and described in the valuation marked X, referred to in the affidavit of B., and growing on &c. (part of) the settled estates devised by &c., or subject &c., as above*], Let the said estate [*or timber*] be sold accordingly, with the approbation of the Judge. [*If subject to incumbrances direct sale subject or free by consent, see sect. 54.*]

Payment into Court, sect. 34.—And Let the money to arise by such sale [*if subject to incumbrances, see p. 1392, and in the meantime*] be paid into Court &c. to the credit of *Exp.* [*Name the Petrs*], in the matter of the Settled Estates Act, 1877, “Proceeds of the sale of the settled estates of &c.,” [*if so ordered, and any of the parties are to be at liberty to apply in Chambers for the application of the purchase-money when so paid in; or if any question remains to be decided, and the petition prays distribution of the proceeds, and Let the consideration of the rest of the said petition be adjourned*].

Payment to Trustees and Investment, sects. 34, 35.—And Let the money to arise by such sale be paid to M. and N. the trustees of the said will [*or indenture of settlement*]; and Let the said trustees apply

the same to some one or more of the purposes mentioned in the 34th section of the said Act without any application to the Court. [*If new trustees to be appointed, see Form 2, p. 1801.*]

Interim Investment, sect. 36.—And Let, until the said money can be so applied, the said trustees from time to time invest the same, or the unapplied portion thereof for the time being, in some or one of the investments in which cash under the control of the Court is authorized to be invested, [*or, if so ordered, in Cons. £3 p. c. Anns &c., or, specify the particular mode of investment directed*] in their own names, and receive the interest thereof and pay the same to &c. (*i.e., the person who would have been entitled to the rents of the estate*) [*or apply the same upon the same trusts, and subject to the same powers and provisions in all respects as are contained in the said will or settlement concerning the rents and profits of the said estate hereby directed to be sold*].

Conveyance, sect. 22.—And Let — &c., execute the deed or deeds of conveyance of the said estate to the purchaser, or respective purchasers thereof on such sale being effected; such deeds &c. to be settled by the Judge.

Notice of Order.—And Let notice of this order be indorsed upon the probate of the will of the said &c. [*or the said indenture of settlement*].

If the lands are in a registered county &c., And Let a memorial of this order be registered in the Registry of Deeds for the county or district of —. [*If notice be dispensed with, see Form 1, p. 1791.*]

Costs when proceeds made payable to trustees, sect. 41.—And Let the said trustees be at liberty out of the money to arise by such sale, to pay the costs and expenses of all parties appearing of and incident to this application to be taxed by the taxing master. [*And see Form 1, p. 1791.*]

If any question remains to be decided, and the petition prays for distribution of the proceeds of the sale, and the purchase-money is directed to be paid into Court, the further consideration of the petition should be adjourned; or leave may be given to apply for distribution in Chambers so as to avoid a second petition.

For direction that the order for sale be registered in the Registry of Deeds for Middlesex, see *Re Thompson*, V.-C. W., 11 Dec. 1858, B. 416.

For an order approving contracts for sale of part, and for sale in Court of the rest of the settled estate, and the trustees to receive and apply the purchase-moneys under sect. 34, and in the meanwhile invest them in Consols, first paying the costs thereof, see *Re Kirby*, V.-C. M., 21 June, 1878, A. 1353.

For order for sale of freehold and copyhold estates, and trustees to receive and apply the proceeds under sect. 34, and meanwhile invest in some one or more of the investments in which cash under the control of the Court can be invested, the costs to be paid out of the proceeds, see *Re Anstey*, V.-C. M., 21 June, 1878, A. 1181.

For order for sale, subject to incumbrances, with the usual inquiries and

directions in such case, and the purchase-money to be paid into Court, see *Re Fane*, V.-C. M., 7 May, 1875, A. 765.

For order for sale—and the proceeds to be applied first in paying off the mortgagees on the estate, they appearing as respondents and consenting to the sale—see *Re Croke*, V.-C. M., 28 Feb. 1877, A. 339.

For order on motion varying the order for sale, by directing that the proceeds be paid into Court instead of to the trustees of the will, see *Re Pollard*, V.-C. M., 18 June, 1878, B. 2248.

2. *Direction to appoint Trustees for the Purpose of receiving the Proceeds of Sale.*

[UPON evidence of consent and fitness, Form 4, p. 1797].—Direction for application of proceeds. And this Court doth hereby appoint the said M. and N. trustees for the purpose of receiving the money to arise by the sale hereby directed. And any of the persons interested in the money to arise by such sale are to be at liberty from time to time to apply at Chambers for the appointment of a new trustee or new trustees as there shall be occasion.

3. *Minerals excepted from Sale—Sects. 16, 19.*

THIS Court being of opinion &c., Let the said estate, except &c. [*Mention the earth, coal, stone, or mineral to be excepted*], lying within, under, or upon the said estate, be sold with the approbation of the Judge &c. [Form 1, p. 1799].

4. *Minerals to be sold separately from the Surface—Sects. 16, 19.*

RECITAL of the former order approving of the agreement for the purchase of the thick seam of coal, and directing it to be effected by a lease for ten years, and payment of the consideration money into Court without reserving any rent, and the certificate of payment into Court of the purchase-money.—“Let, notwithstanding the said order dated &c., the agreement in the said order mentioned entered into by the V. Co. by B. to purchase the measure of thick coal in the said agreement mentioned, for the sum of £600 per acre be carried into effect, by a grant of the said measure of thick coal to B. &c., with a proper provision to limit the time within which the minerals are to be gotten to ten years from the date of the grant; and such deed of grant is to be settled by the Judge.”—Usual directions, see *Re Mallin*, V.-C. S., 8 May, 1861, B. 1081, 3 Gif. 126.

5. *Sale of Minerals apart from the Surface.*

THIS Court being of opinion that it is proper and consistent &c. that a sale should be authorized of the beds of coal under the closes of

land at C. &c. in the petition mentioned, and of the ironstone and other minerals under the said land, and that the contract for sale of the said beds of coal to the B. Co. in the petition mentioned is a fit and proper contract for such sale, doth order the said contract be carried into effect; and Let the Petrs H. &c. or others the trustees &c. of the said will be at liberty to execute a proper conveyance of the said coal, to be settled by the Judge, and to sell the ironstone and other minerals under the said land at C. with the approbation of the Judge, and to receive the money payable under the said contract, and the money to arise by the sale of the said ironstone and other minerals, and apply the same to some one or more of the purposes mentioned in the said Act, without any application to the Court.—Probate to be indorsed.—*Re Milward*, 7 March, 1868, B. 790, 6 Eq. 248.

6. Sale of Shares included in Settlements and Sub-Settlements, either separately, or with Shares not settled, and with or without Minerals—Sects. 16, 19.

THIS Court being of opinion that it is proper &c., and consistent with a due regard to the interest of all parties entitled respectively under the indentures of settlement, dated respectively &c., and the sub-settlements dated &c., in the petition severally mentioned, that a sale should be authorized of the respective shares of the farms, cottages, mines, chief rents, and other hereditaments devised by the will of the said B. deceased, and comprised in or subject to the trusts of the settlements dated &c., and the said sub-settlements dated &c., or any of them respectively, Let the same be accordingly sold with the approbation of the Judge, with or without an exception of all or any of the minerals under the same, and with or without a reservation of any rights and privileges of or incident to the working, selling, and carrying away of such minerals as the Judge may direct, either separately or together with the share of D. in the petition named, and the share of Harriet B. devised by her will to the Petr C. in trust for sale as in the petition mentioned; And Let the purchase-money or proportion of the purchase-money payable in respect of the share of the Petr Maria B., be paid to the trustees for the time being of the said indenture of settlement dated &c.; And Let the purchase-money or proportion of the purchase-money payable for the share of the Petr Henrietta C. be paid to the Petrs by G. C., and T. C., or other the trustees for the time being of the said indenture of settlement dated &c.; such purchase-moneys or proportions thereof respectively to be applied by the said trustees respectively to some one or more of &c.—And Let until &c. [Form 1, p. 1800].—Tax costs and expenses—“And Let one moiety be paid out of the proportion of the purchase-money payable for the share of the Petr Maria B. and the other moiety thereof out of the proportion of the purchase-money payable for the share of the Petr Henrietta C.”—

Notice of order to be indorsed on the settlements, and also on the sub-settlements.—*Re Barrow*, V.-C. M., 15 Dec. 1871, A. 3165.

For order that four-fifths of the estate comprised in the original settlement, and the one-fifth comprised in a subsequent settlement, be sold together, and the trustees of the latter settlement to exercise the power of sale comprised therein, see *Re Thompson*, V.-C. W., 11 Dec. 1858, B. 416.

For order for sale of settled estate, with estates interspersed therewith, of which the Petr (the tenant for life under the settlement) was seised in fee, she consenting thereto: *Re Thornborrow*, V.-C. M., 16 Feb. 1877, B. 405.

7. *Saving Interests of Persons not served—Sect. 29.*

THIS Court &c., that a sale should be authorized of the above-mentioned hereditaments &c.; but subject to and so as not to affect the rights, estates, and interests, if any, of the legal pers. represves of &c., deceased, doth order that (subject as aforesaid) the said hereditaments be sold &c.—See *Re Summer*, V.-C. M., 18 Feb. 1870, B. 385.

8. *Contract for Sale approved, and to be carried into effect.*

“AND this Court being of opinion that it is proper and consistent &c. [Form 1, p. 1799] that a sale should be authorized of the hereditaments in the said contract dated &c., mentioned, being the settled estates comprised in the said settlement, and that the said contract is a proper contract for that purpose, Let the said contract be carried into effect.”—Trustees appointed to receive purchase-money [Form 2, p. 1801]; “And Let the said purchase-money be received by the said new trustees to be applied by them (subject to the payment of costs herein-after directed) to some one or more of the purposes &c., without any application &c., and Let until &c. [Form 1, p. 1799].—Trustees to execute the conveyance.”—“And Let the said trustees be at liberty to pay and retain out of the purchase-money the costs and expenses of the Petrs of and incident to this application, to be taxed,” &c.—Notice of order to be indorsed on the settlement.—*Re Buckeridge*, V.-C. H., 23 July, 1876, A. 1485; *Re Lygon*, V.-C. M., 21 Jan. 1876, B. 193; *Re Gunter*, V.-C. W., 13 Jan. 1866, A. 104.

For like order, and for payment of the purchase-money to the existing trustees, and the expenses of enfranchising copyholds subject to the same trusts, and costs of appointing new trustees to be paid out of the proceeds, see *Re Guillaume*, V.-C. M., 20 July, 1876, A. 1287.

For order authorizing a sale by contract, and an agreement for a lease of lands subject to the settlement, and vesting powers of granting building leases, and of laying out streets and roads, see *Re Robins*, V.-C. H., 14 July, 1878, B. 1355.

9. *Inquiry whether Sale of Timber proper, and if so, Leave to apply in Chambers for such Sale.*

LET an inquiry be made whether, with a due regard to the interests of all parties entitled under the will of the testatrix N., it is fit and

proper, and for the benefit of the persons interested in the settled estate of the testatrix, to cut down and sell the timber (not being ornamental), now growing upon such estate or any part thereof; and if upon such inquiry it shall appear fit and proper, then Let the Petrs be at liberty to apply in Chambers for the sale of such timber, and for the application of the money arising by the sale thereof, and also for the costs of this application and relating thereto.—Notice of order to be indorsed on the probate.—See *Re Newman*, M. R., 23 Jan. 1869, B. 224; and see *S. C.*, 9 Ch. 681, as to reinvesting the proceeds of the sale in buildings.

10. *Interim Investment on Mortgage.*

“THIS Court being of opinion that it is fit and proper that the sum of £— to be raised as hereinafter mentioned should be advanced to S. in the petition named, on the security by way of mortgage of the hereditaments situate at B. in the county of — &c., provided that a good title can be made thereto, and that there is no prior charge or incumbrance upon the said hereditaments, Let an inquiry be made whether a good title can be made to the said hereditaments, and whether there is any existing charge or incumbrance thereon; and in case it shall appear that a good title can be made thereto, and that there is no existing charge or incumbrance thereon, Let a proper mortgage thereof to the Petrs be settled by the Judge; And Let upon the execution of such mortgage by such parties thereto as the Judge shall direct, such execution to be certified, &c.”—Usual directions for raising the amount out of the funds in Court, and payment thereof to the mortgagor; and for raising thereout any costs not payable by the mortgagor.—*Reading v. Hamilton*, M. R., 20 April, 1872, B. 1084, W. N. (72) 91.

11. *Order approving Agreements for Sale of Lands, and Purchase of Ground Rents—Inquiry as to Title—Set-off of Purchase-Moneys—Mutual Conveyances.*

THIS Court being of opinion that it is proper and consistent &c. [Form 1, p. 1799] that a sale should be authorized of the lands and hereditaments comprised in the first-mentioned agreement dated &c., made between the Petrs, the trustees of the testator's will of the one part, and A. (*the purchaser*) of the other part, for the sale of the said lands and hereditaments at the price of £5,460, and that the said agreement is a proper agreement for that purpose, Let the said agreement be carried into effect accordingly; And this Court being of opinion that the purchase of the several chief or ground rents specified or referred to in the schedule to the secondly mentioned agreement dated &c., and made between the said A. of the one part and the Petrs, the trustees of the testator's will, of the other part, is a fit and proper

purchase wherein to invest the said sum of £5,460, Let an inquiry be made whether a good title can be made to the said several chief or ground rents, or any of them; And in case a good title can be made thereto, or any part thereof, Let a proper conveyance of the several chief or ground rents, or such of them to which a good title shall be shown, be settled by the Judge; And Let the purchase-money thereof be set off against the said sum of £5,460, the purchase-money for the said lands and hereditaments, and the balance, if any, be certified; And the said A. by his counsel declaring himself content with the title to the lands and hereditaments purchased by him, Let the said A. within &c. after the date of the Chief Clerk's certificate, pay such balance, if any, into Court to the credit of "*Exp. the Petrs &c. in the matter of the Act &c.*"—Balance when paid in to be invested in Consols, and the dividends paid to the trustees.—"And Let upon payment of such balance (if any) into Court, or upon it being certified that a good title has been made to all the said chief or ground rents, all proper parties join in and execute the conveyance when so settled."—Trustees to execute the conveyance to A. or to whom he shall direct, such conveyance to be settled &c.—Notice of so much of the order as relates to the sale of the lands comprised in the said first-mentioned agreement to be indorsed on the probate.—*Re Hilton*, V.-C. M., 15 July, 1878, A. 2118.

For order authorizing the sale of the settled estate, with reservation of the minerals, and for payment of the costs out of the proceeds, and approving of the investment of part of the proceeds in the purchase of another estate, with inquiry as to the title, and if it be found good, the trustees to be at liberty to complete, see *Re Okeover*, V.-C. M., 2 Aug. 1873, B. 2070.

And for like order, and for reinvestment of part of proceeds in purchase of a copyhold estate, and inquiry as to title, and if good the purchase-money to be raised and paid out of the Consols in Court, and authorizing part of the fund to be applied in permanent improvements on the settled lands, with an inquiry whether certain improvements being effected were such as under sect. 34 of the Settled Estates Act, 1877, might properly be paid for out of it: see *Wheeler v. Tootel*, V.-C. M., 31 July, 1878, B. 3145; and for application of money arising from sale of timber in building and permanent improvements: *Re Newman*, 9 Ch. 681.

12. Order for Sale of Estate of Infants contingently entitled.

THIS Court being of opinion that it is proper and consistent with a due regard for the interests of all parties entitled under the will of &c., that a sale should be authorized of the J. H. property in the petition mentioned, being part of the settled estates devised by the said will, and that the agreement dated &c. is a proper agreement for such sale; Let the said agreement be confirmed and carried into effect accordingly; Let the purchase-money be paid to the Petrs C. and D., the trustees of the said will; And Let the said trustees apply the same, or the residue thereof, after payment of the costs as hereinafter directed, to some one or more of the purposes mentioned in the

proper, and for the benefit of the persons interested in the settled estate of the testatrix, to cut down and sell the timber (not being ornamental), now growing upon such estate or any part thereof; and if upon such inquiry it shall appear fit and proper, then Let the Petrs be at liberty to apply in Chambers for the sale of such timber, and for the application of the money arising by the sale thereof, and also for the costs of this application and relating thereto.—Notice of order to be indorsed on the probate.—See *Re Newman*, M. R., 23 Jan. 1869, B. 224; and see *S. C.*, 9 Ch. 681, as to reinvesting the proceeds of the sale in buildings.

10. *Interim Investment on Mortgage.*

“THIS Court being of opinion that it is fit and proper that the sum of £— to be raised as hereinafter mentioned should be advanced to S. in the petition named, on the security by way of mortgage of the hereditaments situate at B. in the county of — &c., provided that a good title can be made thereto, and that there is no prior charge or incumbrance upon the said hereditaments, Let an inquiry be made whether a good title can be made to the said hereditaments, and whether there is any existing charge or incumbrance thereon; and in case it shall appear that a good title can be made thereto, and that there is no existing charge or incumbrance thereon, Let a proper mortgage thereof to the Petrs be settled by the Judge; And Let upon the execution of such mortgage by such parties thereto as the Judge shall direct, such execution to be certified, &c. ;”—Usual directions for raising the amount out of the funds in Court, and payment thereof to the mortgagor; and for raising thereout any costs not payable by the mortgagor.—*Reading v. Hamilton*, M. R., 20 April, 1872, B. 1084, W. N. (72) 91.

11. *Order approving Agreements for Sale of Lands, and Purchase of Ground Rents—Inquiry as to Title—Set-off of Purchase-Moneys—Mutual Conveyances.*

THIS Court being of opinion that it is proper and consistent &c. [Form 1, p. 1799] that a sale should be authorized of the lands and hereditaments comprised in the first-mentioned agreement dated &c., made between the Petrs, the trustees of the testator's will of the one part, and A. (*the purchaser*) of the other part, for the sale of the said lands and hereditaments at the price of £5,460, and that the said agreement is a proper agreement for that purpose, Let the said agreement be carried into effect accordingly; And this Court being of opinion that the purchase of the several chief or ground rents specified or referred to in the schedule to the secondly mentioned agreement dated &c., and made between the said A. of the one part and the Petrs, the trustees of the testator's will, of the other part, is a fit and proper

purchase wherein to invest the said sum of £5,460, Let an inquiry be made whether a good title can be made to the said several chief or ground rents, or any of them; And in case a good title can be made thereto, or any part thereof, Let a proper conveyance of the several chief or ground rents, or such of them to which a good title shall be shown, be settled by the Judge; And Let the purchase-money thereof be set off against the said sum of £5,460, the purchase-money for the said lands and hereditaments, and the balance, if any, be certified; And the said A. by his counsel declaring himself content with the title to the lands and hereditaments purchased by him, Let the said A. within &c. after the date of the Chief Clerk's certificate, pay such balance, if any, into Court to the credit of "*Exp. the Petrs &c. in the matter of the Act &c.*"—Balance when paid in to be invested in Consols, and the dividends paid to the trustees.—"And Let upon payment of such balance (if any) into Court, or upon it being certified that a good title has been made to all the said chief or ground rents, all proper parties join in and execute the conveyance when so settled."—Trustees to execute the conveyance to A. or to whom he shall direct, such conveyance to be settled &c.—Notice of so much of the order as relates to the sale of the lands comprised in the said first-mentioned agreement to be indorsed on the probate.—*Re Hilton*, V.-C. M., 15 July, 1878, A. 2118.

For order authorizing the sale of the settled estate, with reservation of the minerals, and for payment of the costs out of the proceeds, and approving of the investment of part of the proceeds in the purchase of another estate, with inquiry as to the title, and if it be found good, the trustees to be at liberty to complete, see *Re Okeover*, V.-C. M., 2 Aug. 1873, B. 2070.

And for like order, and for reinvestment of part of proceeds in purchase of a copyhold estate, and inquiry as to title, and if good the purchase-money to be raised and paid out of the Consols in Court, and authorizing part of the fund to be applied in permanent improvements on the settled lands, with an inquiry whether certain improvements being effected were such as under sect. 34 of the Settled Estates Act, 1877, might properly be paid for out of it: see *Wheeler v. Tootel*, V.-C. M., 31 July, 1878, B. 3145; and for application of money arising from sale of timber in building and permanent improvements: *Re Newman*, 9 Ch. 681.

12. *Order for Sale of Estate of Infants contingently entitled.*

THIS Court being of opinion that it is proper and consistent with a due regard for the interests of all parties entitled under the will of &c., that a sale should be authorized of the J. H. property in the petition mentioned, being part of the settled estates devised by the said will, and that the agreement dated &c. is a proper agreement for such sale; Let the said agreement be confirmed and carried into effect accordingly; Let the purchase-money be paid to the Petrs C. and D., the trustees of the said will; And Let the said trustees apply the same, or the residue thereof, after payment of the costs as hereinafter directed, to some one or more of the purposes mentioned in the

34th section of the said Act without any application to the Court; And Let, until the said money can be applied, the said trustees from time to time invest the same, or the unapplied portion thereof for the time being, in some or one of the investments in which cash under the control of the Court is authorized to be invested in their own names, and receive the interest thereof and apply the same upon the same trusts, and subject to the same powers and provisions in all respects, as are contained in the will concerning the rents and profits of the estate hereby directed to be sold; Let the said trustees execute the deed or deeds of conveyance of the said estate to the said X., such deed or deeds to be settled &c.—Tax costs and pay out of purchase-money.—*Re Sparrow*, North, J., 13th Feb. 1892, B. 115; S. C., (1892) 1 Ch. 412.

For another form, see *Liddell v. L.*, 1882, B. 2088; S. C., 31 W. R. 238.

13. *Sale of Copyholds under Settled Estates Act, 1877, by Trustees appointed under Settled Land Act, 1882.*

LET [*parcels*] be sold by public auction by [trustees appointed for the purposes of the Settled Land Act] as such trustees as aforesaid, in such manner, and subject to such conditions, as they shall think fit, but so that the reserved price and auctioneers' fee be fixed by the Judge; And Let the money to arise by such sale be paid to [Settled Land Act trustees], as such trustees as aforesaid; And Let them execute the deed or deeds of conveyance, or surrender of the said estate to the purchaser, or respective purchasers thereof, on such sale being effected.—*Re Outten's Settled Estates*, Kekewich, J., 29th Nov. 1890, B. 1451.

In this case, the copyholds were devised to trustees resident in Australia, who had been admitted by their attorneys. A purchaser objected that the trustees appointed under the Settled Land Acts could not execute the surrender, but that it must be executed by the persons on the court rolls, or their attorneys, or a vesting order must be obtained. Kekewich, J., however (in Chambers), held, that although sect. 22 of the Settled Estates Act (see Shelf. R. P. S. 651) mentioned only the "deed of conveyance," it included a deed of surrender, that the order was right in specifying the surrender, where the property was copyhold, and that a vesting order was not necessary: *Re Earee and Wells*, 21 July, 1891, A. 1043.

(IV.) PROCEEDINGS FOR PROTECTION OF PROPERTY.

1. *Order sanctioning Proceedings.*

UPON the petition of &c. [*for recitals see Form 1, p. 1791*] and this Court [*if so, dispensing &c., Form 1, p. 1791, and*] being of opinion that it is proper and consistent &c. [*Form 1, p. 1791*], and necessary for the protection of the estates settled by the will of — &c. [*or by the indenture of settlement dated &c.*] and described in the [*Schedule, or the plan annexed to the*] said petition that [*state the proceeding or proceedings proposed to be taken, such as an action, defence, petition to Parliament,*

parliamentary opposition, or other necessary proceeding, sect. 17] should be sanctioned by the Court [*if so, and having regard &c., Form 1, p. 1793*], doth sanction such proceeding accordingly [*if so, and doth order &c., add any directions given by Court*]; And it is ordered that the costs and expenses in relation to such proceeding &c. [*direction for raising costs as in Form 1, p. 1791*].

2. *Inquiry as to Parliamentary Opposition.*

“THIS Court doth, notwithstanding the concurrence or consent of &c. has not been obtained, order that an inquiry be made whether it is proper and consistent with a due regard for the interests of all parties who are or may hereafter be entitled under the will of &c., and the settlement dated &c., that the presentation and prosecution by the Petrs or some or one of them of a petition or petitions to Parliament to oppose the three bills in the schedule to this order mentioned should be sanctioned for the protection of the estates settled by the said will and indenture of settlement; And if it shall be certified that it is proper and consistent with such interests, this Court doth sanction such opposition (being made) by such person or persons, and in such manner as shall be certified;”—And in such case the Petr to raise and pay out of any moneys, or investments representing moneys, liable to be laid out in the purchase of lands to be settled in the same manner, a sum not exceeding the amount to be fixed in the certificate of the result of the inquiry towards the costs and expenses, including the costs of and incident to this application, to be taxed &c.—*Re Lonsdale's Settled Estates*, M. R., 3 Feb. 1879, B. 178.

The above forms are based upon the provision contained in sect. 17 of the Act of 1877, by which the Court is authorized “to sanction any action, defence, petition to Parliament, parliamentary opposition, or other proceedings appearing to the Court necessary for the protection of any settled estate, and to order that all or any part of the costs and expenses in relation thereto be raised and paid by means of a sale or mortgage of or charge upon all or any part of the settled estate, or out of any moneys or investments representing moneys liable to be laid out in the same manner as the settled estate, or out of the income of such moneys or investments, or out of any accumulations of rents, profits, or income.”

(V.) LAYING OUT FOR STREETS, ROADS, AND OTHER WORKS—DEDICATION.

1. *Laying-out Streets, Roads, &c.—Sects. 20—22.*

[RECITAL as in Form 1, p. 1791].—This Court being of opinion that it is proper &c. [Form 1, p. 1791] that parts of the settled estates comprised in &c. should be laid out for streets (roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses), Let such parts of the said estates, as the Judge shall approve, be from time to time laid

out, with the approbation of the Judge, for streets (roads, paths, &c.) either to be dedicated to the public, or not; And Let such streets &c., including all necessary or proper fences, pavings, connections, and other works incident thereto, be made and executed accordingly; [*If so*, And Let the parts so to be laid out remain and be vested in the trustees or trustee of the said will, *or* indenture of settlement, for the time being upon such trusts for securing the continued appropriation thereof to the purposes aforesaid in all respects as the Judge shall approve; And Let a proper declaration of trust be settled by the Judge, *or*, And this Court doth hereby appoint M. and N.; *or* Let proper persons be appointed trustees of the parts of the said estates so to be laid out; *If so*, And Let the said &c. (*the settlement trustees*) convey such parts of the said estates so as to vest the same in the said &c. (*trustees so to be appointed*), upon such trusts for securing the continued appropriation thereof to the purposes aforesaid in all respects, as the Judge shall direct; *If so*, And with such provisions for the appointment of new trustees when required, either by application to a Judge in Chambers, or otherwise, as the Judge shall direct, *or*, And Let any persons interested in the said hereditaments, *or* the trustees or trustee for the time being, be at liberty from time to time to apply in Chambers for the appointment of a new trustee or new trustees as there shall be occasion; And Let the conveyance be settled by the Judge; *If so*, and be executed by &c.] *and if so*, And Let all [*or so much of*] the expenses in relation to such laying out, and making and execution [as &c., *specify the part of the costs to be borne by the settled estates*] [*if so*, and the costs and expenses of and incident to this application, to be taxed &c.] be a charge on the said settled estates; [*if so*, and be raised by sale or mortgage of the said estates &c., *or* out of the rents &c., *or* be raised and paid by the trustees of &c., Form 1, p. 1791].

For such order, and the expenses to be paid out of the produce of stock belonging to the trust, see *Re Robins*, V.-C. H., 14 July, 1878, B. 1355.

2. *Laying out Part in Roads—Sects. 20, 21.*

AND this Court being of opinion &c. [Form 1, p. 1807], that such parts of the said estates as are coloured — on the plan of the said estate, verified and identified by the affidavit of &c., and annexed to the said affidavit, and filed therewith, should be laid out as roads &c. [Form 1, p. 1807], to remain and be vested in the trustees or trustee of the said will for the time being, and that building leases of &c. should be authorized &c., subject to &c., Let such parts of the said estate as are coloured — in the said plan be laid out in roads &c., and Let such roads &c., including all necessary and proper fences, pavings, connections &c., be made and executed accordingly; And Let the parts to be so laid out remain and be vested in the trustees or trustee of the will of the said testator for the time being, upon such trusts &c.

3. *Laying out Parts according to Surveyor's Report—Costs and Expenses.*

THIS Court being of opinion that it is proper &c. [Form 1, p. 1807] that such parts of the estates devised by the said will as are situate &c., and are mentioned in the report of &c., should be laid out for streets, roads, sewers, and drains, Let such parts of the said estates be laid out for streets, roads, sewers, and drains in accordance with the recommendations contained in the said report (with such variations, if any, as the trustees or trustee for the time being of the said will shall from time to time approve of); And Let such parts of the said estates as shall be so laid out be held by the person or persons for the time being entitled thereto under or by virtue of the said will upon trust to allow the same respectively to be appropriated, used, and enjoyed for the purposes aforesaid; And Let such streets, roads &c., as aforesaid, including all necessary or proper fences, pavings, connections, and other works incidental thereto respectively, be forthwith made and executed by the said N., and other the trustees or trustee for the time being of the said will; And Let the costs and expenses of and incident to this application be taxed &c., and the amount thereof, together with the charges and expenses of the laying out, making, and execution of the said streets, roads &c. respectively (not exceeding in the whole the sum of £—) be a charge on the real estates devised by, or now subject to, the said will, and any moneys or investments subject to corresponding trusts, and be raised and paid by the said N. out of such trust property.—Notice of the order to be indorsed on the probate.—*Re Hawkins*, V.-C. M., 12 July, 1878, A. 1499.

4. *The like—Trustees to concur with other Part Owners—Acts necessary for Dedication—Rights of Way.*

“LET the Defts T. and W. or the survivor of them, or other the trustees or trustee for the time being of the testator's will, be at liberty to concur with the other owner or owners thereof in laying out parts of the close of land at B., comprised in the scheme of N. (*surveyor*) for streets or a street either to be dedicated to the public or not, and also to grant rights of way and other easements over parts of the said land.”—Liberty to apply in Chambers as to raising out of the funds in Court the sums payable in respect of the testator's moiety of the property, for laying out and preparing it for the purposes of building as to the hereditaments comprised in the plan of the said N., according to such plan or such modification thereof as the Judge may approve.—“And Let such parts of the said land as shall be laid out as a street or streets not dedicated to the public remain subject to the powers vested in the trustees or trustee for the time being of the said will;—And Let the said T. and W., or the survivor of them, or other the trustees &c., do such acts and execute such deeds as may be neces-

sary for dedicating to the public such parts of the said land as are intended to be dedicated as a street or streets to the public, and for granting such rights of way or other easements.”—*Wheeler v. Tootel*, V.-C.M., 31 July, 1878, B. 3145.

NOTES.

JURISDICTION.

Powers given by an order of Court under the Settled Estates Act are not affected by sect. 56 of the Settled Land Act, 1882, and the proper course, if it is desired to supersede them, is to apply under the Settled Estates Act for that purpose: *Re Poole's Settlement*, 32 W. R. 956; 50 L. T. 585; and see *Re Barrs-Haden's Settled Estates*, 49 L. T. 660; 32 W. R. 194, where the Court declined to stay proceedings under the order.

Sects. 20 and 21 have reference to the development of lands for the purposes of a building estate, and the Court has no power under the Act to direct the carrying out of schemes for drainage for agricultural purposes; but it has jurisdiction under 8 & 9 V. c. 56: *Re Poynder's Settled Estates*, *Dickson-Poynder v. Cook*, 50 L. J. Ch. 753; W. N. (81) 126; 45 L. T. 403; 30 W. R. 7.

Under an order, which is wrong in not naming the persons entitled in remainder with whose concurrence and consent the Court has dispensed, the purchaser is protected by sect. 70 of the Conveyancing Act, 1881, which is applicable whether the objection appears on the face of the order or not: *Re Hall-Dare's Contract*, 21 Ch. D. 41, C. A.; and see *Mostyn v. M.*, (1893) 3 Ch. 376, C. A.; but the protection will not extend to a case where the order erroneously deals with the interest of a person who is not a party: *Jones v. Barnett*, (1900) 1 Ch. 370, C. A.; (1899) 1 Ch. 611.

Where a testator expressed a desire that his mineral lands should remain in his family for a considerable number of years, and directed that the general trust for sale contained in his will should not be exercised as to mineral lands until after the decease of the survivor of his children, the direction was held not to be an “express declaration” within sect. 38 excluding the exercise of the powers conferred by the Act: *Re Peake's Settled Estates*, (1893) 3 Ch. 430.

PROCEDURE.

Under sects. 31, 50, the separate examination of a woman married before the Married Women's Property Act, 1882, is still required: *Re Harris' Settled Estates*, 28 Ch. D. 171; *Re Fowle's Settled Estates*, W. N. (87) 209 (where advertisements of a petition for the sanction of the Court to reinvestment in land were not required).

Secus, in the case of a woman married since the commencement of the Married Women's Property Act, 1882: *Riddell v. Errington*, 26 Ch. D. 220; or of a woman married before, but whose interest was acquired after, the Act: *Re Batt's Settled Estates*, (1897) 2 Ch. 65.

A married woman interested in settled estate leased or sold under the Act, who has been served with a notice under sect. 26, and submits her rights to the Court, need not be separately examined: *Re Stanley's Settled Estates*, 61 L. T. 169; 38 W. R. 32; W. N. (89) 164; and on a petition for the payment out of Court of proceeds of real estate settled by the testator to trustees, where some of the beneficiaries were married women, their examination was dispensed with: *Re Ward's Settled Estates*, W. N. (95) 41.

Where there are subsidiary or derivative settlements by way of trust for sale executed by beneficiaries of the original settlement, the beneficiaries of such subsidiary settlements are not necessary parties to the petition: *Re Hodge's Settled Estates*, W. N. (95) 69.

Where an estate is vested in trustees and there is not, for the time being, any beneficial owner of the rents and profits, the trustees (and not the receiver appointed by the Court) are the persons who may apply by petition in a

summary way under sect. 23 to exercise the powers conferred by the Act: *Vine v. Raleigh*, 24 Ch. D. 238.

The Court dispensed with notice to an unborn child *en ventre*, who, if male, would be co-heir in gavelkind of land as to which it was doubtful whether or not the father had died intestate: *Re Rayner's Settled Estates*, W. N. (91) 152.

For a case in which on the petition of trustees of a will (who had unsuccessfully applied by originating summons) for leave to make improvements, and without presenting any definite scheme, an order was made dispensing with a formal scheme, see *Re Christy's Settled Estates*, 42 W. R. 613.

For forms of application under the Act, see D. C. F. 1203 *et seq.*

LEASE.

A sub-lease of settled land, held under a renewable lease, for the unexpired residue of the term, with a covenant for extension after renewal of the head lease, cannot be sanctioned under sects. 4, 5, as such further lease is not "to take effect in possession": *Re Farnell's Settled Estates*, 33 Ch. D. 599.

The effect of the proviso in sect. 46 is, that no lessee acquiring a lease under the Act shall be exempted by the lessor from any liability as to waste which would otherwise affect him as tenant for years; and, consequently, a lease exempting the lessee from liability for "fair wear and tear and damage by tempest" is void under the section: *Davies v. D.*, 38 Ch. D. 499.

Where wide powers, including a power to grant building leases for terms not exceeding 999 years, were conferred on the trustees, and on tenants for life, some of whom were permanently resident abroad, an order was made (on a petition by all the tenants for life) vesting in the trustees general powers of granting building leases for such terms: *Re Houghton's Estates*, W. N. (94) 20.

AUTHORIZING SALES.

An order for sale entirely out of Court cannot be made under the Act: *Re Harvey's Settled Estates*, 21 Ch. D. 123; not following *Re Adams' Settled Estates*, 9 Ch. D. 116; *Re Dryden's Settled Estates*, W. N. (81) 133.

The effect of a sale by the Court is, under sect. 22, to revoke the uses of the settlement, and sect. 42 of the Succession Duty Act applies so as to shift the duty from the land to the purchase-money: *Re Warner's Settled Estates*, 17 Ch. D. 711.

An order in the Form 1, p. 1799, is not a positive direction to sell, but merely an authority to the trustees to sell, and the Court has power to delay a sale and stay proceedings under the order if circumstances make it expedient: *Re Barrs-Haden's Settled Estates*, 49 L. T. 660; 32 W. R. 194.

The intention of the Act is that a sale should not be sanctioned except in the presence of all parties interested, but that the sanction having been given, their estates should pass by the execution of a proper instrument by a person named, without requiring their concurrence, and though sect. 22 only mentions the "deed of conveyance," it includes a surrender of copyholds: *Re Earee and Wells*, Kekewich, J., July 21, 1891.

The Court sanctioned a contract for sale of leaseholds in consideration of a rent-charge during the remainder of the term, treating the rent-charge as payment of a capital sum by instalments: *Re Grove's Settled Estates*, W. N. (88) 147.

Where the trustees were two ladies, a widow and spinster, the Court was reluctant to confer upon them the authority to sell under the Act, and the petition stood over for the appointment of other trustees: *Re Peake's Settled Estates*, (1893) 3 Ch. 430; but upon it appearing that the petitioners had been unable to procure other suitable persons to act, the Court made an order conferring the authority on the two ladies during their joint lives, subject to the approval of the Court in the case of each sale: *Re Peake's Settled Estates* (No. 2), (1894) 3 Ch. 520.

The purchase-money of land sold under the Settled Estates Act, 1877, was directed to be applied as capital money arising under the Settled Land Act, 1882, although there was no tenant for life within the meaning of that Act competent to exercise the option given by sect. 33: *Re Tesseymann's Settled Estate*, W. N. (97) 168.

COSTS OF PROCEEDINGS FOR PROTECTION OF PROPERTY.

Where the Court is satisfied of the necessity of proceedings taken, whether by claim or defence, for protection of the settled estate, the costs, as between solicitor and client, can be directed to be raised and paid under sect. 17 of the Act of 1877, although no application has been made to the Court previously to commencing such proceedings: *Re Earl de la Warr's Settled Estates*, 16 Ch. D. 587; and for form of order, see *Re Lord Rivers' Estate*, 1b. 588, note.

SECTION VI.—SETTLED LAND ACTS.

(I.) PRELIMINARY.

Titles of Orders under Settled Land Acts, 1882 to 1890, R. S. C. (December) 1882, Appendix L., No. 25, R. S. C., 1883.

1886, J., No. .

or, 1886, R., No. .

In the matter of the Blackacre Estate [*or*, of the timber on the estate], situate at —, in the county of — [*or*, of the chattels] settled by the settlement, dated the — day of —, made on the marriage of John Jones and Mary his wife [*or*, by the will of George Roberts, dated].

And in the matter of the Settled Land Act, 1882.

1886, S. No. .

In the matter of the Blackacre Estate [*or*, of the timber on the estate], situate at —, in the county of —, settled land within the meaning of the Settled Land Act, 1882, sect. 59, by reason of John Smith, the person seised of or entitled to such land being an infant.

In the matter of the Settled Land Act, 1882.

1886, R., No. .

In the matter of the Blackacre Estate at —, in the county of —, settled by a settlement within the meaning of the Settled Land Act, 1884, sect. 8, by Mary Roberts, deceased, the late wife of John Roberts.

In the matter of the Settled Land Acts, 1882 to 1890.

Formal part of Orders under Settled Land Act, 1882.

(A.) UPON the application of A. B., the tenant for life [*or* tenant in tail, *or* as the case may be, describing the nature of the applicant's estate] under the above-mentioned settlement.

(B.) UPON the application of A. B., an infant, the tenant for life [*or* as the case may be] under the above-mentioned settlement, by X. Y., his testamentary guardian [*or* guardian appointed by order dated &c., *or* next friend].

(C.) Upon the application of C. D. and E. F., the trustees of the above-mentioned settlement for the purposes of the above-mentioned Act.

(D.) Upon the application of G. H., the tenant for life in remainder [or tenant in tail in remainder, or as the case may be, *describing the applicant's interest*] under the above-mentioned settlement, subject to the life interest of A. B. [or as the case may be].

(E.) Upon the application of I. J., the purchaser of the lands [or the timber upon the lands, or chattels, or as the case may be] settled by the above-mentioned settlement.

(F.) Upon the application of I. J., the lessee under a mining lease, dated &c., granted under the powers of the above-mentioned Act, of the mines and minerals under the lands settled by the above-mentioned settlement.

(G.) Upon the application of I. J., the mortgagee under a mortgage intended to be created under sect. 18 of the above-mentioned Act, of the lands settled by the above-mentioned settlement.

(H.) Upon the application of K. L., interested under the contract hereinafter mentioned.

NOTES.

SETTLED LAND ACTS.

These Acts are the Settled Land Act, 1882 (S. L. A. 1882, 45 & 46 V. c. 38), and the Settled Land Acts, 1884, 1887, 1889, and 1890 (S. L. A. 1884, 1887, 1889, 1890, 47 & 48 V. c. 18; 50 & 51 V. c. 30; 52 & 53 V. c. 36; 53 & 54 V. c. 69), all which Acts may (see sect. 2 of the Act of 1890, and 55 & 56 V. c. 10) be cited as the Settled Land Acts, 1882 to 1890.

SETTLEMENT—SETTLED LAND.

By the principal Act of 1882, being "an Act for facilitating sales, leases, and other dispositions of settled land, and for promoting the execution of improvements thereon," "settlement" is defined (sect. 2) as "any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession." And an estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor, or descending to the testator's heir, is for the purposes of the Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement (sub-sect. 2), and the determination of the question whether land is settled land for the purposes of the Act is governed by the state of facts and the limitations of the settlement at the time of the settlement taking effect (sub-sect. 4).

A single "settlement" may therefore be created by several instruments, e.g., a series of family settlements, under which the land stands limited to persons in succession: *Re M. of Ailesbury and L. Iveagh*, (1893) 2 Ch. 345. A settlement of land and a subsequent will devising other land to the uses of the settlement, and bequeathing money to be invested in the purchase of land to be settled to the same uses, constitute together one settlement: *Re Mundy's Settled Estates*, (1891) 1 Ch. 399, O. A.; though the limitations are

not declared by reference, but independently, and the powers conferred are not precisely the same: *Re Byng's Settled Estates*, (1892) 2 Ch. 219. And two estates comprised in the same settlement may constitute one settled estate, notwithstanding the interposition in the limitations of one of them of a long term for the payment off of incumbrances: *Re L. Stamford's Settled Estates*, 43 Ch. D. 84; and see *Re Byng's Settled Estates*, *sup.*; and so where one estate has been settled and the equity of redemption in another estate is similarly settled by a subsequent instrument: *Re Monson's Settled Estates*, (1898) 1 Ch. 427; and though the lands are situate in England and Ireland respectively: *Re Eyre Coote*, *Coote v. Cadogan*, W. N. (99) 222; and where two estates are settled together and the legal estate in one of them being outstanding in a mortgagee, contingent remainders which fail as to one estate are good as to the other, there is nevertheless only one "settlement" and not two: *Re Freme, F. v. Logan*, (1894) 1 Ch. 1, C. A.

So where there was a settlement by will and resettlement by deed, and also intermediate settlements by the tenant for life under the will on her several marriages, and a subsequent settlement on her daughter, it was held that all these instruments together constituted a "settlement" of which trustees might be appointed: *Re Tibbit's Settled Estates*, (1897) 2 Ch. 149, following *Re Meade's Settled Estates* (1897), 1 I. R. 121; and a resettlement of the entire fee simple limiting a life estate to the existing tenant for life, without any words indicating that such estate is limited in continuation of his existing estate for life, is not necessarily to be regarded as a new and independent settlement, but may, if circumstances so require, be construed as constituting, together with previous deeds, "the settlement" for the purposes of the Act: *Re Mundy and Roper*, (1899) 1 Ch. 275, C. A.

The words "Act of Parliament" in sect. 2, sub-sect. 1, are not confined to private Acts, and accordingly the Accumulations Act, 1800 (39 & 40 G. III. c. 98), where accumulations directed by the settlement are arrested thereunder, will form part of the settlement: *Vine v. Raleigh*, (1896) 1 Ch. 37.

The words "stands for the time being limited to or in trust for any persons by way of succession" include limitations and terms of years for securing jointures or portions: *Re Mundy and Roper*, (1899) 1 Ch. 275, C. A.

Where an annuity was bequeathed with a direction that a portion of the estate should be set apart to provide it, and subject thereto that portion was given to A. absolutely, the portion so set apart was held to be "limited to persons in succession" within the Act: *A. G. v. Owen, A. G. v. Coulson*, (1899) 2 Q. B. 253; but limitations of successive interests to the same person cannot, it would seem, constitute a settlement: see *Re Pocock and Frankerd*, (1896) 1 Ch. 302; and as the possible curtesy of the husband of a *feme covert* arises by the general law, it cannot be regarded as a limitation for this purpose: *Bates v. Kesterton*, (1896) 1 Ch. 159.

Sect. 2, sub-sect. 1, does not apply to ecclesiastical property; e.g., a house which from time immemorial had been granted by the bishop to an ecclesiastical dignitary for life: *Re Bp. of Bath and Wells*, (1899) 2 Ch. 138; and an award under an Inclosure Act to a vicar "and his successors" in respect of glebe is not a settlement within the sub-section: *Re Vicar of Castle Bytham*, (1895) 1 Ch. 348.

The expression "settlement" being comprehensive, the powers of the Act may be exercisable by the tenant for life in respect of more than one "settlement"; as, e.g., settlements comprised in one instrument, or in that and several earlier instruments: *Re Mundy and Roper*, (1899) 1 Ch. 275, C. A.; approving *Re Du Cane and Nettlefold*, (1898) 2 Ch. 96; but where by will successive tenants for life were empowered to create jointures and had exercised these powers, but so that their life estates were not charged, it was held that the will by itself constituted a "settlement": *Re Keck and Hart*, (1898) 1 Ch. 617.

Where derivative settlements are made by persons who take interests which have not yet fallen into possession under the original settlement, the original settlement is the settlement for the purposes of the Act: *Re Knowles' Settled Estates*, 27 Ch. D. 707.

By the Settled Land Act, 1890, s. 4, every instrument whereby a tenant for life, in consideration of marriage, or as part or by way of any family arrangement, not being a security for payment of money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement,

is to be deemed one of the instruments creating the settlement; and the enactment is to apply and have effect with respect to every disposition before as well as after the passing of the Act, unless inconsistent with the nature or terms of the disposition.

This section is limited to the purpose of excluding the operation of sect. 50 of the Act of 1882 (*v. inf.* p. 1822): *Re Du Cane and Nettlefold*, (1898) 2 Ch. 96.

By sect. 2, sub-sect. 3, of the Settled Land Act, 1882, land, and any estate or interest therein, which is the subject of a settlement is, for the purposes of the Act, "settled land," and is, in relation to the settlement, referred to as the settled land; and, by sub-sect. 10, "land" includes incorporeal hereditaments, also an undivided share in land; and consequently the tenant for life of one undivided share can sell that share without the concurrence of those interested in the other shares: *Cooper v. Belsey*, (1899) 1 Ch. 639, C. A., overruling *Re Collinge's Settled Estates*, 36 Ch. D. 516.

By sect. 2, sub-sect. 4, the determination of the question whether land is settled land for the purposes of the Act or not is governed by the state of facts and the limitations of the settlement at the time of the settlement taking effect.

As to the meaning and effect of this sub-section, see *Re L. Stamford's Settled Estates*, 43 Ch. D. 84, 90; *Re M. of Ailesbury and L. Iveagh*, (1893) 2 Ch. 345, 355; Hood and Challis, 193.

POWERS OF COURT.

By sect. 46, all matters within the jurisdiction of the Court (*i.e.*, Her Majesty's High Court of Justice, see sect. 2, sub-sect. 10 (ix)) are assigned to the Ch. Div.

By sect. 44, "if at any time a difference arises between a tenant for life and the trustees of the settlement respecting the exercise of any of the powers of this Act, or respecting any matter relating thereto, the Court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit."

By sect. 56, dealing with cases of conflict between the provisions of any settlement and those of the Act (*v. inf.* pp. 1823, 1824), if a question arises or a doubt is entertained respecting any matter within the section, the Court may, on the application of the trustees of the settlement or of the tenant for life, or of any other person interested, give its decision, opinion, or advice thereon.

PROCEDURE.

By sect. 46, provisions are made as to the mode of application to the Court (sub-sects. 3, 4, 5), and for the making of rules of Court (sub-sect. 7).

The application to the Court is to be by petition or summons at Chambers (sect. 46, sub-sect. 3); but by the rules under the Act (December, 1882), r. 2, in case a petition shall be presented without the direction of the Judge, no further costs shall be allowed than would be allowed on summons.

By r. 4, service is to be, in the case of applications under sects. 15 and 34 (*v. inf.* pp. 1838, 1845), on the trustees; under sect. 38 (*v. inf.* p. 1826), on the trustees, if any, and the tenant for life, if not the applicant; and under sect. 44, *sup.*, on the tenant for life or the trustees, as the case may be. No other person is to be served in the first instance. Except where otherwise provided, where an application is made by any person other than the tenant for life, the tenant for life alone is to be served in the first instance, and (r. 5) applications by a tenant for life are not in the first instance to be served on any person. But the Judge may require notice to be served on such persons as he thinks fit, and give, add to, or vary all necessary directions as to service, or dispense with service in any particular case (r. 6). If any person not already served is directed to be served, the application is to stand over generally or until such time as the Judge directs (*ib.*).

In *Wheelwright v. Walker* (37 Ch. D. 752), on an application by a tenant for life under sect. 38, service of notice of the application on his only child was ordered.

Forms of summonses and of affidavit in support verifying the title of the tenant for life and trustees are given in the Appendix to the Rules.

On an appeal by a tenant for life as to sale of mansion-house, a respondent trustee was allowed to be heard by counsel (contrary to the general rule) in support of the appeal: *Re M. of Ailesbury's Settled Estates*, (1892) 1 Ch. 508, O. A.

COSTS UNDER THE ACTS.

By sect. 46, sub-s. 6, "the Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges or expenses of all or any of the parties to any application, and may, if it thinks fit, order that all or any of those costs, charges or expenses be paid out of property subject to the settlement."

By sect. 47, "where the Court directs that any costs, charges or expenses be paid out of property subject to a settlement, the same shall, subject and according to the directions of the Court, be raised and paid out of capital money arising under this Act, or other money liable to be laid out in the purchase of land to be made subject to the settlement, or out of investments representing such money, or out of income of any such money or investments, or out of any accumulations of income of land, money or investments, or by means of a sale of part of the settled land in respect whereof the costs, charges or expenses are incurred, or of other settled land comprised in the same settlement and subject to the same limitations, or by means of a mortgage of the settled land, or any part thereof, to be made by such person as the Court directs, and either by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term, or otherwise, or by means of a charge on the settled land or any part thereof, or partly in one of those modes and partly in another or others, or in any such other mode as the Court thinks fit."

Under these sections the Court has power to order that costs incurred by the tenant for life in respect of an attempted sale be raised by a charge on the settled land: *Re Smith's Settled Estates*, (1891) 3 Ch. 65; see Form 10, *inf.* p. 1837. Commission of agents for effecting building leases was held payable out of capital: *Re Maryon Wilson's Settled Estates*, (1901) 1 Ch. 934.

As to the application of capital money in payment of costs under sect. 21, sub-sect. 10, *v. inf.* p. 1843.

By r. 14, any person paying into Court any capital money arising under the Act shall be entitled first to deduct the costs of paying the money into Court.

By r. 15, in all cases not provided for by the Act or rules the existing practice of the Court as to costs and otherwise, so far as the same may be applicable, is to apply to proceedings under the Act.

By r. 16, the fees and allowances to solrs in respect to proceedings under the Act are to be those provided by R. S. C. as to costs for the time being in force, so far as they are applicable to such proceedings; and by r. 17, a similar provision is made as to Court fees.

There is no rule which obliges several persons who together constitute a tenant for life to employ the same solr: *Smith v. Lancaster*, (1894) 3 Ch. 439, O. A. (where costs of four out of twenty-five employing separate solrs to peruse conveyances on sale were allowed).

(II.) TENANT FOR LIFE.

1. *Person appointed to exercise Powers of Tenant for Life on behalf of Infant under Settled Land Act, 1882—Sect. 60.*

UPON the application &c. of the Plt K., an infant, by C. his next friend, and upon hearing the solrs for the applicant, and upon reading &c., the Judge doth hereby appoint S. of &c., and H. of &c., to exercise the powers by the Settled Land Act conferred on tenants for life under

settlements on behalf of the said K., during his minority, or until further order, in accordance with the provisions in that behalf contained in the said Act.—Costs to be costs in the action.—*Kinnersley v. K.*, North, J., at Chambers, 7 Nov. 1883, A. 1638; *Re Noad*, Chitty, J., at Chambers, 22 Feb. 1883, B. 232.

For forms of application, see D. C. F. 1239, 1240.

2. The like—On behalf of Infant, for purpose of particular Contract under Sects. 3—5 and 16—20, 31.

UPON the application &c. of A. B., an infant, the tenant for life under the Settled Land Act, 1882, by C. D. his next friend, and upon hearing the solrs for the applicant and for E. F. the purchaser, Let the contract dated &c., made between &c., for the sale to the said E. F., at the sum of £—, of the hereditaments therein described be carried into effect; And Let the powers conferred upon a tenant for life by sects. 3 to 5, both inclusive, and sects. 16 to 20, both inclusive, of the Settled Land Act, 1882, be exercised by G. H. of &c. on behalf of the said A. B. during his minority, for the purposes of this application.—Tax costs as between solr and client, and raise and pay same out of the property subject to the said settlement.

3. The like Form under Sects. 6—13, 16—20, 59—Infant Tenant in Fee Simple—Leasing Powers.

UPON the application &c. of S., the tenant in fee simple under the will of &c., an infant, by G. his next friend, and upon hearing the solr for the applicant, and upon reading &c., Let the powers conferred on a tenant for life by sects. 6 to 13, both inclusive, and sects. 16 to 20, both inclusive, of the above-mentioned Act, be exercised by the said G. and C., on behalf of the said S., during his minority.—Tax and pay costs out of trust property.

See also Form 2, *inf.* p. 1825.

4. The like—Infant entitled to Undivided Moieties—Power to grant Building Leases—Sects. 6—13, 31.

UPON the application &c. of B., by M. his guardian, and upon hearing the solr for the applicant, and upon reading &c., It is ordered that the powers conferred upon a tenant for life by sects. 6 to 13 inclusive and sect. 31 of the Settled Land Act, 1882, be exercised by S. of &c. (being the person appointed by order dated &c., to exercise, *inter alia*, the said powers in respect of the then real estate of the said infant), on behalf of the said infant, of all the real estate of the said infant, as well the undivided moiety [*described in the said order*] (being the moiety to which the said infant B. was and is entitled as one of the co-heirs in gavelkind of his father G. B., deceased intestate), as also the other

undivided moiety of such lands and hereditaments to which the said infant B. is entitled as sole heir of his brother C. G. B. deceased intestate; And Let the said S. be at liberty to grant building leases of such real estate, lands and hereditaments during the minority of the said B. pursuant to sects. 6, 7, and 8 of the Settled Land Act, 1882, and to enter into contracts for that purpose, pursuant to sect. 31 of the same Act.—Costs of application to be taxed as between solr and client, and to be paid by S. out of income.—*Re Barth, Kay, J.*, at Chambers, 7 Nov. 1884, A. 1499.

5. *The like—General Powers within Specified Limits—Sects. 55—60.*

UPON the application of A. B., by C. D., his testamentary guardian, and E. F. and G. H., his guardians, appointed by an order dated &c.; Let the said A. B., E. F. and G. H. be at liberty, without having to obtain the sanction of the Court or Judge for that purpose, and whether any sale or exchange be for the purpose of facilitating the working of the mines and minerals under, or within, or forming part of the settled estates of X. or not, to exercise the powers of a tenant for life under the Settled Land Acts, 1882 and 1884, on behalf and during the minority of the said A. B., the tenant in tail in possession of the settled estates devised by or subject to the uses and trusts of the will of X., in relation to any lands and hereditaments forming parts of the said settled estates, not exceeding in any one instance five acres in extent, and in case of a sale thereof five acres in extent and £2,000 in value, and that on any such sale or exchange they be at liberty to receive the purchase-money, or money paid for equality of exchange, provided that the same do not exceed £200.—Directions to pay same into Court.—*Re Countess of Dudley, Chitty, J.*, 17 March, 1887, A. 959, P; 35 Ch. D. 338.

6. *Tenant for Life restrained from mortgaging so as to create a First Charge—Settled Land Act, 1882, s. 53; Settled Land Act, 1890, s. 11.*

UPON motion by way of appeal &c. [*Usual undertaking as to damages*]; Let the Deft (*name*) be restrained until judgment or further order from mortgaging or attempting to mortgage the estates in the county of B. of which the Deft is tenant for life under the will of — in such a way as to create a first charge over any part of that portion of the said estates which consists of the B., and which is not included in any existing incumbrance.—Deft to pay the Plts' costs of appeal to be taxed.—See *Hampden v. E. of Buckinghamshire*, C. A. 24 Ap. 1893, A. 1070; (1893) 2 Ch. 531.

For forms of orders appointing trustees of settlement on behalf of infant, *v. inf.* p. 1825.

7. *Trustees' Costs to be paid by Tenant for Life, or, if not, out of Capital.*

AFFIRM the said order dated &c. ; And Let the Appellant (*the tenant for life*), H. E. D., pay to the Respondents, G. L. W., A. H. T., J. W. D., and H. C. D., their costs occasioned by the said appeal, to be taxed in case of difference.—Liberty for the Respondents to retain their costs out of the capital funds subject to the said settlement in case the same are not paid by the Appellant.—*Re Daniell*, C. A. 9 Aug. 1894, A. 01142; (1894) 3 Ch. 503, C. A.

NOTES.

TENANT FOR LIFE.

By the Settled Land Act, 1882, s. 2, the person who is for the time being under a "settlement" beneficially entitled to possession (which word, by sub-sect. 10, includes receipt of income) of settled land for his life is, for purposes of the Act, the "tenant for life" under that settlement: sub-sect. 5. If in any case there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life: sub-sect. 6. A tenant for life within the foregoing definitions is to be deemed to be such, notwithstanding that under the settlement or otherwise the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent.

The words "entitled to possession" mean entitled in possession as distinguished from entitled in reversion: *Re Atkinson*, 30 Ch. D. 605; 31 Ch. D. 577, C. A.

A jointress, whose rent-charge remains paid, has not a concurrent interest, but merely a charge, so that the tenant for life can convey discharged from the jointure: *Re M. of Ailesbury and L. Iveagh*, (1893) 2 Ch. 345, 357.

A married woman absolutely entitled with a restraint on anticipation is not a tenant for life within the Act: *Bates v. Kesterton*, (1896) 1 Ch. 159, *v. sup.* p. 1814.

Where a house and lands are vested in trustees for a term of years upon trust to allow one to occupy the house and lands rent free for so long as she may wish to do so, such person is a tenant for life within the meaning of the Act: *Re Carne's Settled Estates*, (1899) 1 Ch. 324, following *Re Eastman's Settled Estates*, W. N. (98) 170; *secus*, if the right of personal enjoyment is not exercised, but in lieu thereof a lease is granted to others: *Re Edwards' Settlement*, (1897) 2 Ch. 412.

A tenant for life, being also heir-at-law, is tenant for life under the Act if a trust for accumulation of rents during his life expires by reason of the Thellusson Act: *Re Atherton*, W. N. (91) 85.

For a case in which twenty-five persons together constituted the tenant for life, see *Smith v. Lancaster*, (1894) 3 Ch. 439, C. A.

By sect. 19, where the settled land comprises an undivided share in land, or, under the settlement, has come to be held in undivided shares, the tenant for life of an undivided share may join or concur in any manner and to any extent necessary or proper for any purpose of the Act, with any person entitled to or having power or right of disposition of or over another undivided share.

PERSONS HAVING POWERS OF A TENANT FOR LIFE.

By sect. 58, sub-sect. 1, the powers of a tenant for life are given to each of the following persons, when his estate or interest is in possession, namely:—(1) A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, although the

reversion is in the Crown, and so that the exercise by him of his powers shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services. (2) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event. (3) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers shall bind the Crown. (4) A tenant for years determinable on life, not holding merely under a lease at a rent. (5) A tenant for the life of another, not holding merely under a lease at a rent. (6) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose. (7) A tenant in tail after possibility of issue extinct. (8) A tenant by the curtesy. (9) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event.

The words in the commencement of the section refer to possession as contrasted with reversion, not to personal possession as contrasted with possession by another: *Re Morgan*, 24 Ch. D. 114; *Re Jones*, 26 Ch. D. 736, 741, 744, C. A.

The following points are noteworthy under the several clauses of this subsection:—

—Clause 2: Under a gift on trust for the testator's wife for maintenance of his son without liability to account until his majority, and then upon trust for the son absolutely, with a gift over in case the son should die a minor and without issue, the son has the powers of a tenant for life: *Re Morgan*, 24 Ch. D. 114;

—Clauses 4, 6: A gift of an estate in lease to a person during the remainder of a term if he shall so long live is not within either of these clauses: *Re Hazle's Settled Estates*, 26 Ch. D. 428; 29 Ch. D. 78, C. A.;

—Clause 5 includes the case of the represves of a deceased next of kin and the surviving next of kin becoming entitled, by virtue of the Accumulations Act, 1800, to income during the life of another: *Vine v. Raleigh*, (1896) 1 Ch. 37;

—Clause 6 applies to a gift to a person so long "as he shall reside on the estate for not less than three months in each year after he shall become entitled to the actual possession thereof": *Re Paget's Settled Estates*, 30 Ch. D. 161; and (*semble*) where a term of years is limited to trustees upon trust to allow a *feme* to occupy personally during widowhood and she exercises her right: *Re Edwards' Settlement*, (1897) 2 Ch. 412; *secus*, a gift upon trust during A.'s life to apply income for benefit of him, his wife, and children, or any of them, with a forfeiture clause in case of assignment by him, and a direction in that event for application of income at the discretion of the trustees: *Re Atkinson*, 30 Ch. D. 605; 31 Ch. D. 577, C. A. The expression "trust for accumulation" in clause 6 ought not to be narrowly construed, and where the interest of the tenant for life was to be suspended until debts of the testator were paid, it was held that, as the implied trust for payment of debts might be properly carried out by accumulating rents and profits, there was substantially a "trust for accumulation of income" within the clause: *Williams v. Jenkins*, (1893) 1 Ch. 700; and see *Re Woodhouse* (1898), 1 I. R. 69;

—Clause 8: By sect. 8 of the Settled Land Act, 1884, the estate of a tenant by the curtesy is, for the purposes of the Act of 1882, to be deemed an estate arising under a settlement made by his wife;

—Clause 9 is liberally construed in favour of the tenant for life (*Clarke v. Thornton*, 35 Ch. D. 307, 311, 312), and stringent directions for application of rents by the trustees in keeping down and paying off interest, outgoings, and charges during the tenancy for life will not prevent the tenant from having the powers of a tenant for life, nothing standing in the way of his possession except charges which he might redeem: *Re Jones*, 24 Ch. D. 583; 26 Ch. D. 736, C. A.; *Re Clitheroe's Estate*, 28 Ch. D. 378; 31 Ch. D. 135,

C. A.; and see *Williams v. Jenkins*, (1893) 1 Ch. 700; *Re De Hoghton, De H. v. De H.*, (1896) 1 Ch. 855, C. A.; *secus*, where a period of time is fixed during which the person claiming to be, or to exercise the powers of tenant for life in possession can have no right to put himself in possession, or claim any part of the rents, however large: *Re Strangeways, Hickley v. S.*, 34 Ch. D. 423, C. A.

INFANT.

By sect. 59, where a person who is in his own right seised of or entitled in possession to land is an infant, then for the purposes of the Act the land is settled land, and the infant is to be deemed tenant for life thereof; and by sect. 60, where a tenant for life or a person having the powers of a tenant for life under the Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life, the powers under the Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally, or in a particular instance, orders.

Persons appointed by the Court under this section can make a good title without the necessity of appointing, under sect. 38, trustees of the settlement for the purposes of the Act: *Re Countess of Dudley's Contract*, 35 Ch. D. 338, Form 5, *sup.* p. 1818; but the order ought to contain a direction that the purchase-money be paid into Court: *S. C.* Under these sections the Court in Ireland refused, where an infant was entitled to an undivided share of land, to appoint one of his co-owners to exercise on his behalf the powers of the Act, but required the appointment of an independent person: *Re Greenville's Estate*, 11 L. R. Ir. 138. The Court, in directing the mode of sale under this section, ordered it to be made out of Court: *Re Price, Leighton v. P.*, 27 Ch. D. 552.

The powers of sect. 17, as to selling minerals apart from surface, may be exercised during the minority of the tenant for life by trustees under sect. 33: *Re Duke of Newcastle's Settled Estates*, 24 Ch. D. 129.

The case of an infant entitled absolutely, with a gift over in case of his death under age, is within sect. 58, sub-sect. 2: *Re Morgan*, 24 Ch. D. 114, *sup.* p. 1820; but where the infant is entitled contingently on attaining twenty-one, the provisions of the Settled Estates Act may be resorted to: *v. sup.* p. 1788.

The share of an infant, under the Statute of Distribution, in land which has been improperly allowed to remain unconverted is settled land within the Act, so as to enable the Court to appoint trustees under sect. 38: *Re Wells*, 48 L. T. 859; 31 W. R. 764; but see *Re Greenville's Estate*, 11 L. R. Ir. 109.

Where an infant heir-at-law was entitled in fee subject to his mother's right to dower, the Court appointed a person to exercise, on his behalf, the powers of a tenant for life under sects. 3—5, 16—20, on an undertaking by the mother to convey or release her claim to dower out of the land, without prejudice to her right to dower out of the proceeds: *Re M'Clintock*, 27 L. R. Ir. 462.

LUNATIC.

By sect. 62, where a tenant for life, or a person having the powers of a tenant for life under the Act, is a lunatic so found by inquisition, the committee of his estate is empowered, in his name and on his behalf, under an order made in lunacy, to exercise the powers of a tenant for life under the Act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate.

The powers of this section arise only in the case of a lunatic so found by inquisition, and as sect. 116 (2) of the Lunacy Act, 1890, extends only to property "belonging to" the lunatic, the Court in lunacy has no power to authorize the exercise of the statutory power of sale on behalf of a tenant for life, *non compos*, but not found lunatic: *Re Baggs*, (1894) 2 Ch. 416, n. (*secus*, where a power independently of the Act is conferred; *Re X.*, (1894) 2 Ch. 415, C. A.).

The committee of a lunatic cannot give a legal notice to the trustees under sect. 45 of intention to exercise the powers of the Act unless he has previously obtained the sanction of the Court in lunacy: *Re Ray's Settled Estates*, 25 Ch. D. 464.

Where a tenant for life is a lunatic, and his committee applies, under sect. 62 of the Act, for an order enabling him to exercise the powers of the Act, and no trustees are in existence, new trustees must be appointed for the purposes of the Act, and be served with notice of the application: *Re Taylor*, 52 L. J. Ch. 728; 31 W. R. 596; 49 L. T. 420.

DEALINGS BETWEEN TENANT FOR LIFE AND THE ESTATE.

By the Settled Land Act, 1890, s. 12, where a sale of settled land is to be made to the tenant for life, or a purchase from him of land to be made subject to the limitations of the settlement, or an exchange with him of settled land for other land, or a partition with him of land an undivided share whereof is subject to the limitations of the settlement, the trustees of the settlement are to stand in the place of and represent the tenant for life, and, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction.

POWERS OF TENANT FOR LIFE.

The scheme of the Act is to confer on the tenant for life very wide powers in substitution for and extension of those usually given by settlements to the tenant for life, or the trustees with his consent; *ex. gr.*, powers of sale, exchange, enfranchisement, and partition: sects. 3, 4; S. L. A., 1890, s. 5; on a sale, exchange, or partition to charge, with the consent of the incumbrancer, an incumbrance affecting one part of the settled land on any other part thereof, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly: S. L. A., 1882, s. 5; to grant leases: sects 6—12; and accept surrenders of leases: sect. 13; to dedicate parts of the settled land for streets and open spaces: sect. 16; to sell minerals and surface separately: sect. 17; to mortgage the settled estate for purposes of the Act: sect. 18; S. L. A., 1890, s. 11; to execute conveyances: sect. 17; S. L. A., 1890, s. 6; free from the limitations of the settlement and charges subsisting or to arise thereunder: S. L. A., 1882, s. 20; to effect improvements: ss. 25—30; and to enter into contracts: sect. 31.

His powers are not capable of assignment or release, and do not pass to a person as being by operation of law or otherwise an assignee of a tenant for life, but remain exercisable by the tenant for life after and notwithstanding any assignment of his estate or interest; and a contract by the tenant for life not to exercise any of the powers is void. But the exercise of the powers will be without prejudice to the rights of the assignee for value of the estate or interest of the tenant for life; and the assignee's rights are not to be affected without his consent, but, unless he is in actual possession of the settled land or part thereof, his consent is not to be requisite for the making of leases by the tenant for life in conformity with the Act: sect. 50.

The effect of sect. 50 is that the statutory power is vested in the tenant for life once and for all; and therefore, although he is party to an absolute resettlement, vesting in him a new life estate arising thereunder, the statutory power of sale continues unaffected: *Re Mundy and Roper*, (1899) 1 Ch. 275, O. A.

By sect. 51, any provision in a settlement tending or intended to prohibit or prevent the tenant for life from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power, under the Act, is to be deemed to be void.

A clause defeating the estate of a tenant for life on breach of a condition as to residence is within this section: *Re Paget's Settled Estates*, 30 Ch. D. 161; *Re Thompson*, 21 L. R. Ir. 109; and so is a proviso depriving him of the income of a fund in the event of his alienating his interest in the realty: *Re Ames, A. v. A.*, (1893) 2 Ch. 479; and a proviso in a bequest of personal

estate to be enjoyed by the tenant for life of settled realty, that in case of sale of the real estate the bequest shall go over: *Re Smith, Grose-Smith v. Bridger*, (1899) 1 Ch. 331; *secus*, a provision less favourable than the Act, as *ex. gr.* for expenditure of money for improvements, and repayment thereof by the tenant for life, as such a provision would tend to induce him to resort to the Act: *Re Sudbury and Poynton Estates, Vernon v. V.*, (1893) 3 Ch. 74; and a special provision authorizing improvements out of money to be raised by the trustees and paid to the tenant for life, and repaid by annual sums to form a sinking fund, was held not to tend to prevent the exercise of the statutory power, but the tenant for life, continuing to act under the power, was to continue the payments to the sinking fund: *Re Sudbury and Poynton Estates, Vernon v. V.*, 62 L. J. Ch. 539; 68 L. T. 707.

In order to bring a case within the section there must be in the settlement a limitation which, but for the attempted prohibition, would constitute a tenant for life capable of exercising the powers of the Act: *Re Atkinson*, 31 Ch. D. 577, 581, C. A.; and until sale or disposition the condition may be good, and the breach of it cause a forfeiture: *Re Haynes, Kemp v. H.*, 37 Ch. D. 306.

By sect. 52, notwithstanding anything in a settlement, the exercise by the tenant for life of any power under the Act shall not occasion a forfeiture.

By sect. 56, the powers conferred by the Act are not to affect prejudicially any subsisting powers exercisable by the tenant for life, or by trustees, and the powers given by the Act are cumulative.

By sect. 53, the tenant for life, in exercising any power under the Act, is to have regard to the interests of all parties entitled under the settlement, and is, in relation to the exercise thereof by him, to be deemed in the position, and to have the duties and liabilities of, a trustee for those parties.

The tenant for life has the absolute right to decide whether a sale shall take place: *Wheelwright v. Walker*, 23 Ch. D. 752; *Hatten v. Russell*, 38 Ch. D. 334; *Re Chaytor's Settled Estates Act*, 25 Ch. D. 651; *Thomas v. Williams*, 24 Ch. D. 558; and cannot be restrained from selling capriciously or against the wishes of remaindermen: *Wheelwright v. Walker. sup.*; but in the mode of sale he must exercise the discretion of a trustee, and sell as fairly as a trustee would: *Wheelwright v. Walker, sup.*; *Hatten v. Russell, sup.*; with due regard, not only to the interests of the remaindermen, but to the general interest and well-being of the settled land, including the interests of the tenants: *Re Marq. of Ailesbury's Settled Estates*, (1892) 1 Ch. (C. A.) 506; *S. C.*, *Lord Henry Bruce v. M. of Ailesbury*, (1892) A. C. 256; and see *Mogridge v. Clapp*, (1892) 3 Ch. 396 (C. A.); and is liable to the interference of the Court if his discretion is affected by improper motives: *Re Duke of Marlborough's Settlement*, 30 Ch. D. 127; 32 Ch. D. 1, C. A.; *Lewin*, 641, 642; and as to the control of the Court over the exercise of the powers of the tenant for life, see *Re Sebright's Settled Estates*, 33 Ch. D. 429; *Re Mansel*, W. N. (84) 209; *Mogridge v. Clapp*, (1892) 3 Ch. 395.

Section 53 is not to be regarded as conferring the rights of a trustee upon the tenant for life: *Re Llewellyn*, 37 Ch. D. 317, 325; and he is not necessarily entitled to costs as a trustee: *Sebright v. Thornton*, W. N. (85) 176.

The powers may be exercised notwithstanding that judgment has been given for the execution of the trusts of the settlement: *Cardigan v. Curzon-Howe*, 30 Ch. D. 531.

By sect. 56, sub-s. 2, in case of conflict between the provisions of a settlement and the provisions of the Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under the Act, the provisions of the Act shall prevail; and accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of the Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act.

In the case of concurrent powers in the trustees of the settlement, or some other person under the settlement, and in the tenant for life, this sub-section requires the consent of the tenant for life to the exercise of the powers in addition to the requirements of the settlement: *Re Duke of Newcastle's Estates*, 24 Ch. D. 129; although he is a lunatic not so found: *Re Atherton*, W. N. (91) 85; and as to the meaning of the word "conflict," see *Lonsdale (E.) v. Lowther*, (1900) 2 Ch. 687.

Powers already given by an order of the Court under the Settled Estates Act are not affected by sect. 56; in order to supersede them, application must be made under that Act: *Re Poole's Settlement*, 32 W. R. 956; 50 L. T. 585; *Re Barra-Haden's Settled Estates*, 32 W. R. 194; 49 L. T. 661.

The power of a tenant for life under sect. 28, to require capital money to be laid out in improvements, was held to be in conflict with and to prevail over a power given by the settlement to the trustees to apply income in repairs and improvements: *Clarke v. Thornton*, 35 Ch. D. 307.

Upon sale of copyholds by an equitable tenant for life under sect. 20, the lord is only entitled to one fine: *Re Naylor and Spendla*, 34 Ch. D. 217, C. A.

Easement.—A sale of a right to tunnel under the settled land is not a sale of an "easement," but of "part of the land," under sect. 3: *Re Pearson's Will*, 83 L. T. 626.

Discharge of Incumbrances.—The expression "incumbrance" in sect. 5, includes a rent-charge created under the Improvement of Land Act, 1864 (27 & 28 V. c. 114), and therefore it is competent for the tenant for life with the consent of the owner of the rent-charge, and without the intervention of the Board of Agriculture to exonerate a part of the land, and charge the entire rent-charge on the remainder: *Re Earl of Strafford and Maples*, (1896) 1 Ch. 235, C. A.

Section 11 of the Act of 1890 gives the tenant for life power to mortgage any part of the settled land in order to pay off incumbrances on any other part, notwithstanding that the proposed mortgage will have priority over annuities which are charged on the incumbered part, but if the proposed exercise of the power will unjustly prejudice the interests of the annuitants, the Court, having regard to sect. 53, will interfere by injunction: *Hampden v. E. of Buckinghamshire*, (1893) 2 Ch. 531; *sup.* Form 6, p. 1818.

The section applies where a tenant for life pays off an improvement charge made under sect. 257 of the Public Health Act, 1875, and desires to keep it alive: *Re J. Smith's S. E.*, (1901) 1 Ch. 689.

NOTICE TO TRUSTEES.

By sect. 45, one month's notice of intention to exercise the powers of sale, exchange, partition, lease (except ordinary leases for twenty-one years: see Settled Land Act, 1890, s. 7), or charge, is to be given by the tenant for life to each of the trustees of the settlement, and to their solr by registered letter. A general notice was insufficient under this section: *Re Ray's Settled Estates*, 25 Ch. D. 464; but by the Settled Land Act, 1884, s. 5, a general notice is made sufficient in the case of a sale, exchange, partition, or lease.

The giving of the notice is a condition precedent to the exercise of the powers: *Re Countess of Dudley's Contract*, 35 Ch. D. 338, 341; but may be waived by the trustees, and less than one month's notice may be accepted: Settled Land Act, 1884, s. 5 (3).

Unless the contrary intention is expressed in the settlement, the number of the trustees at the date of the notice must not be less than two: see Settled Land Act, 1882, s. 45 (2); but if the powers of the settlement are exercisable by the trustees "or trustee," notice to a sole or continuing trustee is good: *Re Garnett Orme and Hargreave's Contract*, 25 Ch. D. 595.

The non-existence of trustees for the purposes of the Act is a defect of conveyance and not of title: *Hatten v. Russell*, 38 Ch. D. 334; *Mogridge v. Clapp*, (1892) 3 Ch. 382, 396, 401, C. A.; so that a purchaser is protected if, before completion, there are trustees in existence to whom notice has been given: *Hatten v. Russell*, *sup.*; or if he pays his purchase-money into Court in ignorance of the fact that there are no trustees in existence: *Re Fisher and Grasebrook*, (1898) 2 Ch. 660; and a lease is valid though there were no trustees when it was granted: *Mogridge v. Clapp*, *sup.*; and a notice given more than a month before completion is sufficient: *Duke of Marlborough v. Sartoris*, 32 Ch. D. 616; but an agreement for a lease by a tenant for life at a time when, to the knowledge of the intending lessee, there were no trustees of the settlement, was held not binding on the remaindermen: *Hughes v. Fanagan*, 30 L. R. Ir. 111.

By sect. 45 (3) a person dealing in good faith with a tenant for life is not concerned to inquire respecting the giving of the notice. This provision was held available in favour of a lessee from a tenant by the curtesy who had affected to grant the lease as absolute owner: *Mogridge v. Clapp*, (1892) 3 Ch. 382, C. A.

(III.) TRUSTEES UNDER THE ACTS.

1. *Appointment of Trustees for the Purposes of the Settled Land Act, 1882—Sect. 38.*

UPON the application of C., the tenant for life, under the will of R. C., of the real hereditaments called &c., and upon hearing the solr for the applicant, and upon reading &c., Let R. & W. of &c. be appointed trustees under the settlement created by the will of R. C., so far as the same relates to the said hereditaments called &c., for the purposes of the Settled Land Act, 1882; And Let it be referred to the taxing master to tax the applicant her costs of this application as between solr and client; And Let the said R. and W., as such trustees as aforesaid, out of the said settled estate, retain and pay the said costs when taxed.—*Re Clough*, Chitty, J., at Chambers, 22 Feb. 1883, A. 239; *Re Hayden*, Chitty, J., at Chambers, 30 Nov. 1883, A. 1868.

For form of application, see D. C. F. 1238.

2. *The like, on behalf of Infant, for Purposes of Particular Sale—Sects. 3—13, and 16—20.*

UPON the application by originating summons dated &c. of T., an infant (who is to be deemed to be tenant for life of the undivided one-third part of the real estate passing under the said will under the settlement thereof deemed to exist by reason of his infancy) by D., his next friend, and upon hearing the solrs for the applicant, and for T. and P. (*the proposed trustees*), and upon reading &c., The Judge doth hereby appoint T. and P. trustees of the said settlement for the purposes of the Settled Land Act, 1882, but such trustees are not, without the leave of the Judge, to exercise on behalf of the said infant the powers conferred by the said Act upon a tenant for life, except by concurring in a sale by auction of the real estate devised by the said will to the testator's three sons.—See *Re Taylor*, North, J., at Chambers, 28 Feb. 1893, B. 286.

As the Act in terms gives to the trustees appointed for the purposes of the Act authority to exercise on behalf of the infant the powers of a tenant for life, any order conferring lesser powers upon the trustees necessarily operates by way of limitation of the powers conferred by the Act. A useful form of order therefore appears to be that given above, which does not purport to authorize any particular exercise of the statutory powers, but prohibits their exercise (except in the particular way intended) without the leave of the Court. And see D. C. F. 1239.

NOTES.

TRUSTEES FOR THE PURPOSES OF THE ACT.

Trustees of the settlement for the purposes of the Settled Land Act, 1882, are defined by sect. 2 to be "the persons, if any, who are for the time being under a settlement trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under

a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for the purposes of the Act."

Trustees with a power of sale exercisable with the consent of the tenant for life are trustees for the purposes of the Act: *Constable v. C.*, 32 Ch. D. 233; including the sale of heirlooms, though the power of sale in the settlement does not extend to them: *S. C.*; and though the power of sale of real estate is merely implied by reference to a power of varying investments of personal estate: *Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595; but as to trustees with a power of sale exercisable with the consent of a person whose consent cannot be obtained, see *Re Johnstone's Settlement*, 17 L. R. Ir. 172.

The expression "trustees of the settlement for the purposes of the Act" does not include trustees to whom personal estate has been bequeathed upon trust to convert it and invest the proceeds in the purchase of real estate to be settled strictly: *Burke v. Gore*, 13 L. R. Ir. 367; nor trustees for a term of years upon trust to allow mansion-house and lands to be occupied by a particular person at pleasure, and to raise specified sums of money, are not trustees for the purposes of the Act: *Re Carne's Settled Estates*, (1899) 1 Ch. 324.

Trustees with a future power of sale were not within the Act: *Wheelwright v. Walker*, 23 Ch. D. 753; *Re Bryant and Barningham*, 44 Ch. D. 218, C. A.; but now, by the Settled Land Act, 1890, s. 16, where there are for the time being no trustees of the settlement within the Act of 1882, the following persons shall, for the purposes of the Settled Land Acts, be trustees of the settlement: "the persons (if any) who are for the time being under the settlement trustees, with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such power of sale, or if there be no such persons, then the persons (if any) who are for the time being under the settlement trustees with future power of sale or under a future trust for sale of the land to be sold, or with power of consent to or approval of the exercise of such a future power of sale, and whether the power or trust takes effect in all events or not."

A tenant for life, who is also one of trustees with a power of sale not taking effect until the death of the tenant for life, was held to be able to make a good title under the section: *Re Cox and Yeadon*, 91 L. T. p. 241; but see 37 Sol. J. 109.

APPOINTMENT BY THE COURT.

By the Settled Land Act, 1882, s. 38 (1), if there are no trustees of the settlement within the definition in the Act, or where in any other case it is expedient for the purposes of the Act that new trustees of a settlement should be appointed, the Court may, if it thinks fit, on the application of the tenant for life, or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder or otherwise, or, in the case of an infant, of his testamentary or other guardian or next friend, appoint fit persons to be trustees under the settlement for the purposes of the Act; and by sect. 38 (2), the persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and until the appointment of new trustees the personal representatives or representative for the time being of the last surviving or continuing trustee, are for the purposes of the Act the trustees or trustee of the settlement.

Upon an application under the section the Court has inquired into the purpose for which the appointment was asked, and refused it when the object was to have a large fund taken out of Court and invested on mortgage in Ireland: *Burke v. Gore*, 13 L. R. Ir. 367; but as a rule the Court, in the absence of special circumstances, makes the order without going into any such question: *Lewin*, 632.

As to the mode of application, *v. sup.* p. 1815. The Court directed the registrar to pass and enter an order appointing trustees for the purposes of the Act after the authorities at Somerset House had adjudicated that stamp duty for new trustees was not required, and had stamped the order to that effect: *Re Potter*, W. N. (89) 69; *Re Kennaway*, W. N. (89) 70.

An order appointing trustees having been drawn up, and acted upon, but not passed or entered when one of the trustees died, the Court on an *ex parte*

application, allowed the order to be re-drawn, passed, and entered *nunc pro tunc*: *Re Jones, Bullis v. J.*, W. N. (91) 114; 39 W. R. 619.

As the function of the trustees is to impose a check on the tenant for life, the tenant for life, or any person who may become tenant for life, will not be appointed trustee: *Re Harrop's Trusts*, 24 Ch. D. 717; nor a tenant for life in remainder: *Re Thompson's Will*, 21 L. R. Ir. 109; nor a member of the firm of solrs who act for the tenant for life: *Re Kemp's Settled Estates*, 24 Ch. D. 485; *Re Walker's Trusts*, 48 L. T. 632; 31 W. R. 716; *Re E. Stamford, Payne v. S.*, (1896) 1 Ch. 288; nor two brothers, the Court requiring two independent trustees: *Re Knowles' Settled Estates*, 27 Ch. D. 707.

Under special circumstances, where a proposed sale was proved to be beneficial for an infant, resident in a colony, who was entitled to a share, the Court appointed as trustees for the purposes of the Act persons who were resident in the colony: *Re Simpson, Re Whitchurch*, (1897) 1 Ch. 256, C. A.

As to the power of the Irish Land Commissioners to appoint trustees for the purposes of the Settled Land Act in certain cases, see 48 & 49 V. c. 73, s. 13. As to the appointment of trustees in Ireland when trustees have already been appointed in England, see *Re Maberly's Settled Estate*, 19 L. R. Ir. 341.

By the Trustee Act, 1893, s. 47 (replacing the Settled Land Act, 1890, s. 17), all the powers and provisions contained in the Act of 1893, with reference to the appointment of new trustees, and the discharge and retirement of trustees (as to which *v. sup.* pp. 1205 *seq.*), are to apply to and include trustees for the purposes of the Settled Land Acts, 1882 to 1890, whether appointed by the Court or by the settlement, or under provisions contained in the settlement, and this enactment applies and is to have effect with respect to an appointment or a discharge and retirement of trustees taking place before as well as after the passing of the Act, and is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of the Act, otherwise than under the provisions of the Conveyancing and Law of Property Act, 1881. As to the object of this section, see *Re Wilcock*, 34 Ch. D. 508, 510; *Re Kane's Trusts*, 21 L. R. Ir. 112.

(IV.) LEASES.

1. Order to grant Particular Lease where no Contract has been entered into—Sects. 10 or 15.

UPON the application of [as in Forms A. or B., *sup.* p. 1812], Let the [building or mining] lease intended to be granted to M. N. of the lands [or of the mansion-house &c.] settled by the said settlement be, pursuant to sect. 10 [or 15] of the above-mentioned Act, approved; And Let the applicant [or the said X. Y.] be authorized to execute the same.

For forms of application, see D. C. F. 1229, 1230.

2. Order to grant Particular Lease where Tenant for Life has entered into a Contract—Sects. 10 or 15.

UPON the application of [as in Forms A. or B., *sup.* p. 1812], Let the conditional contract dated &c., and made between the applicant [or the said X. Y.] of the one part, and M. N. of the other part, for a [building or mining] lease to the said M. N. of the hereditaments therein mentioned for the term and upon the conditions therein stated, be, pursuant to sect. 10 [or 15] of the above-mentioned Act, approved; And Let the said A. B. [or X. Y.] be authorized to execute a lease in pursuance of the said contract.—[Add order as to costs.]

3. *Liberty to grant Leases—Settled Land Act, 1882, s. 10.*

UPON the application of G., of &c., the tenant for life under the settlement dated &c., And upon hearing the solrs for the applicant and for D. &c., And upon reading &c., Let the applicant G. [*or in case of an infant, "the said X. Y. during the infancy of the said G."*] and each of his successors in title, being a tenant for life or having the powers of a tenant for life under the Settled Land Act, 1882, be at liberty, pursuant to sect. 10 of the said Act, from time to time to make building [*or mining*] leases of the lands comprised in the said settlement for the term of — years [*or in perpetuity*] on the conditions specified in the said Act [*or on other conditions than those specified in sects. 7 to 9 of the said Act*].—Tax costs, and pay out of trust property.—*Re George, Chitty, J., at Chambers, 8 April, 1886, A. 611.*

For similar order, see *Re Wood, Pearson, J., at Chambers, 11 Feb. 1885, B. 149.* For form of application, see D. C. F. 1229.

4. *Liberty to make Grants for Building Purposes pending Action in Chancery Division—Sect. 10.*

UPON the application by originating summons of A. B., the tenant for life under the settlement created by the will of X., and upon hearing counsel for the applicant and the respondents; And the applicant by his counsel undertaking that he will not, while the action of S. v. T. (now pending in the Chancery Division), 18—, S.—, is pending, make any grant in accordance with this order without informing the proposed grantee or grantees of the existence of such action, and undertaking to pay the respondent's costs of this application as between solr and client, to be taxed &c., in case of difference, Let the applicant be, pursuant to sect. 10 of the Settled Land Act, 1882, authorized from time to time to make grants for building purposes of the lands comprised in the said settlement in perpetuity at fee farm rents and otherwise on the conditions specified in the said Act.—*Re Duke of Cleveland, Kekewich, J., at Chambers, 11 April, 1892, A. 543.*

5. *Mining Lease—Variation according to Circumstances of the District—Appointment of Trustees—Infant—Concurrence by Tenants for Life under separate Settlements of Undivided Shares—Sects. 6, 10, 38.*

UPON the application of C. F. D. (a person having the powers of a tenant for life in respect of the two-third parts of the N. estate, settled by the settlement created by the will of R. D.), an infant, by F. C. D. her mother and next friend, and of the said F. C. D., widow, the tenant for life of the remaining one-third part of the N. estate, settled by the settlement created by the will of A. D., and upon hearing &c.,

and upon reading &c., Let J. D. R. of &c., and L. D. R. of &c., be appointed trustees for the purposes of the Settled Land Act, 1882, of the settlement created by the will of R. D., and also of the settlement created by the will of A. D.; And Let the said J. D. R. and L. D. R. be appointed during the minority of C. F. D., an infant, being a person having the powers of a tenant for life under the Settled Land Act, 1882, of the estates settled by the will of R. D. to exercise, on behalf of the said C. F. D., the powers conferred upon a tenant for life by sects. 6 to 13, both inclusive, and sects. 16 to 20, both inclusive, of the Settled Land Act, 1882, but so far only as by the exercise of such powers she can give effect to an agreement dated &c., and made between &c.; And the Judge being of opinion that, with respect to the district in which the N. estate, settled by the said wills of R. D. and A. D., is situate, it is difficult to make a lease of such settled estate for mining purposes, except for a longer term and on other conditions than the term and conditions specified in that behalf in the Settled Land Act, 1882; And the Judge being also of opinion that the said agreement dated &c. is beneficial to all persons interested in the N. estate under the settlements thereof made by the above-mentioned wills of the said R. D. and A. D.; Let the said agreement dated &c. be carried into effect; And Let the said J. D. R. and L. D. R., on behalf of the said infant C. F. D., concur with the said F. C. D. as the tenant for life under the will of the said A. D. in granting a lease of the said hereditaments comprised in the said agreement dated &c., in pursuance of and in accordance with the terms of the said agreement; And Let the said F. C. D., as the tenant for life under the will of the said A. D., be at liberty to concur with the said J. D. R. and L. D. R. in granting a lease of the said hereditaments in pursuance of and in accordance with the terms of the said agreement; And Let one equal fourth part of two equal third parts of the rents, royalties, reservations and moneys payable under the lease to be granted as aforesaid, be received by the said J. D. R. and L. D. R., or other the trustees for the time being, for the purposes of the Settled Land Act, of the settlement created by the will of the above-named R. D., to be held and applied as capital moneys arising under the said Act from the hereditaments comprised in the said settlement, the residue of the said two equal third parts being applied as rents and profits of the said hereditaments; And Let three equal fourth parts of the remaining one equal third part of the rents, royalties, reservations and moneys payable under the lease to be granted as aforesaid be reserved by the said J. D. R. and L. D. R., or other the trustees for the time being, for the purposes of the Settled Land Act, of the settlement created by the will of the said A. D., to be held and applied as capital moneys arising under the said Act from the hereditaments comprised in the said settlement, the residue thereof being applied as rents and profits of the said hereditaments; And Let it be referred to the taxing master to tax, as between solr and client, the costs of all parties of and occasioned by this application, and also

the costs of the said agreement dated &c., and the negotiations therefor, and of the lease to be granted in pursuance thereof which shall not be paid by the said E. B. under the said agreement dated &c. ; And Let the said costs, when taxed, be paid by the trustees of the respective settlements created by the wills of the said R. D. and A. D. out of capital moneys in their respective hands, arising under the said Act, in the following proportions (that is to say): two-third parts of such costs out of capital moneys arising under the settlement created by the will of the said R. D., and one-third part thereof out of the capital moneys arising under the said settlement created by the will of the said A. D.—Liberty to apply.—*Re Rees, Edward Davies' Settled Estate*, North, J., at Chambers, 3 Aug. 1891, A. 1421.

6. *Order for payment into Court by Lessee under a Mining Lease—Sect. 11.*

UPON the application of [as in Form F., *sup.* p. 1813], Let the applicant be at liberty to lodge in Court, as directed in the schedule hereto, £—, being three-fourths (or one-fourth) of the rents payable by him under a lease dated &c., for the half-year ending &c., less £— the costs of lodgment in Court; And Let the applicant be at liberty, on or before the — day of — and the — day of —, 19—, and the same days in each succeeding year during the term created by the said lease, to lodge in Court, as directed in the said schedule, so much of the rents payable by him under the said lease as is by sect. 11 of the above-mentioned Act directed to be set aside as capital money arising under the said Act, after deducting therefrom the costs of lodgment in Court.

N.B.—The title of the ledger credit in the Lodgment Schedule will be: "In the matter of the Blackacre estate, settled by the settlement dated &c. [or by the will of &c., as the case may be], and in the matter of the Settled Land Act, 1882."—"Mineral rents under lease dated &c."

For forms of application, &c., see D. C. F. 1232 *et seq.*

7. *Lease of Mansion-house—Sect. 15—Act of 1890, s. 10.*

UPON the application of A. B., the tenant for life, under the settlement created by the will of X., Let the said A. B. be at liberty to grant a lease to — of the principal mansion-house known as &c., and the demesnes thereof and other lands usually occupied therewith (pleasure-ground and park, and other lands usually occupied therewith), and forming part of the lands comprised in the said settlement, for the term of — years from the — day &c., at the yearly rent of £—, secured by condition of re-entry, and other the conditions specified in the said Act.

8. *Applicant declared to be Tenant for Life—Leave to exercise Powers of accepting Surrenders and making New Leases—Settled Land Act, 1882, ss. 6—13, s. 63, and Settled Land Act, 1884, s. 7.*

THE application by originating summons, dated &c., of L. S. of &c., the tenant for life, or the person who is deemed to be the tenant for life, under the settlement created by the above-mentioned will and codicil, which &c. was adjourned to be heard in Court coming on &c. accordingly; And upon hearing counsel for the applicant and for the respondents E. E. B. and T. S. (*trustees appointed under Settled Land Act*), and upon reading (*inter alia*) an affidavit of E. E. B. and L. S., the exhibit B¹ therein referred to, This Court doth declare that the applicant L. S. is the person entitled, under the above-mentioned settlement created by the said will and codicil, to the income of the land settled thereby; And it is ordered that pursuant to sect. 7 of the Settled Land Act, 1884, the powers conferred on a tenant for life by sect. 63, together with sects. 6 to 13, both inclusive, of the Settled Land Act, 1882, be exercised by the applicant L. S. with regard to [*describe property*], part of the above-mentioned premises settled by the said will and codicil, by accepting a surrender of the existing lease of the premises dated &c., and by making a new lease thereof in the terms of the draft proposed new lease which has been agreed between the persons expressed to be parties thereto, being exhibit B¹ to the said affidavit of E. E. B. and L. S., and of which this Court doth hereby approve; And it is ordered that pursuant to the said sect. 7 of the Settled Land Act, 1884, the powers conferred upon a tenant for life by sect. 63, together with sects. 6 to 13 of the Settled Land Act, 1882, be exercised by the applicant L. S. with regard to all the said settled premises by from time to time accepting surrenders of and granting building or other leases of the said settled premises or any part or parts thereof for such terms and upon such conditions as are specified in the said Settled Land Acts, 1882 and 1884; And it is ordered that it be referred to the taxing master to tax as between solr and client the costs of the applicant and of the respondents of the said application in Chambers and occasioned by the adjournment thereof into Court; And it is ordered that the respondents E. E. B. and T. S. do out of the corpus of the property, subject to the trusts of the said settlement created by the said will and codicils, pay and retain the said costs when taxed.—*Re Searle's Settlement*, Kekewich, J., 17 Jan. 1901, B. 137; see (1900) 2 Ch. 829.

NOTES.

LEASES.

By sect. 6 of the Settled Land Act, 1882, a tenant for life is empowered to grant leases of "the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose

whatever, whether involving waste or not," for terms not exceeding, in case of a building lease, 99 years; in case of a mining lease, 60 years; and in case of any other lease, 21 years. Sects. 7, 8, and 9 (as varied by the Settled Land Act, 1890, ss. 7, 8) prescribe the mode, considerations, conditions, and terms in, for, and upon which leases in general, building leases, and mining leases may respectively be granted. A lease by a tenant by the curtesy, believing himself to be tenant in fee, may nevertheless take effect under the Act, if in conformity with it: *Mogridge v. Clapp*, (1892) 3 Ch. 382. *Semble*, sect. 20 has no reference to leases or other conveyances made under the previous sections: *Mogridge v. Clapp*, (1892) 3 Ch. 382, 394.

Under the power conferred by sect. 6, a building or other lease may be made of the surface of the land reserving the mines and minerals beneath it: *Re Gladstone*, (1900) 2 Ch. 101, C. A. (overruling *Re Newell and Nevill's Contract*, (1900) 1 Ch. 90); *Re D. of Rutland's Settled Estates*, (1900) 2 Ch. 206; and so under a power in a settlement to lease all "or any part" for building, and also to lease mines with or without surface: *Re D. of Rutland's Settled Estates*, *sup.*

The power must be exercised with due regard to the provisions of sect. 53, and therefore a lease will be void as against the remaindermen if it is granted by the tenant for life to his wife for the purpose of conferring a benefit on her at the expense of his successors in title: *Sutherland v. S.*, (1893) 3 Ch. 169; or if widow, tenant for life *durante viduitate*, seeks to grant a lease of the house to her intended husband so that they may live in it together: *Middlemas v. Stevens*, (1901) 1 Ch. 574; or if the tenant for life accepts a sum of money from the lessee as a bribe for granting the lease, and not by way of fine: *Chandler v. Bradley*, (1897) 1 Ch. 315.

Where the tenant for life is a lunatic lawfully detained, but not so found by inquisition, the power of leasing may be exercised by the committee with the leave of the Judge in lunacy, sect. 120 of the Lunacy Act being available in aid of sects. 6 and 62 of the Settled Land Act, 1882: *Re Salt*, (1896) 1 Ch. 117, C. A., distinguishing *Re Bagge*, (1894) 2 Ch. 416, *v. sup.* p. 1821.

The existence of trustees for the purposes of the Acts is not a condition precedent to the power of the tenant for life to make a lease, which is valid, although there are no such trustees, and a lessee dealing in good faith with the tenant for life is not bound to inquire whether there are such trustees, nor affected with constructive notice that there are none: and, *semble*, although he have actual notice, his title is not invalidated: *Mogridge v. Clapp*, *sup.* But omission by the tenant for life to have trustees appointed might prevent him from obtaining specific performance against an unwilling lessee: *S. C.*, at p. 395; *q. v.* as to the effect of sect. 7, sub-sect. 2, of the Settled Land Act, 1890.

A lease granted in part in consideration of the lessee expending a specified sum in improvements and repairs is a "building lease" within sect. 8, sub-sect. 1 of the Act of 1882: *Re Daniell's Settled Estates*, (1894) 3 Ch. 503, C. A.; but the Court will not under sect. 7 of the Act of 1884 sanction a building lease in which the agreed repairs or improvements to be done by lessee are such as an ordinary landlord is expected to do: *S. C.*

Past voluntary expenditure by a lessee is not a "consideration" under sect. 8, sub-sect. 1, of the Act of 1882, justifying a lease by tenant for life at less than the "best rent," nor is it "money laid out" within sect. 7, sub-sect. 2, which refers to money beneficially laid out with direct reference to the grant of the lease: *Re Chawner's Settled Estates*, (1892) 2 Ch. 192.

By sect. 10, where it is shown to the Court, with respect to the district in which any settled land is situate, either (i.) that it is the custom for land therein to be leased or granted for building purposes, for a longer term or on other conditions than those specified in the Act, or in perpetuity; or (ii.) that it is difficult to make such leases or grants except for a longer term or on other conditions than those specified in the Act, or except in perpetuity, the Court may authorize generally the tenant for life to make, from time to time, leases or grants of or affecting the settled land in that district or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry or otherwise, as in the order of the Court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case; and thereupon the tenant for life, and subject to any direction in the order to the contrary, each of his successors in title,

being a tenant for life under the Act, may make in any case, or in any particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order.

By sect. 11, "under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside as capital money arising under this Act, part of the rent as follows, namely, where the tenant for life is impeachable for waste in respect of minerals, three-fourth parts of the rent, and otherwise one-fourth part thereof, and in every such case the residue of the rent shall go as rents and profits."

In the case of open mines, the tenant for life, though not expressed by the settlement to be unimpeachable for waste, must be treated as being so for the purposes of sect. 11, and may therefore grant a lease of such mines upon the terms of setting aside one-fourth only of the rent: *Re Chaytor*, (1900) 2 Ch. 804. As to the right of tenant for life to work open mines, *v. sup.* Vol. I., p. 551.

A person entitled for life to income of money to arise from sale of settled land, and to rents and profits until sale, is not, strictly speaking, impeachable for waste within sect. 11, but if he makes a lease of unopened minerals, three-fourths of the rents and royalties ought to be set aside as capital money: *Re Ridge, Hellard v. Moody*, 31 Ch. D. 504, C. A.

Sect. 11 does not apply to a mining lease granted by a tenant for life under a contract entered into by his testator as absolute owner: *Re Kemey-Tynte, K.-T. v. K.-T.*, (1892) 2 Ch. 211.

By the Settled Land Act, 1890, s. 9, "where, on a grant for building purposes by a tenant for life, the land is expressed to be conveyed in fee simple, with or subject to a reservation thereof of a perpetual rent or rent-charge, the reservation shall operate to create a rent-charge in fee simple issuing out of the land conveyed, and having incidental thereto all powers and remedies for recovery thereof conferred by sect. 44 of the Conveyancing and Law of Property Act, 1881, and the rent-charge so created shall go and remain to the uses, on the trusts, and subject to the powers and provisions which immediately before the conveyance was subsisting with respect to the land out of which it is reserved."

By sect. 12 of the principal Act, the leasing powers are extended in certain cases to leases for giving effect to contracts previously entered into, or to a covenant for renewal, and for confirming previous leases which are void or voidable. By sect. 13, powers of accepting surrenders of leases, and by sect. 14, powers of granting licences for leases of copyholds, are conferred.

As to leases and sales of the mansion-house and park under sect. 10 of the Settled Land Act, 1890, repealing and re-enacting, with variations, sect. 15 of the principal Act, *v. inf.* p. 1838.

By sect. 9, where the Court authorizes generally the tenant for life to make from time to time leases or grants for building or mining purposes under sect. 10 of the principal Act, the order shall not direct any particular lease or grant to be settled or approved by the Judge, unless the Judge shall consider that there is some special reason why such lease or grant should be settled or approved by him. Where the Court authorizes any such lease or grant in any particular case, or where the Court authorizes a lease under sect. 15 of the Act, the Court may either approve a lease or grant already prepared, or may direct that the lease or grant shall contain conditions specified in the order, or such conditions as may be approved by the Judge in Chambers without directing the lease or grant to be settled by the Judge.

(V.) SALES, CONTRACTS, AND OTHER DISPOSITIONS.

1. Order for Sale out of Court of the Mansion-house, or of Timber or Chattels—Sects. 15, 35, or 37—Settled Land Act, 1890, s. 10.

UPON the application of [*as in Forms A. or B., sup.* p. 1812], Let the applicant [*or the said X. Y.*] be at liberty to sell the principal mansion-house [*or the timber ripe and fit for cutting*] on the land

[*or the furniture and chattels*] settled by the above-mentioned settlement, in such manner and subject to such particulars, conditions, and provisions as he may think fit.—Usual order to tax costs of application.—Let C. D. and E. F., the trustees of the said settlement, be at liberty to pay the said costs out of the proceeds of the said sale [*or, in the case of timber, out of the three-fourths of the proceeds of the said sale to be set aside as capital money arising under the said Act*].

For forms of application, see D. C. F. 1230, 1231.

2. *Order for Sale by the Court of the Mansion-house, &c., or of Timber or Chattels—Sects. 15, 35, or 37—Settled Land Act, 1890, s. 10.*

UPON the application of [*as in Forms A. or B., sup. p. 1812*], Let the principal mansion-house [*or the timber ripe and fit for cutting*] on the land [*or the furniture and chattels*] settled by the above-mentioned settlement, be sold with the approbation of the Judge.—Directions for payment of purchase-money into Court.

3. *Contracts for Sale of Mansion-house, &c., confirmed.*

UPON the appeal &c., Discharge order dated &c.; Let A. B. be at liberty to sell the mansion-house of the Savernake estate, with the pleasure-grounds, park, and lands usually occupied therewith, in the petition mentioned, and also the other lands, hereditaments, and premises comprised in the agreement embodied in two contracts, dated &c., in accordance with the terms of the said agreement, and that the said contracts for such sale be confirmed.—Liberty to apply.—Tax costs and pay the same out of purchase-money.—*Re Ailesbury (Marquis of)*, Court of Appeal, 12 Dec. 1891, A. 1650; S. C., (1892) 1 Ch. 506, C. A.; affirmed in House of Lords, (1892) A. C. 356, *nom. Bruce v. Marquis of Ailesbury*.

4. *Leave to Tenant for Life to sell Specific Heirlooms—Sect. 37.*

UPON the application of A. B., the tenant for life &c., Let the applicant be authorized to sell certain chattels settled by the will of C. D., that is to say, a painting in oil colours, by &c. &c., at the price of £—, and in other respects on the terms of a conditional agreement, dated &c.—Directions for payment of commission on sale.—And Let, if the said conditional agreement shall fail of effect on the part of purchasers, the applicant be at liberty to sell the said picture to any person or persons for a sum not less than £—.—Direct taxation and payment of costs.—Costs to include all fees paid for valuation made by expert witnesses.—*Re Radnor's (Earl) Will*, Chitty, J., 29 July, 1890, B. 954; S. C., 45 Ch. D. 402, C. A.

5. *Leave to sell specified Heirlooms, pending decision of Question as to re-investment of Proceeds.*

UPON the application of A. B., And the applicant by his counsel undertaking within one month to raise the question whether any part of the proceeds already obtained from the sale of heirlooms can be properly re-invested so as to devolve as the settled real estate, and in the meantime not to direct any such re-investment of the proceeds of the sale now sanctioned, and to abide by any direction of the Court which may be given as to re-investment of such proceeds in the purchase of chattels, upon the application of the trustees or guardians of the infant tenant in tail or otherwise, Let the applicant be at liberty to sell through X., of &c., four pictures [*describing them*] comprised in the above-mentioned settlement for £—.—Purchase-money to be paid to trustees, to be held upon trusts of settlement.—Pay commission and costs.—*Re Marlborough's (Duke of) Settlement*, Chitty, J., 3 Feb. 1885, B. 220; *v. inf.* p. 1839.

6. *Declaration as to Application of Proceeds of Heirlooms in Discharge of Incumbrances.*

THE application of the Plt, which upon hearing &c., was adjourned, to be heard in Court, coming on &c.—Declare Plt, as tenant for life under above settlement, entitled to have proceeds of sale of heirlooms applied in discharge of incumbrances affecting settled estates without keeping the charges alive.—Trustees, upon request of tenant for life, to invest proceeds in discharge of mortgage.—*Re Marlborough's (Duke of) Settlement*, *M. v. Marjoribanks*, Chitty, J., 18 June, 1885, B. 826; *S. C.*, 30 Ch. D. 127; 32 Ch. D. 1, C. A.

7. *Declaration on Sale by Tenant for Life of Settled Land that Tenant for Life has Right to convey discharged from Jointures—Settled Land Act, 1882, ss. 2 (1), 20 (1 and 2), 50 and 58 (1, (iv)).*

REVERSE the order of Kekewich, J., dated 14 May, 1898, except so far as it declares that the appellant, as tenant for life within the meaning of the Settled Land Acts, 1882 to 1890, under the above-mentioned settlement dated &c., has power to sell the estate free from the rent-charges limited by the said settlement in favour of M. H. M. M. and S. J. M. M.; Appoint W. S. M. of —, L. A. S. B. of —, and S. M. of —, trustees under the settlement effected by the above-mentioned instruments for the purposes of the Settled Land Acts, 1882 to 1890; Declare that M. H. M. M., S. J. M. M. and L. C. M. M., and P. A. M. M., G. B. M. M., O. F. M. M. and H. L. M. M., annuitants, jointress and portioners respectively under the above-mentioned instruments, are respectively bound by the above-mentioned contract, and that the appellant C. F. M. M., as tenant for life under the said settlement effected by the above-mentioned instruments, having power to convey

the above-mentioned estate free from the respective terms of years whereby the jointure and portions are respectively secured and discharged from such rent-charges or annuities, jointure, and portions respectively, the said F. L. R., A. G. F. and J. S. S. (*purchasers*) are not entitled to require the concurrence in the conveyance to them of the hereditaments comprised in the said contract of the said M. H. M. M., or S. J. M. M., L. C. M. M., or P. A. M. M., G. B. M. M., O. F. M. M., or H. L. M. M., or of the trustees of the said respective term of years, and that the objections of the purchasers to the title of the said hereditaments have been sufficiently answered by the vendor, and that a good title has been shown; costs, charges and expenses of the appellant to be paid out of the property subject to the settlement, including the purchase money to be paid vendor, but not the hereditaments comprised in the said contract.—*Re Mundy and Roper's Contract*, C. A. 20 Dec. 1898, B. 4491; (1899) 1 Ch. 275.

N.B.—In this case the decision of Stirling, J., in *Re Marq. of Ailesbury and Lord Iveagh*, (1893) 2 Ch. 345, was approved.

8. *Costs incurred by separate Solicitors of several Persons constituting Tenant for Life paid out of Proceeds of Sale.*

Tax the following costs, that is to say:—(a) One set of costs for conducting the sale of such part of the above-mentioned real estate as was sold by public auction under Schedule I. Part I. of the general order made under the Solrs' Remuneration Act, 1881; (b) One set of costs to be taxed under Part I. of the same schedule for negotiating the sale of such part of the said real estate as was sold by private contract, if any such costs are properly chargeable; (c) One set of costs to be taxed under Part I. of the same schedule for deducing title to the said real estate; (d) The costs of all parties to the conveyances of the said real estate for perusing and completing such conveyances, and in such taxation such of the parties to the said conveyances as were represented by separate solrs in and about the perusal and completion of the said conveyances are to be entitled to separate sets of costs of such perusal and completion, but one set of costs only is to be allowed to any tenant for life, or person having the powers of a tenant for life, and his incumbrancers or assignees; And Let the costs hereinbefore directed to be taxed be paid out of the entire proceeds of the sale of the said real estate, the costs (a), (b) and (c) being payable to Mr. W. F. of — as solr for the vendors.—See *Smith v. Lancaster*, C. A., 8 Aug. 1894, B. 2026; (1894) 3 Ch. 439, C. A.

9. *Application of Proceeds of Sale of Heirlooms for Repair of unsold Heirlooms—Salvage—Settled Land Act, 1882, s. 37 (2).*

LET the Plt, as tenant for life, be at liberty to sell such of the family portraits, paintings, pictures, and picture-frames containing

the same, late of, or belonging to the late I. I., Earl W., and the late G. E., Earl W., respectively, or either of them, and of the pictures, picture-frames, engravings, prints, photographs, statues, china, curiosities, furniture, plate, books, linen, glass, and other goods, chattels, and effects settled by the testatrix's will as are mentioned in Schedules (2, 3 and 4) of the affidavit of &c., and the several exhibits marked respectively (M. D. W. 1 and M. D. W. 2) referred to in the affidavit of &c., and filed in the Central Office, and that the Plt W. F., Earl W., do pay the net proceeds of sale after payment of the expenses of sale to the Defts the Rt. Hon. W. W., Earl of S., and the Hon. E. A. R. C., as trustees of the pictures and heirlooms bequeathed by the testatrix's will.—Liberty for the Defts as such trustees to apply, in restoration of the remaining pictures and heirlooms bequeathed by the said will, such reasonable portion of the proceeds of the said sale as in their discretion they may think fit.—*Re Waldegrave, W. v. W.*, North, J., 30 Nov. 1899, B. 4024; 81 L. T. 632.

10. *Costs of attempted Sale charged on Settled Land—Sects. 4, 21 (10), 46 (6), 47, 55 (3).*

THE application of A. B. &c., which upon hearing &c. was adjourned &c.—Declare that the costs, charges and expenses, to be taxed &c., of the applicant of and incidental to the attempted sale by auction on the — day &c., of the Shortgrove Estate &c., are costs, charges and expenses of and incidental to the exercise of the powers of sale conferred by the Settled Land Act, 1882, in respect of the settlement in the summons mentioned by which the said estate was settled; Let the said costs, charges and expenses, so far as they have been incurred in relation to the said estate, be paid out of the property subject to the said settlement, and be raised by means of a charge on the land thereby settled, or the unsold part thereof.—Tax costs of application, and direction to raise and pay the same in like manner as above.—*Re Smith's Settlement*, Kekewich, J., 9 May, 1891, B. 784; (1891) 3 Ch. 65.

11. *Enforcing Contract, &c.—Sect. 31.*

UPON the application of A. B., the tenant for life under the settlement created by the will of X., Let the contract, dated &c., for sale of &c. (exchange, partition, mortgage, lease, or execution of improvements &c.), be carried into effect (enforced, varied, or rescinded).

For form of application, see D. C. F. 1237.

12. *Order for Payment into Court by Purchaser of Purchase-money of Settled Land, Timber, or Chattels—Sect. 22.*

UPON the application of [*as in Form E., sup. p. 1813*], Let the applicant be at liberty to lodge in Court, as directed in the schedule

hereto, £—, the purchase-money of the A. estate [or as the case may be], settled by the said settlement.

N.B.—The ledger credit in the Lodgment Schedule will be—"In the matter of the settlement, dated &c. (or created by the will of &c., as the case may be), proceeds of sale of &c., and In the matter of the Settled Land Act, 1882."

For form of application, see D. C. F. 1232.

NOTES.

SALES.

By r. 8, any sale authorized or directed by the Court under the Act shall be carried into effect out of Court, unless the Judge shall otherwise order, and generally in such manner as the Judge may direct.

MANSION-HOUSE.

Sect. 15 of the principal Act provided that, "notwithstanding anything in this Act, the principal mansion-house on any settled land, and the demesnes thereof, and other land usually occupied therewith, shall not be sold or leased by the tenant for life without the consent of the trustees of the settlement, or an order of the Court."

This section has been repealed and re-enacted with variations by the Settled Land Act, 1890, s. 10, which enacts as follows:—"Notwithstanding anything contained in the Act of 1882, the principal mansion-house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the Court. Where a house is usually occupied as a farmhouse, or where the site of any house, and the pleasure grounds and park and lands (if any) usually occupied therewith, do not altogether exceed twenty-five acres in extent, the house is not to be deemed a principal mansion-house within the meaning of this section."

The Court, under this section, on an application for sale of a mansion-house, can take a wider view than in the case of a proposed sale of heirlooms; and, exercising a discretion unfettered by rules, and treating the well-being of settled land as a paramount object of the Act, will consider not only the wishes and interests of the tenant for life and remainderman, but all the circumstances, including the interests of the tenants on the estate: *Re Marq. of Ailesbury's Settled Estates*, (1892) 1 Ch. 506, C. A.; *S. C.*, *Bruce v. Marq. of Ailesbury*, (1892) A. C. 356, Form 3, *sup.* p. 1834; and see *Richardson v. R.*, (1900) 2 Ch. 778.

Though a testator expressly directed that the mansion-house was to be kept up as a place of residence for the person for the time being entitled to the possession thereof under his will, and that the heirlooms should at all times be kept in the mansion-house, the Court sanctioned a sale, but with directions as to the disposal of the heirlooms: *Re Brown's Will*, 27 Ch. D. 179.

The fact that the testator has directed a sale after the death of the tenant for life has weight with the Court in ordering a sale against the wish of the trustees: *Re Wortham's Settled Estates*, 75 L. T. 293.

Where the tenant for life had mortgaged his estate to the full value, the Court declined to order the sale without full information as to the facts, and the consent of the mortgagees: *Re Sebright's Settled Estates*, 33 Ch. D. 429, C. A.

Semble, trustees appointed during the minority of the tenant for life have an unrestricted power to sell the mansion-house: *Re Countess of Dudley*, 35 Ch. D. 338, 343, *per* Chitty, J.

The section applies to the lease of an easement over the mansion-house, park and grounds: *Sutherland v. S.*, (1893) 3 Ch. 169.

HEIRLOOMS.

By sect. 37 (1), "where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born, or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them. (2) The money arising by the sale shall be capital money arising under this Act, and shall be paid, invested, or applied, and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner, as the chattels sold. (3) A sale or purchase of chattels under this section shall not be made without an order of the Court."

The Court must be satisfied that the proposed sale is reasonable and proper, having regard to the interests of all persons entitled, the interests of persons more remotely entitled being of less weight than those of persons nearer in succession: *Earl of Radnor's Will*, 45 Ch. D. 402, 424, C. A.; and see *Re Beaumont's Settled Estates*, 58 L. T. 916; and the fact that the tenant for life applying for leave to sell is in difficulties through extravagance will not be regarded. In the case of a unique family heirloom of repute, sentimental feelings in the family may be regarded: *Re Hope, De Cetto v. H.*, (1899) 2 Ch. 679, C. A. (The "Hope Diamond" case).

And by force of sect. 53 the tenant for life is in the position of a trustee with a discretionary power of sale, and must have regard to the interests of other persons entitled: *Re Beaumont's Settled Estates*, *sup.* Where circumstances rendered it expedient, the Court sanctioned the removal of some of the heirlooms to another family mansion, and the sale of the rest: *Browne v. Collins*, 62 L. T. 566; and see *Re Brown's Will*, 27 Ch. D. 179, *sup.*; and authorized trustees to pay out of the proceeds of sale of heirlooms the expenses of the repair and renovation of other heirlooms, consisting of pictures, settled by the same will, and remaining unsold: *Re Waldegrave*, W. N. (99) 240; 81 L. T. 632; Form 9, p. 1836, *sup.*

A dignity or title of honour which descends to the heirs general or heirs of the body is within the definition of "land," and heirlooms settled so as to devolve with the dignity or title may be sold under this section: *Re Rivett-Carnac's Will*, 30 Ch. D. 136; *Re Earl of Aylesford's Settled Estate*, 32 Ch. D. 162.

It has been held that the devolution of the proceeds of the sale of chattels, and of any interim investments thereof, follows the devolution which originally belonged to the chattels, and the money may be applied, under sect. 21, in paying off incumbrances affecting the inheritance of the settled land without keeping such incumbrances on foot for the benefit of an infant remainderman; and though the course of devolution is thus changed, the tenant for life cannot be prevented from directing any such application, on the ground of his being a trustee of the power under sect. 53: *Re D. of Marlborough's Settlement*, *D. of Marlborough v. Marjoribanks*, 32 Ch. D. 1, C. A.; see Form 5, *sup.* p. 1835; *Bruce v. Marquis of Ailesbury*, (1892) A. C. 356, 365, H. L.

But the Act does not empower a tenant for life to sell any property which, when vested in a tenant in fee simple, would be by law inalienable: *Re Rivett-Carnac's Will*, 30 Ch. D. 136.

TIMBER.

By sect. 35 (1), "where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement, or an order of the Court, may cut and sell that timber, or any part thereof. (2) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits."

If the timber is sold along with the land, the proceeds must be treated as capital money: *Re Llewellyn, L. v. Williams*, 37 Ch. D. 317; *Re Smith's Settled Estates*, (1891) 3 Ch. 65.

CONTRACTS.

By sect. 31 (1), the tenant for life is empowered (i) to contract to make any sale, exchange, partition, mortgage, or charge; (ii) to vary or rescind the contract as an absolute owner might; (iii) to contract to make a lease, and to vary the terms in making the lease; (iv) to accept surrenders of contracts or leases, and make new ones; (v) to enter into, vary, or rescind contracts as to improvements; and (vi) generally for carrying into effect any of the purposes of the Act. By sub-sect. (2), contracts are binding, and enure to the settled land and the successors in title of the tenant for life. By sub-sect. (3), "The Court may, on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying, or rescinding thereof."

Upon a summons under this sub-section, nothing can be decided as against persons not parties to the contract: *Re Ailesbury Settled Estates*, W. N. (93) 140; 62 L. J. Ch. 1012; 42 W. R. 15; 69 L. T. 493.

By the Settled Land Act, 1890, s. 6, a tenant for life may make any conveyance which is necessary or proper for giving effect to a contract entered into by a predecessor in title, and which if made by such predecessor would have been valid as against his successors in title.

UNIVERSITIES AND COLLEGES ESTATES ACT, 1898.

By this Act (61 & 62 V. c. 55), sect. 1, for the purposes of sale, enfranchisement, exchange, partition and leasing, a university or college is empowered to exercise any of the powers conferred on a tenant for life by the Settled Land Acts, 1882 to 1890, and for those purposes the provisions of sects. 3, 4, 6—10, 12—14, 16, 17, 31, 34, 55 of the Act of 1882, sect. 4 of the Act of 1884, sects. 2 and 3 of the Act of 1889, and sects. 5, 8, 9 of the Act of 1890 are rendered applicable subject to certain modifications and to the supervision of the Board of Agriculture. The Act contains provisions as to the application of capital money (sect. 2), powers of borrowing for improvements (sect. 3), and money payable into Court or to trustees (sect. 6), under the Act or the Universities and Colleges Estates Acts, 1838 to 1880.

(VI.) APPLICATION OF MONEY UNDER THE ACTS.

1. *Investment*—Sect. 22 (3).

UPON the application of A. B., the tenant for life under the settlement created by &c. [or of C. D. and E. F., the trustees of the settlement &c.], Let the funds in Court representing the capital moneys arising from the sale of the lands comprised in the settlement created by the will of &c. be dealt with as directed in the schedule hereto.—
[Add Payment Schedule, Form No. 1 or 2.]

2. *Application of Money paid for a Lease or Reversion*— Sect. 34.

UPON the application of (Form A., B., or D., *sup.*, pp. 1812, 1813), Let £— being the proceeds of the sale of a lease for years [or life, or a reversion, or other interest, describing it] settled by the above-mentioned

settlement, be, pursuant to sect. 34 of the above-mentioned Act, applied for the benefit of the parties interested under the said settlement in manner following [*specify the mode or modes of application*].

For a case in which it was held that, upon payment of the purchase-money to trustees of a settlement, the income of the investments would be applicable for payment of jointure rent-charges, see *Re Marquis of Ailesbury and Lord Iveagh*, (1893) 2 Ch. 345, 358.

For form of application, see D. C. F. 1237.

NOTES.

CAPITAL MONEY.

"Capital money" arising under the Act comprises:—(1) Money received upon any sale or enfranchisement, or for equality of exchange or partition; (2) Fines received on the grant of leases under any power conferred by the Act of 1882: see S. L. A. 1884, s. 4; (3) The proportion of rent under mining leases to be set aside under sect. 11; (4) Money raised on mortgage of the settled land under sect. 18; (5) Three-fourths of the net proceeds of the sale of timber cut under sect. 35, where the tenant for life is impeachable for waste in respect of timber; (6) Money arising from the sale of heirlooms under sect. 37; (7) Money received under an option to purchase contained in a building lease, or agreement for a building lease, under the Settled Land Act, 1889; and (8) Money which, under the powers of sect. 11 of the Settled Land Act, 1890, the tenant for life raises on mortgage of the settled land for the purpose of discharging an incumbrance on such land or any part thereof.

PAYMENT OF CAPITAL MONEY INTO COURT.

By r. 10, any person directed by the tenant for life to pay into Court any capital money arising under the Act may apply by summons at Chambers for leave to pay the money into Court.

By r. 11, the summons is to be supported by an affidavit setting forth:—

- (1) The name and address of the person desiring to make the payment;
- (2) The place where he is to be served with notice of any proceeding relating to the money;
- (3) The amount of money to be paid into Court, and the account to the credit of which it is to be placed;
- (4) The name and address of the tenant for life under the settlement by whose direction the money is to be paid into Court;
- (5) The short particulars of the transaction in respect of which the money is payable.

By r. 12, the order made upon the summons for payment into Court may contain directions for investment of the money on any securities authorized by sect. 21, sub-sect. 1 of the Act, and for payment of the dividends to the tenant for life, either forthwith or upon production of the consent in writing of the applicant; the signature to such consent to be verified by the affidavit of a solr. But if the transaction in respect of which the money arises is not completed at the date of payment into Court, the money shall not, without the consent of the applicant, be ordered to be invested in any securities other than those upon which cash under the control of the Court may be invested.

By r. 13, money paid into Court under the Act shall be paid to an account to be entitled in the matter of the settlement, with a short description of the mode in which the money arises if it is necessary or desirable to identify it, and in the matter of the Act.

APPLICATION OF CAPITAL MONEY.

By sect. 21, capital money arising under the Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, is, when received, to be invested or applied in one or more of the following modes:—(1) In investment on Government securities, or on other securities on which the trustees

of the settlement are by the settlement or by law (as to which, *v. sup.* pp. 1181 *et seq.*) authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities. (2) In discharge, purchase or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land-tax, rent-charge in lieu of tithe, Crown-rent, chief rent or quit-rent, charged on or payable out of the settled land. (3) In payment for any improvement authorized by the Act: *v. inf.* p. 1848. (4) In payment for equality of exchange or partition of settled land. (5) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land. (6) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life. (7) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein or in other land. (8) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right or privilege convenient to be held with the settled land for mining or other purposes. (9) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge. (10) In payment of costs, charges and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of the Act. (11) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder. (12) In payment, if the Court think fit, to the trustees of the settlement for the purposes of the Settled Land Acts: S. L. A. 1890, s. 14.

Under this enactment the following points are noteworthy:—

—The words of the section being “when received,” the Court cannot authorize the application of capital moneys before they are received in paying for contemplated improvements: *Re Millard's Settled Estates*, (1893) 3 Ch. 116, C. A.; and see *Re Marquis of Bristol's Settled Estates*, (1893) 3 Ch. 161; *Round v. Turner*, W. N. (89) 38; 60 L. T. 379; nor charge purchase-money, under a contract to be completed *in futuro*, with the interim expense of stocking and working a farm: *Round v. Turner*, 60 L. T. 379; W. N. (89) 38.

—*Sub-sect. 2*: The words “incumbrances affecting the inheritance of settled land” refer to ordinary charges, such as mortgages, portions, or debts secured by mortgage of a long term of years: *Re Frewen, F. v. James*, 38 Ch. D. 383; an annuity charged upon tithes: *Re Esdaile*, 54 L. T. 637; W. N. (86) 47; but terminable rent-charges for land drainage and improvement under the Land Improvement Act, 1864, were not capable of redemption within the sub-section: *Re Knatchbull's Settled Estates*, 27 Ch. D. 969; 29 Ch. D. 588, C. A.; *Re D. of Leinster's Estate*, 23 L. R. Ir. 152; *Re Howard's Settled Estates*, (1892) 2 Ch. 233; though they might be purchased as investments, the liability of the tenant for life remaining: *Re Knatchbull, Re Howard, sup.*

—But now, under the Settled Land Act, 1887, s. 1, capital money may be applied in redeeming or otherwise providing for the payment of rent-charges granted for paying off moneys advanced for improvements of the kind authorized by the Act of 1882; and not merely the unpaid balance of principal, but also a proper sum as compensation for loss of interest: *Re Lord Egmont's Settled Estates*, 45 Ch. D. 395, C. A.; overruling *Re Lord Sudeley's Settled Estates*, 37 Ch. D. 123; and notwithstanding that the improved lands have been sold, and the rent-charges shifted to other parts of the settled estate: *Re Howard, sup.*; but this enactment is not retrospective, and therefore a tenant for life is not entitled to be recouped the instalments

of rent-charges paid before it came into operation; *secus*, as regards those falling due after the passing of it: *S. C.*; *Re Dalison's Settled Estates*, (1892) 3 Ch. 522; *Re Marquis of Bristol's Settled Estates*, *sup.*; and it does not extend to money paid to redeem future annual instalments of tithe rent-charge under sect. 7 of the Irish Church Act Amendment Act, 1872 (35 & 36 V. c. 13): *Re D. of Leinster's Estate*, *sup.*; nor in repayment of a sum paid by the tenant for life, in order to obtain a reduction of interest, to the holders of the rent-charge as an inducement to them to transfer it: *Re Verney's Settled Estates*, (1898) 1 Ch. 508; and in the exercise of its discretion under the section the Court declined to allow capital money to be applied in redeeming terminable charges on glebe land of a benefice to the detriment of the owners of the advowson: *Exp. Vicar of Castle Bytham*, (1895) 1 Ch. 348; and as, under sect. 1 of the Settled Land Act, 1887, moneys expended in redeeming the rent-charges there mentioned are only to be "deemed" to be applied in payment for improvements, and are not payments for improvements in fact, sect. 15 of the Act of 1890 (*v. inf.* p. 1848) does not give any further power to the Court: *Re Dalison's Settled Estates*, *sup.*; *Re Marquis of Bristol's Settled Estates*, *sup.*

—And the sub-section extends to incumbrances affecting a part only of the settled land: *Re Chaytor's Settled Estates Act*, 25 Ch. D. 651; and capital money arising from the part so charged can be applied for improvement of another part: *Re Lord Stamford's Settled Estates*, 43 Ch. D. 84.

—*Sub-sect. 9*: Trustees appointed under sect. 38 are not persons absolutely entitled within the sub-section: *Cookes v. C.*, 34 Ch. D. 498; nor is a tenant for life who has power to sell and cut the timber, and apply the proceeds to his own use, if he sells it as standing timber along with the estate: *Re Llewellyn, L. v. Williams*, 37 Ch. D. 317; and as to the effect of the sub-section in enabling the Court to direct payment out of Court to trustees of the purchase-money for settled lands under the Lands Clauses Act, 1845, see *Re Smith, Exp. L. & N. W. Ry. Co. and Midland Ry. Co.*, 40 Ch. D. 386, C. A.; *Re Harrop's Trusts*, 24 Ch. D. 717; *Re Wright's Trusts*, 24 Ch. D. 662; *Re D. Rutland's Settlement*, 31 W. R. 947; *Re Rathmine Drainage Act*, 15 L. R. Ir. 576; *Re Wootton's Estate*, W. N. (90) 158; *Re Simpson, Re Whitechurch*, (1897) 1 Ch. 256, C. A.; *Re Belfast Improvement Acts, Exp. Reid*, (1898) 2 I. R. 1; and see *S. L. A.* 1890, s. 14.

—*Sub-sect. 10*: The words "of or incidental to" have been liberally construed: *Re Llewellyn, sup.*; *Cardigan v. Curzon-Howe*, 41 Ch. D. 375, C. A.; so as to include costs of the tenant for life of successfully defending an action to restrain him from exercising his powers: *S. C.*; costs of an attempted sale, where the tenant for life acted honestly and with due diligence: *Re Smith's Settled Estates*, (1891) 3 Ch. 65; Form 10, *sup.* p. 1837; costs as between solicitor and client of the surveyor of the tenant for life in reference to schemes of improvement: *Re L. Stamford's Estates*, 43 Ch. D. 84; but costs of obtaining the concurrence of mortgagees of the life estate ought not, in general, to be paid out of capital money: *Cardigan v. Curzon-Howe, sup.*

By the Settled Land Act, 1890, s. 11, where money is required for discharging an incumbrance (not being an annual sum payable only during a life or lives, or during a term of years absolute or determinable) on the settled land or part thereof, the tenant for life may raise the money and costs on mortgage of the settled land or any part thereof.

INVESTMENT.

By sect. 22 (1), "capital money arising under the Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly. (2) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement; and any investment is to be in the names

or under the control of the trustees. (3) The investment or other application under the direction of the Court shall be made on the application of the tenant for life, or of the trustees. (4) Any investment or other application shall not, during the life of the tenant for life, be altered without his consent." (5) Capital money arising under the Act, and the securities on which an investment thereof is made, are for all purposes of disposition, transmission, and devolution to be considered as land, and to be held and go accordingly. (6) The income of the securities is to be paid or applied as the income of the land, if not disposed of, would have been payable or applicable under the settlement. (7) The securities may be converted into money, which is to be capital money arising under the Act.

The exercise in good faith of the power of direction as to investment given to the tenant for life by sect. 22, sub-sect. 2, cannot be controlled by the trustees or by the Court: *Re L. Coleridge's Settlement*, (1895) 2 Ch. 704; and see *Re Gee*, 64 L. J. Ch. 606; W. N. (95) 90; but in order that the tenant for life may exercise his option of directing the payment of purchase-money into Court, it is necessary that there should be trustees for the purposes of the Act in existence: *Hatten v. Russell*, 38 Ch. D. 334, 345; *Re Fisher and Grazebrook*, (1898) 2 Ch. 660 (but not as against a purchaser, who pays his money into Court, not knowing that there are no trustees in existence: *Re Fisher and Grazebrook*, *sup.*); and the option is exercised by the tenant for life consenting to the payment of the purchase-money into Court: *Cookes v. Cookes*, 34 Ch. D. 498.

The object of sub-sect. 5 is to indicate the nature of the money while it remains in the hands of the trustees uninvested: *Re Freme*, (1894) 1 Ch. 1, 9; and see *Re D. of Marlborough*, (1897) 1 Ch. 712, 718.

The Court refused to allow money arising under the Act to be sent out to exors in America for investment: *Re Lloyd, Edwards v. L.*, 64 L. T. 643; W. N. (86) 37.

Money arising otherwise than under the Act.—By the Settled Land Act, 1882, s. 32, where under an Act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, or under the Settled Estates Act, 1877, or under any other Act, public, local, personal or private, money is at the commencement of the Act of 1882 in Court, or is afterwards paid into Court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorized by the Act under which the money is in Court, that money may be invested or applied as capital money arising under the Settled Land Act.

By sect. 33, "where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this Act."

The expression "money liable to be laid out in land" in these sections includes personal property held by trustees with power to invest in land: *Re Soltan*, (1898) 2 Ch. 629; and money which trustees are empowered to invest, at the request of the tenant for life, in the purchase of particular land: *Re Hill, H. v. Pilcher*, (1896) 1 Ch. 962.

Under sect. 32, purchase-money of charity land paid into Court, under the Lands Clauses Act, has been invested in debenture stock: *Re Byron's Charity*, 23 Ch. D. 171; and costs of such investment were payable by the Commissioners of Sewers, though their special Act did not authorize investments in debenture stock: *Re Hanbury*, 52 L. J. Ch. 687; 31 W. R. 784; and where purchase-money of glebe lands is paid into Court under the Lands Clauses Act, the Court has jurisdiction to authorize in a fit case the application of the money in the redemption of terminable rent-charges on the glebe created under the Land Improvement Act, 1864: *Exp. Vicar of Castle Bytham*, (1895) 1 Ch. 348.

Sect. 33 has been held applicable, notwithstanding the definition of "settlement" in sect. 2 (*v. sup.* p. 1813), where money was bequeathed in trust to lay it out in the purchase of real estate to be settled in strict settlement, with a direction that, until the purchase, it should be invested in "government or real securities, but not in any other mode of investment:" *Re Mackenzie's Trusts*, 23 Ch. D. 750; and so where proceeds of sale of a

settled estate under the Settled Estates Act, 1877, were invested *interim* in Consols: *Re Tennant*, 40 Ch. D. 594; and see *Re Tesseyman*, W. N. (97) 168; *Re Mundy's Settled Estates*, *inf.*; and where exors, under a will devising land to uses of a settlement, were directed to lay out money in the purchase of land to be limited to the same uses: *Re Mundy's Settled Estates*, (1891) 1 Ch. 399, C. A.; so also where, under a will not providing for interim investments, such an investment was required until a purchase of real estate could be prudently made: *Re Maberley, M. v. M.*, 33 Ch. D. 455; *secus*, where money arising from personal estate bequeathed on trust for conversion and investment in the purchase of lands was in Court in an admon action: *Burke v. Gore*, 13 L. R. Ir. 367.

Money arising from sale of land inalienably entailed was ordered to be paid to trustees appointed under sect. 38: *Re Bolton*, 52 L. T. 728; W. N. (85) 90.

MONEY ARISING FROM LIMITED INTEREST.

By sect. 34, "where capital money arising under this Act is purchase-money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement or the Court, as the case may be, and in the case of the Court on the application of any person interested in that money, may, notwithstanding anything in this Act, require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be."

The section corresponds with sect. 74 of the Lands Clauses Act (*v. inf.* Chap. LIII.), and its construction will be regulated by the decisions under that Act: *Cottrell v. C.*, 28 Ch. D. 628.

(VII.) IMPROVEMENTS AND MANAGEMENT.

1. *Scheme for Improvement—Appointment of Surveyor—Application of Capital Money—Sect. 26.*

UPON the application of A. B., the tenant for life under the settlement created by the will of X., Let the scheme submitted by the said A. B. for the application of the capital moneys arising &c., in or towards payment of the improvement in the said scheme mentioned, be approved; And Let E. F., of &c., be appointed to certify when the said improvement shall have been effected; And Let, upon the completion of the said improvement being certified as aforesaid, the funds in Court be dealt with as directed in the schedule hereto.—[*Add Payment Schedule*, Form 51, Vol. I.]

For forms of application, see D. C. F. 1235, 1236.

2. *Adopting Scheme for Improvements under Sect. 26 to be paid for out of Compensation Money for Land taken by a Railway Company.*

UPON the application of H., the tenant for life of the estates settled by the will of W., and upon hearing the solrs for the applicant and for the L. & N. W. Rail. Co., and upon reading &c., Let the scheme left at the Chambers of the Judge on &c., pursuant to

the Settled Land Act, 1882, for the execution of improvements on the detached portion of the L. estate, subject to the trusts of the said will, be carried into effect; And Let C., of &c., builder and surveyor, be appointed surveyor for the purposes of sect. 26, sub-sect. 2, of the said Act; And Let the funds in Court be dealt with as directed in the schedule hereto, and the proceeds of sale, in the schedule directed to be paid to such person or persons as shall be named in the chief clerk's certificate as entitled to receive the same, be so paid; the applicant, by his solr, undertaking to make up the sum necessary to complete the improvements beyond the proceeds of the fund in Court.—Costs according to Act.—Schedule directing sale from time to time of sufficient Consols in Court to raise “what shall be certified to be necessary to be raised during the progress of the improvements to be paid in respect of the amount actually laid out or expended on such works not less on each occasion than £100,” and on completion of works to sell the residue of the Consols and pay amounts raised to “such person or persons as shall be certified to be entitled to receive the same.”—*Re Hill*, Pearson, J., at Chambers, 15 March, 1886, A. 889.

3. *Leave to apply Capital Money in Improvements—Sect. 26, sub-sect. (2) (iii).*

UPON the application of [*as in Forms A. or B., sup. p. 1812*]; Let O. D. and E. F., the trustees of the above-mentioned settlement for the purposes of the above-mentioned Act, be at liberty to apply £—out of the capital money arising under the said Act in their hands, subject to the said settlement, in payment for [*describe the work or operation*], being [*part of*] an improvement executed upon the lands subject to the said settlement pursuant to a scheme approved by the said C. D. and E. F. under the said Act.

For form of application, see D. C. F. 1236.

4. *Adopting Scheme for Improvements to be paid for out of Capital Money upon the Certificate of an Architect, to be approved at Chambers—Sects. 26 and 63.*

ON adjourned summons.—Approve of the scheme left at the Chambers of the Judge for improvements on the estates settled by the two indentures dated &c., so far as regards the items numbered 1, 2, 3, and 5; And Let the said F., C., and W., and the survivors and survivor of them, be at liberty to exercise the powers conferred by the Settled Land Act, 1882, and to execute the said improvements; And the specification and contracts for the works comprised in the items hereby approved are to be settled at Chambers; And Let the said F., C., and W., the trustees of the said settlement for the purposes of the said Act, be at liberty to apply capital money in their hands, subject to the said settlement, in payment for the said improvements

upon the certificate of an architect to be approved by the Judge in Chambers.—Direction for taxation of costs and payment out of capital.—*Backhouse v. Ecroyd*, Kay, J., 20 April, 1886, A. 602.

5. *Approval of Proceedings for Protection of Land before House of Lords—Sect. 36.*

THE application of A. B. &c., adjourned &c.; Let the proceedings taken by the applicant before the House of Lords and the Committee of Privileges of the said House for establishing his claim to the Earldom of Aylesford be, pursuant to the 36th section of the Settled Land Act, 1882, approved as proceedings taken for the protection of the settled land which under the said settlement stands settled in such manner as to devolve with the said earldom.—Tax and raise the said costs.—*Re Earl of Aylesford's Settled Estates*, Bacon, V.-C., 20 Feb. 1886, A. 340; 32 Ch. D. 162.

6. *Application of Capital Money—Improvements—Mansion House—Alterations and Additions with a view to Letting—Settled Land Act, 1882, s. 25; Settled Land Act, 1890, s. 13 (ii).*

THE application by originating summons, dated &c., of H. B. G., the tenant for life under the above-mentioned settlement, which upon hearing &c., was adjourned to be heard in Court &c.; And it appearing that the yearly rent-charge of (£120:16s. 10d.) in the summons mentioned was created in pursuance of the Limited Owners' Residences Act, 1870, and the Limited Owners' Residences Act (1870) Amendment Act, 1871, with the object of paying off moneys advanced for the purpose of defraying the expenses of improvements at K—Hall mentioned in the First Schedule hereto; And this Court being of opinion that the improvements mentioned in the First Part of the said First Schedule are, and that the improvements mentioned in the Second Part of the same schedule are not, of a kind authorized by the Settled Land Acts, 1882 to 1890; And being further of opinion that the said rent-charge ought to be apportioned rateably between the authorized and the unauthorized improvements, and that only such part as is attributable to the improvements so authorized as aforesaid is properly redeemable out of capital moneys subject to the trusts of the said settlement; Let the said C. E. T. and F. P. [*the trustees of the said settlement for the purposes of the Settled Land Acts*] be at liberty as from the (1st March, 1893) [*the day on which the said summons was issued*] to redeem the following apportioned part of the said rent-charge, namely (£75:11s. 7d.) per ann. out of the total of (£120 16s. 10d.) per ann. by merging such apportioned part in the lands out of which it issues, or by otherwise releasing such lands from the payment thereof, and by releasing the said H. B. G. from a corresponding pro-

portion of any instalments of the said rent-charge which fell due upon the (1st March, 1893) and still remain unpaid; And Let the said C. E. T. and F. P. be at liberty to apply (£391:13s. 11d.), part of the capital moneys in their hands, and subject to the trusts of the said settlement, in paying for the improvements at B— Old Hall, mentioned in the Second Schedule hereto.—Costs of all parties to be taxed as between solr and client, and paid out of the capital moneys in the trustees' hands, subject to the trusts of the settlement.

FIRST SCHEDULE.

Improvements at K— Hall.

FIRST PART.

	£	s.	d.	£	s.	d.
New roof to mansion—						
Messrs. B. and Co.'s original estimate	704	14	0			
Extras and haulage referred to in the affidavit of &c..	69	17	6			
				774	11	6
Change in main entrance and other internal alterations				298	13	9
Proportion of architect's commission and expenses, and of costs of obtaining order of Board of Agriculture				83	12	10
Total	<u>£1,156</u>			18	1	

SECOND PART.

Heating apparatus	394	0	0
Paving stable yard and sundry works	148	14	1
Work and improvements at stables	100	0	0
Proportion of architect's commission and expenses, and of costs of obtaining order of Board of Agriculture	50	1	9
Total	£692	15	10

SECOND SCHEDULE.

Improvements at B— Old Hall.

New drainage and plumber's sanitary arrangements and water supply in connection.....	205	0	0
Laying on water to the site from L—	186	13	11
Total	<u>£391</u>	<u>13</u>	<u>11</u>

—*Re Gaskell*, Chitty, J., 18 Jan., 1894, A. 85; (1894) 1 Ch. 485.

NOTES.

IMPROVEMENTS.

Sect. 25 enumerates at length the various improvements authorized by the Act; and the Settled Land Act, 1890, s. 13 (which is to be construed strictly: see *Re De Tessier's Settled Estates*, (1893) 1 Ch. 163), extends the enumeration contained in sect. 25.

By the Tenants' Compensation Act, 1890 (53 & 54 V. c. 57), charges of the kind last mentioned are to be land charges within the meaning of the Land Charges Registration and Searches Act, 1888 (51 & 52 V. c. 51), and registered accordingly.

By sect. 30, the enumeration of improvements contained in sect. 9 of the Improvement of Land Act, 1864 (27 & 28 V. c. 114), is extended so as to comprise, subject and according to the provisions of that Act, as regards

future applications to the Land Commrs (now the Board of Agriculture, see 52 & 53 V. c. 30, s. 2), all improvements authorized by the Settled Land Act.

As to sect. 9 of 27 & 28 V. c. 114, see *Re Newton's Settled Estates*, W. N. (90) 24, where Cotton, L. J., dissented from the opinion expressed by Kay, J., that that section was more extensive than sect. 25 of the Settled Land Act; and that re-roofing may, according to circumstances, come under the head of repairs or permanent improvements, see *S. C.*; as to additional works for the permanent working of mines, see *Re Mundy's Settled Estates*, (1891) 1 Ch. 399, C. A.; and as to the formation of silos, under 46 & 47 V. c. 61, *Re Broadwater Estate*, 54 L. J. Ch. 1104; 33 W. R. 738; and for improvements which would have been authorized without the Act, *Re Houghton Estate*, 30 Ch. D. 102.

Under sect. 13 of the Settled Land Act, 1890, there must be a present intention to let, as distinguished from an intention to occupy, before expenditure of capital money in "additions to or alterations in buildings," will be authorized: *Stanford v. Roberts*, (1901) 1 Ch. 440. The "rebuilding" mentioned in sub-sect. iv. will not include structural repairs, however extensive: *Re De Tessier's Settled Estates*, *sup.*; nor extend to alterations for the purpose of mere ornamentation, or to suit the private taste and convenience of the tenant for life: *Re Lord Gerard's Settled Estates*, (1893) 3 Ch. 252, C. A.; explaining *Re Houghton Estate*, *sup.*; *Re Lisburne's S. E.*, W. N. (01) 91 (stabling); and see Lewin, 649, n.; but will include alteration, reconstruction, and enlargement of a mansion-house where part of the house is unaltered and the walls of another part are utilised: *Re Walker's Settled Estates*, (1894) 1 Ch. 189; or improved flooring to keep dry rot out of the basement of a large house let off in offices: *Stanford v. Roberts*, *sup.*, and reasonableness and propriety are to be tested by what a prudent owner would do: *S. C.* In calculating the "annual rental" for the purpose of the concluding proviso, income derived from capital money invested should be included: *Re De Tessier's Settled Estates*, *sup.*; and the amount of a rent usually paid for a farm for the moment unoccupied, but not anything in respect of any part of the land in the occupation of the tenant for life: *Re Walker's Settled Estates*, *sup.*

An agreement by a limited owner to sell land to a waterworks co., in consideration of fully paid-up shares in the co., for the purposes of developing a building estate, and to provide part of the working capital, was held to fall within ss. 25 (xiii), 27: *Re Orwell Park Estate*, W. N. (94) 135.

The cost of reconstructing the drainage of leasehold houses, forming part of a residuary estate bequeathed to trustees upon trust for tenant for life and remaindermen, was payable out of capital money, as an improvement, notwithstanding a direction in the will that, pending sale, the ground rents, after payment of "all incidental expenses and outgoings," were to be paid to the tenant for life: *Re Thomas, Weatherall v. T.*, (1900) 1 Ch. 319; and that proceeds of sale of an estate in Ireland may be applied in payment for improvement of an estate in England comprised in the same settlement, see *Re Eyre Coote, C. v. Cadogan*, W. N. (99) 222.

By the Agricultural Holdings (England) Act, 1883 (46 & 47 V. c. 61), s. 29, capital money under the Act of 1882 may be applied in payment of moneys expended, and costs incurred, by a landlord under that Act in the execution of any improvement mentioned in the first or second parts of the schedule thereto, as for an improvement authorized by the Settled Land Act; and such money may also be applied in discharge of any charge created on a holding under the Act in respect of any such improvement as aforesaid, as in discharge of an incumbrance authorized by the Settled Land Act to be discharged out of such capital money. Glass-houses erected on a farm for the growth of garden produce are improvements within this Act: *Meux v. Copley*, (1892) 2 Ch. 253.

SCHEME.

By sect. 26, sub-sect. 1, where the tenant for life is desirous that capital money arising under the Act shall be applied in or towards payment for an improvement authorized by the Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon.

By sub-sect. (2), where the capital money to be expended is in the hands

of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on (1) a certificate, formerly of the Land Commrs, and now of the Board of Agriculture (see 52 & 53 V. c. 30, s. 2), certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate is to be conclusive in favour of the trustees, as an authority and discharge for any payment made by them in pursuance thereof; or on (2) a like certificate of a competent engineer, or able practical surveyor, nominated by the trustees and approved by the Board, or by the Court, which certificate shall be conclusive as aforesaid; or on (3) an order of the Court directing or authorizing the trustees to so apply a specified portion of the capital money.

Where the capital money to be expended is in Court, then, after a scheme is approved by the Court, the Court may, if it thinks fit, on a report or certificate of the Board, or of a competent engineer, or able practical surveyor, approved by the Court, or on such other evidence as it thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement.

Under this section it was essential that the scheme should be submitted to the trustees before the works were commenced: *Re Hotchkin's Settled Estates*, 35 Ch. D. 41; though where a scheme has been approved, without any limitation as to expenditure, any extra expenditure necessary for the execution of the scheme might be paid out of capital money: *Re Bulwer Lytton's Will*, 38 Ch. D. 20, C. A.; and as to the right of trustees for an infant to prepare and approve schemes during the minority, see *Re Grey's Court Estate*, W. N. (01) 60.

Now, by the Settled Land Act, 1890, s. 15, the Court may, in any case where it appears proper, make an order directing or authorizing capital money to be applied in or towards payment for any improvement, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval, as required by the Act of 1882, to trustees of the settlement, or to the Court. The section (which was merely intended to remove the blot revealed by *Re Hotchkin's Settled Estates*: see *Re Dalison's Settled Estates*, (1892) 3 Ch. 522, 526) is retrospective as regards improvements executed since the Act of 1882: *Re Ormrod's Settled Estates*, (1892) 2 Ch. 318. The Court in its discretion declined to allow, out of capital money, expenditure which the tenant for life deliberately made previously to the Act: *S. C.*; and in the exercise of its discretion the Court will not make a prospective order as to the application of capital moneys not yet in hand: *Re M. of Bristol's Settled Estates*, (1893) 3 Ch. 161; and see *Re Millard's Settled Estates*, (1893) 3 Ch. 116, C. A.; but trustees for the purposes of the Acts may approve a scheme for improvements submitted to them by a tenant for life, before they have capital money in hand and available for the proposed expenditure, and reimburse the tenant for life the money expended *bonâ fide* with the knowledge of the trustees in pursuance of the approved scheme: *Re D. of Norfolk's Parliamentary Estates, D. of Norfolk v. L. Herries*, (1900) 1 Ch. 461; and, in the absence of a scheme, the Court has jurisdiction under the section to allow the application of capital money in reimbursing to the tenant for life money actually paid by him for improvements executed, but this *ex post facto* exercise of jurisdiction will be made with care, and expenditure in respect of drainage and sanitary arrangements of the mansion-house, or other things incidental to ordinary occupation, will not be allowed: *Re Tucker's Settled Estates*, (1895) 2 Ch. 468, C. A.

As to the right of the tenant for life to require that capital money shall be laid out under a proper scheme for such improvement, notwithstanding that there is a trust under which the trustees could apply income for such purpose, see *Clarke v. Thornton*, 35 Ch. D. 307; and see *Re L. Stamford's Settled Estates*, 43 Ch. D. 84, 96.

PROCEEDINGS FOR PROTECTION OF LAND.

By sect. 36, the Court may approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding for protection of settled land, or of any action or proceeding for recovery of land, subject to a settlement, and may direct that any costs, charges, or expenses incurred in relation thereto be paid out of property subject to the settlement.

Costs of proceedings whereby a claim to a peerage was established, and which resulted in the recovery of estates settled on corresponding limitations, were allowed under this section: *Re E. of Aylesford's Settled Estates*, 32 Ch. D. 162, Form 5, *sup.* p. 1847.

(VIII.) SETTLEMENT BY WAY OF TRUST FOR SALE.

By sect. 63, any land, or estate or interest in land, which under or by virtue of any instrument or any number of instruments, whether made before or after, or partly before and partly after, the commencement of the Act, is subject to a trust or direction for sale, and application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, is to be deemed to be settled land, and the instrument or instruments under which the trust arises is to be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, is to be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons are to be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of the Act, are for purposes of the Act trustees of the settlement. In every such case the provisions of the Act referring to a tenant for life and to a settlement, and to settled land, are to extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised.

As to the construction of this section, and difficulties arising thereunder, see *Re Ridge, Hellard v. Moody*, 31 Ch. D. 504, C. A.; *Taylor v. Poncia*, 25 Ch. D. 646; *Lewin*, 739.

In order that land may be subject to a trust or direction for sale within the section, it is sufficient that there is an implied trust or direction arising from a devise upon trust to pay debts: *Re M'Curdy's Settled Estates*, 27 L. R. Ir. 395.

By the Settled Land Act, 1884, s. 6, sub-s. 1, in the case of a settlement within the meaning of sect. 63 of the Act of 1882, any consent not required by the terms of the settlement is not, by force of anything contained in that Act, to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or powers created by the settlement. And by sub-sect. 3, the section applies to dealings before, as well as after, the passing of the Act. But sect. 7 provides that the powers conferred by sect. 63 of the Act of 1882—(1) are not to be exercised without the leave of the Court; but (2) the Court may by order in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given; (3) the Court may from time to time rescind or vary any order made under that section, or make any new or further order; (4) so long as such an order is in force, neither the trustees of the settlement, nor any person other than a person having the leave, shall execute any trust or power created by the settlement, for any purpose for which leave is, by the order, given to exercise a power conferred by the Act of 1882; (5) the order may be registered and re-registered, as a *lis pendens* against the trustees of the settlement named in the order, describing them on the register as "Trustees for the purposes of the Settled Land Act, 1882"; (6) any person dealing with the trustees from time to time, or with any other person acting under the trusts or powers of the settlement, is not to be affected by the order unless and until it is duly registered, and when necessary re-registered, as a *lis pendens*; (7) an application to the Court may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of sect. 63 of the Act of 1882; (8) an application to rescind or vary the order, or to make

any new or further order, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement; (9) the person or persons to whom leave is given by the order are to be deemed the proper person or persons to exercise the powers conferred by sect. 63 of the Act of 1882, and are to have and may exercise those powers accordingly; (10) dealings which have taken place before the passing of this Act, under any trust or power to which the section applies, are not to be affected by it.

Under these sections, where property is subject to a trust or direction for sale, the trustees may execute the trust, and exercise their powers irrespective of the restrictions arising under the Act of 1882, until an order has been made by the Court giving leave to some other person or persons to exercise all or any of the powers conferred by sect. 63 on the tenant for life; and until such an order has been made no tenant for life or other limited owner is able, under the Act of 1882, to exercise any power conferred by that Act. But when such an order has been made, and so long as it remains in force, the trustees cannot execute any trust or power created by the settlement for any purpose to which the leave given by the order extends: *Re Harding's Estate*, (1891) 1 Ch. 60, 64.

The words "instrument or instruments under which the trust arises" make it imperative on the Court to look simply at the instrument which creates the trust for sale, and where there was not, at the date of a contract for sale, any person entitled to the income of the settled land "for his life, or any other limited period," sect. 63 did not apply: *Re Earle and Webster's Contract*, 24 Ch. D. 144; and see *Re Horne's Settled Estate*, 39 Ch. D. 84, C. A.; and so where there was an absolute trust for sale at a particular time without any discretion as to postponement: *Taylor v. Poncia*, 25 Ch. D. 646; *Re Horne's Settled Estate*, *sup.*

Where the tenants for life of the income of the proceeds of sale were two elderly maiden ladies, and in default of their having children the proceeds belonged to persons who were trustees for sale, leave was granted to the tenants for life to sell the land: *Re Harding's Estate*, *sup.*

For form of application by tenant for life for liberty to exercise powers, see D. C. F. 1241.

CHAPTER XLVI.

PARTITION AND SALE.

SECTION I.—ORDERS UNDER THE PARTITION ACTS, 1868, 1876 (31 & 32 V. c. 40 ; 39 & 40 V. c. 17).

1. *Sale at Request of Persons entitled to less than a Moiety—Where all the Parties interested are not before the Court—Inquiry whether Sale or Partition preferable—Partition Act, 1868, s. 3.*

UPON motion for judgment &c., and upon reading [*enter pleadings and evidence read therein*], and the Plt and the Defts who claim to be interested in the hereditaments in the statement of claim mentioned, by their counsel requesting a sale thereof and a distribution of the proceeds, instead of a division of the said hereditaments among the parties interested, this Court doth order that the following inquiries be made, that is to say:—1. An inquiry what were the hereditaments situate at &c., and respectively devised and bequeathed by the will of H. H., the testator in the statement of claim mentioned, distinguishing freehold and leasehold hereditaments respectively. 2. An inquiry who are the persons interested in the said hereditaments respectively, and for what estates and interests, and in what shares and proportions, and whether they are parties to this action. 3. An inquiry whether it will be more beneficial to the persons entitled to the said hereditaments that the same should be sold and the proceeds of sale distributed among them, or that a division of the said hereditaments should be made, and in case it shall be certified that all the persons interested are parties to this action and that a sale is more beneficial, It is ordered that the said hereditaments be sold with the approbation of the Judge, and that the money to arise from the sale of such of the said hereditaments as are freehold be paid into Court to the credit of this action: *Re H. H. (deceased) P. v. B.*, 1880, H. 2152, "Proceeds of sale of freeholds," subject to further order, and that the money to arise from the sale of the said hereditaments as are leasehold be paid into Court to the credit of the said action, "Proceeds of sale of leaseholds," subject to further order. But in case it shall be certified that some of the persons interested are not parties to this action, any of the persons interested are to be at liberty, after it shall have been certified that all persons who are not parties and who ought

to be served with notice of this judgment have been so served, or that service of such notice has been dispensed with, to apply at Chambers for an order for sale of the said hereditaments.—Adjourn further consideration.—Liberty to apply.—*Re Hardiman, Pragnell v. Batten*, M. R., 4 Dec. 1880, A. 2597.

2. *Sale at Request of Persons entitled to less than a Moiety—Declaration that Sale preferable to Partition—Partition Act, s. 3.*

AND the Plt and the Deft who claim to be interested in the hereditaments in the pleadings mentioned, by their counsel requesting a sale thereof and a distribution of the proceeds, instead of a division of the said hereditaments among the persons interested; And this Court being of opinion that, by reason of the nature of the property, such sale and distribution will be more beneficial for the persons interested than a division of the property between or among them;—Let the following &c.:—1. Inquiry as to persons interested [Form 1, *sup.* p. 1853]. [And if it shall be certified that all the persons interested in the said hereditaments are parties to this action]; Let the said hereditaments be sold with the approbation of the Judge; And Let the money to arise from such sale be paid into Court to the credit of this action, *A. v. B.*, 18—, A. 501, to an account to be entitled “Proceeds of sale of,” &c., subject to further order. But if it shall be certified that any of the persons interested are not parties to this action, then Let any of the persons interested be at liberty, when it shall have been certified that all persons who are not parties and who ought to be served with notice of this judgment have been so served, or that service of such notice has been dispensed with, to apply at Chambers for an order for sale of the said hereditaments.—Adjourn further consideration.—Liberty to apply.

The above form was approved by the Master of the Rolls in *Sykes v. Schofield*, 14 Ch. D. 629 (Form No. 3), disapproved and varied in *Re Hardiman, Pragnell v. Batten*, M. R., 16 Ch. D. 360 (Form No. 1, *sup.*), adopted by V.-C. Hall in *Waite v. Bingley*, 30 W. R. 698; 51 L. J. Ch. 651; adding that sale to be subject to mortgages, and inquiry as to mortgages: 21 Ch. D. 674, where see form.

If all parties interested are not before the Court, the words, “And this Court being of opinion, &c.,” should be omitted: *Re Hardiman, Pragnell v. Batten*, 16 Ch. D. 360 (Form 1, *sup.*).

For order on motion under O. XL, 11, the Plt's title being admitted by the statement of defence, directing the usual inquiries as to the persons interested, see *Gilbert v. Smith*, 2 Ch. D. 686, C. A. Form 18, *inf.* p. 1865.

For immediate order for sale, upon admissions in the pleadings under O. XL, 11, both Plt and Deft who were entitled as tenants in common in equal shares requesting a sale; payment of the proceeds into Court, and an account of rents and profits received by Plt, further consideration being adjourned, see *Burnell v. B.*, M. R., 21 March, 1879, A. 661; 11 Ch. D. 213; *Willis v. W.*, 38 W. R. 7; 61 L. T. 610; but where the property is large, and the pedigree complicated, the proper course is to direct an inquiry at Chambers: *Wood v. Gregory*, 43 Ch. D. 82; and for immediate order for sale out of Court where circumstances special, see *Re Stedman, Coombe v. Vincent*, and *Pitt v. White*, Form No. 23, p. 1867, and notes thereto.

3. *Similar Form to last, but where Incumbrances.*

AND this Court being of opinion that by reason of the nature of the property and the number of the parties interested, or presumptively interested, therein such sale and distribution will be more beneficial for the parties interested than a division of the property between or among them, Let the following inquiries and account be made and taken, that is to say:—1. An inquiry who are the persons interested in the hereditaments and property in the statement of claim mentioned, and for what estates and interests, and in what shares and proportions [and whether they are parties to this action]. 2. An inquiry what incumbrances affect the said hereditaments, or any and what part thereof. 3. An account of what is due to such of the said incumbrancers as shall consent to the sale hereinafter directed in respect of their incumbrances. 4. An inquiry as to the priority of such last-mentioned incumbrances. And in case it shall be certified that all the persons interested in the said hereditaments other than incumbrancers as above are parties to this action, Let the said hereditaments be sold with the approbation of the Judge free from the incumbrances (if any) of such of the said incumbrancers as shall consent to the sale, and subject to the incumbrances of such of them as shall not consent; And Let the money to arise from such sale be paid into Court to the credit of this action, *Sykes v. Schofield*, 18—, 8. 509, to an account to be entitled “Account of proceeds of sale, &c.,” subject to further order; And if such money or any part thereof shall arise from real estate sold with the consent of incumbrancers, the money so arising is to be applied in the first place in payment of what shall appear to be due to such incumbrancers according to their priorities. But in case it shall be certified that any of the persons interested are not parties to this action, then Let any of the persons interested be at liberty, when it shall have been certified that all persons who are not parties and who ought to be served with notice of this judgment have been so served, or that service of such notice has been dispensed with, to apply to the Judge at Chambers for an order for the sale of the said hereditaments.—Adjourn further consideration.—Liberty to apply.—See *Sykes v. Schofield*, M. R., 17 July, 1880, B. 2803; 14 Ch. D. 629.

4. *Sale at Request of Persons interested in a Moiety or upwards—
Partition Act, 1868, s. 4.*

THIS action coming on for trial &c., and upon reading [*enter pleadings and evidence*], And the Plts [*if so*, and the Defts X. and Y.], who claim to be interested in a moiety or upwards of the hereditaments and premises in the pleadings mentioned, by their counsel requesting a sale of the same hereditaments and a distribution of the proceeds, instead of a division of the said hereditaments and premises between or among the parties interested, It is ordered that an inquiry be made who are

the persons interested in the said hereditaments and premises, and for what estates and interests, and in what shares and proportions, and whether they are parties to this action; and if it shall be certified that all the persons interested in the said hereditaments and premises are parties to this action, and that the Plts [and the Defts X. and Y.] are interested individually or collectively to the extent of one moiety or upwards in the said hereditaments and premises and request a sale, It is ordered that the said hereditaments and premises be sold with the approbation of the Judge; And it is ordered that the money to arise from such sale be paid into Court to the credit of this cause, *T. v. B.*, 1876, B. 220, to an account to be entitled "Proceeds of sale, &c.," subject to further order; And if it shall be certified that any of the persons so interested as aforesaid are not parties to this action, then It is ordered that any persons interested collectively or individually to the extent of a moiety or upwards in the said hereditaments be at liberty to apply in Chambers for a sale of the said hereditaments and premises after it shall have been certified that the persons who are not parties, or who ought to be served with notice of this judgment, have been so served, or that service of notice of such judgment has been dispensed with, and that the parties or party interested collectively or individually to the extent of one moiety or upwards in the said hereditaments and premises request a sale thereof as they may be advised.—Adjourn further consideration.—Liberty to apply.—*Re Brereton, Todd v. B.*, V.-C. Malins, 30 June, 1876, A. 1486; *Senior v. Hereford*, V.-C. Hall, 2 Dec. 1876, B. 2076; 4 Ch. D. 494; *Lackenburgh v. L.*, M. R., 25 Feb. 1876, B. 651; *Scott v. Watson*, V.-C. Hall, 8 July, 1876, B. 1190; *Re Smith, Brant v. Parsons*, V.-C. Hall, 18 March, 1882, B. 836.

5. *The like, with Inquiry as to Incumbrances.*

THIS action coming on for trial &c., in the presence of counsel for the Plts and the Deft, And the Plts, who claim to be interested in a moiety or upwards of the hereditaments in the pleadings mentioned, by their counsel requesting a sale &c. [Form 1, *sup.*]; Let the following inquiries and accounts be made and taken, namely:—1. An inquiry who are the persons interested in the said hereditaments other than the incumbrancers on the entirety of the said hereditaments, or on the entirety of any and what specific part or parcel thereof, and for what estates and interests, and in what shares and proportions, and whether they are parties to this action. 2. An inquiry what incumbrances affect the entirety of the said hereditaments, or the entirety of any and what parts or parcels thereof. 3. An account of what is due to such of the said incumbrancers, if any, as shall consent to the sale herein-after directed in respect of their incumbrances. 4. An inquiry what are the priorities of such last-mentioned incumbrances; And if it shall be certified that all the persons interested in the said hereditaments

other than incumbrancers on the entirety thereof, or on the entirety of any specific part or parcel thereof, are parties to this action, and that the Plts are interested to the extent of one moiety or upwards in the said hereditaments and request a sale, Let the said hereditaments be sold with the approbation of the Judge, free from the incumbrances, if any, of such of the incumbrancers as shall consent to the sale, and subject to the incumbrances of such of them as shall not consent; And Let the money to arise from such sale be paid into Court to the credit of this action, A. v. B., 1885, A. 500, to an account to be entitled "Proceeds of sale of &c.," subject to further order; And if such money or any part thereof shall arise from real estate sold with the consent of incumbrancers, the money so arising is to be applied in the first place in payment of what shall appear to be due to such incumbrancers according to their priorities; But if it shall be certified that any of the persons interested other than as aforesaid are not parties to this action, then Let any of the persons interested collectively or individually to the extent of one moiety or upwards in the said hereditaments be at liberty to apply in Chambers for a sale of the said hereditaments when it shall have been certified that the persons who are not parties or who ought to be served with notice of this judgment have been so served, or that service of such notice has been dispensed with, and that the parties or party interested collectively or individually to the extent of one moiety or upwards in the said hereditaments and premises request a sale thereof as they may be advised.—Adjourn further consideration.—Liberty to apply.—*Wilson v. Wright, Chitty, J.*, 11 July, 1885, B. 1039.

6. *Similar Form to last, but with Inquiries as to Receipt of Rents and Profits and as to particular Incumbrancer.*

UPON motion for judgment &c. by counsel for the Plt, and upon hearing counsel for the Defts and the Plts A. B. and C. D., and the Defts who claim to be interested in a moiety or upwards of the freehold hereditaments in the pleadings mentioned by their counsel requesting a sale [Form 1, *sup.*], Let the following inquiries be made, that is to say:—

1. An inquiry who are the persons interested in the said hereditaments other than the incumbrancers on the entirety of the said hereditaments, or on the entirety of any and what specific part or parcel thereof, and for what estates and interests, and in what shares and proportions, and whether they are parties to this action.

2. An inquiry who has been in receipt of the rents and profits of the said hereditaments since the death of S. W.

3. An inquiry who are the persons now beneficially interested in the £— charged on the — estate by the equitable mortgage dated &c., and for what estates and interests, and in what shares and proportions, and whether the whole or any and what part of the said £— is a sub-

sisting incumbrance on the said estate, and what is due or raisable in respect of that incumbrance.

4. An inquiry what other incumbrances (if any) affect the entirety of the said hereditaments, or the entirety of any and what specific parts or parcels thereof, and what is due in respect of such incumbrances.

And Let, if it shall be certified that all persons interested in the said hereditaments other than incumbrancers on the entirety thereof, or on the entirety of any specific part or parcel thereof, are parties to this action, and that the Plts A. B. and C. D. and the Defts are interested to the extent of moiety or upwards &c. [*follow Form 4 to end*].—*Goodacre v. G.*, Chitty, J., 4 June, 1888, A. 1324.

7. *Declaration of Title—Liberty to Bid—Partition Act, 1868, s. 3.*

“**DECLARE** that, subject to the interests of the unborn issue of the children of L., the father (in the statement of claim named), the Plts and the Defts are entitled, in manner mentioned in the statement of claim, to the hereditaments therein mentioned. And this Court being of opinion &c. [*sup.* Form 3], and the Plts and such of the Defts as are *sui juris* requesting a sale; Let the several estates mentioned &c., but subject as regards the estates respectively affected thereby to the several leases mentioned &c., be sold with the approbation of the Judge; and any of the parties &c. are to be at liberty to apply to the Judge at Chambers to include in such sale any other parcels of lands, mines, or hereditaments held under the same titles as any of the estates hereby directed to be sold.”—Liberty for all parties to bid at the sale, except the parties having the conduct of such sale [see Forms 17 and 18 *inf.*]; And Let the money to arise by such sale be paid into Court to the credit of &c., to such accounts as the Judge in Chambers, having regard to the ownership of the several estates to be sold, shall direct. And Declare that &c. are trustees &c. [See Form 12, Chap. XLI. p. 1267.].—Adjourn &c.—Liberty to apply.—*Lees v. Coulton, L. v. Clutton*, M. R., 17 April, 1875, B. 730; S. C., 20 Eq. 20.

8. *Declaration of title—Substituted Service by Post of Judgment for Sale—Partition Act, 1868, s. 4.*

UPON motion for judgment &c., by counsel for the Plts, and upon hearing counsel for the Defts, Declare that the leasehold premises in L. in the amended writ of summons mentioned belonged to the testator, John K., and his son, the testator, James K., in moieties. And Declare that each of the children of the testator, John K., named in his will, namely, the said James K., the Deft J. G. K., G. W. K., the Deft S. C., M. L., and E. E. K., took an absolute interest in one-sixth of the moiety of the testator, John K., of the said leasehold

premises, subject to a gift over to his or her children in case of his or her death in the lifetime of the testator, John K.'s widow, E. K., the tenant for life, leaving children. And Declare that the one-sixth share of the said E. E. K., who died a spinster in the lifetime of the said E. K., will vest in the legal pers. represve of the said E. E. K. when constituted, and that the children hereinafter named of the said James K. (who died in the lifetime of the said E. K., leaving children) are entitled in equal shares to the one-sixth share of the said James K. in the said moiety of the testator, John K., and that the Defts, J. N. L., A. M. L., M. L. R., E. B. B., and H. O. L., children of the said M. L., who also died in the lifetime of the said E. K., leaving children, and the Deft E. B. B., as the legal pers. represve of D. C. L., deceased, another child of the said M. L., are entitled in equal one-seventh shares to the one-sixth share of the said moiety of the testator, John K., and that the remaining one-seventh share of such last-mentioned one-sixth share will belong to the legal pers. represve of S. E. L., when constituted. And Declare that the Plts, J. N. K., E. B. N., L. K., D. K., and B. K. (the children of the testator, James K., named in his will), are absolutely entitled in equal shares to the moiety of the testator, James K., in the said leasehold premises subject to the life estate therein of the Plt., E. A. K., his widow. Let notice of this judgment be served upon the said G. W. K. by sending a copy of the same in a registered letter through the post addressed to the said G. W. K. at &c., on or before the — day of &c., and an affidavit of the due posting of such registered letter containing such copy is to be sufficient evidence of service; And the Plts and Defts who are interested to the extent of one moiety and upwards in the said leasehold premises by their counsel requesting a sale &c. Let the said leasehold premises be sold with the approbation of the Judge, free from the incumbrances of the Plts, E. A. and J. A. K. (who by their counsel consent thereto), unless the said G. W. K., or the legal pers. represves of the said E. E. K. or S. E. L., when constituted (who are the only persons interested in the said hereditaments who are not before the Court), do on or before &c. enter an appearance under O. xvi, 41, in which case any of the parties interested in the premises to the extent of a moiety and upwards are to be at liberty to apply at Chambers for a sale.—Direction to pay proceeds of sale into Court.—Adjourn further consideration.—Liberty to apply.—*Knight v. K.*, Kay, J., 7 August, 1886, A. 2593.

9. *Inquiry as to Shares settled.*

AN inquiry as to persons interested [Form 4, p. 1855], and whether any and which of the shares and interests of such several persons respectively are comprised in any and what settlement or settlements.—*Plume v. Weston*, V.-C. M., 7 Nov. 1868, B. 2688.

10. *Account and Inquiry as to Permanent Improvements by Tenant-in-Common.*

1. Account of the money (if any) expended by the Deft or [*where title derived through person making the expenditure*] his predecessor in title in permanent improvements to the said hereditaments since the — day of — [*date of conveyance under which title of parties derived*];
 2. Inquiry as to the extent to which the present value of the said hereditaments has been increased by such expenditure.—*Williams v. W.*, Kekewich, J., 6 May, 1899, B. 2072; W. N. (99) 66; 81 L. T. 163; 68 L. J. Ch. 528.

11. *Accounts of Rents and Profits, and as to Repairs and Outgoings—Partition Act, 1868, s. 4.*

UPON motion for judgment &c., Let the following inquiries and accounts be made and taken; that is to say (*inter alia*), an account of the rents and profits of the said hereditaments received by the Deft C., or by any other person or persons, by his order, or for his use since the — day of — &c., and of all sums which have been [*properly*] expended by the said Deft in or about the necessary repairs of the said hereditaments, or otherwise in or about the necessary outgoings in respect thereof.—*Cooke v. Hunter*, Kekewich, J., 14th May, 1892, A. 771.

12. *Inquiry as to Rents received, and as to Occupation Rent.*

AN inquiry what sum is due from the Deft J. W. in respect of the rents and profits of the said hereditaments received by him since the death of B., the tenant for life; and also in respect of his occupation of such of the premises as have been occupied by him since the death of the said B., allowing the said J. W. all sums properly expended by him in repairs or otherwise.—See *Graham v. Cole*, V.-C. B., 22 Feb. 1871, A. 581.

For the like inquiry and allowance, see *Pascoe v. Swann*, 27 Beav. 508; and see Sect. II., Form 4, *inf.* p. 1886, and for the order on further consideration in *Graham v. Cole*, where sums certified in respect of occupation rent was charged upon particular share, see *S. C.*, V.-C. B., 3 June, 1873, A. 1769, Seton, 5th ed. 1541, Form 19; but *secus*, *Hill v. Hickin*, Stirling, J., 3 Aug. 1897, A. 1526, (1897) 2 Ch. 579, where it was held that a sum certified due from co-owner in respect of occupation rent (he not having been tenant of his co-owners) could not be set off as against a mortgagee of the co-owner's share, though it might have been set off against the co-owner personally.

13. *Inquiry whether Contract beneficial, and if not, Direction for Sale—31 & 32 V. c. 40, s. 3.*

AN inquiry whether the contract entered into with the Deft G. for the sale to him of the said estate for the sum of £ — is a fit and proper

contract for the sale of the said estate, and whether it is for the benefit of the several persons under disability that the said contract should be adopted; And if so, Let the same be carried into effect; But if it shall not be so certified, Let the said estate be sold with the approbation of the Judge free from the incumbrances &c.—Direction for payment into Court of G.'s purchase-money if the said contract shall be adopted, or if not, then of the proceeds of the sale.—Adjourn &c.—*Mallinson v. Siddle*, V.-C. M., 23 June, 1870, B. 1719.

For order in a partition suit, adopting a conditional agreement for the sale of property to which the infant Plt and infant Deft were entitled as co-heiresses, see *Grove v. Comyn*, V.-C. M., 23 May, 1874, A. 1287, *sup.* Chap. XXXVIII., "INFANTS," Sect. III., Form 5, p. 985.

In *Thompson v. Richardson*, I. R. 6 Eq. 596, it was ordered that if on the inquiry directed it should be certified that the provisional agreement for sale would be for the benefit of the infants interested, the certificate, when confirmed, should be acted on without further order, and the provisional agreement adopted and carried into effect.

14. *Sale (out of Court) instead of Partition—Share of Infant Plaintiff requesting Sale to be earmarked as Real Estate: Partition Act, 1876, s. 6, and S. C. F. R. 21.*

(1.) *Judgment.*

UPON motion for J., this day made unto this Court by counsel for the Plts [W. H. *one of the Plts being an infant*], and upon hearing counsel for the Defts, and upon reading the pleadings [*enter evidence*], and the Plts and Defts who claim to be interested in a moiety of the hereditaments in the statement of claim mentioned by their counsel requesting a sale thereof and a distribution of the proceeds instead of a division of the said hereditaments between or among the persons interested; This Court doth order that an inquiry be made who are the persons interested in the hereditaments and property in the pleadings mentioned, and for what estates and interests and in what shares and proportions, and whether they are parties to this action; And if it shall be certified that all persons interested are parties to this action, it is ordered that the said hereditaments be sold out of Court subject to such reserves, and with such remuneration to the auctioneers employed as shall be approved by the Judge; And it is ordered that the money to arise by such sale be paid into Court to the credit of this action [subject to further order]; But if it shall appear that any of the persons interested are not parties to this action, then it is ordered that any of the persons interested collectively or individually to the extent of one moiety or upwards in the said hereditaments, be at liberty when it shall have been certified that the persons who ought to be served with notice of this judgment have been so served, or that service of such notice is dispensed with, to apply at Chambers for a sale of the said hereditaments. Reserve further consideration.—Liberty to apply.—*Howard v. Jalland*, Kekewich, J., 7 Aug. 1890, A. 1153.

(2.) *Order on Summons in Chambers subsequent to Judgment.*

UPON the application of the Plts &c., and upon hearing the solrs for the Defts, and upon reading the judgment dated 7 Aug. 1890, the Chief Clerk's certificate dated 9 Dec. 1890, and the Judge being satisfied that upon the evidence of the Chief Clerk's certificate, dated 9 Dec. 1890, all persons interested in the hereditaments and property in the pleadings mentioned, are before the Court or bound by this order for sale; This Court doth order that the same hereditaments and property be sold out of Court subject to such reserves, and with such remuneration to the auctioneer employed on such sale as shall be approved by the Judge; And it is ordered that the money to arise by such sale be paid into Court to the credit of this action, *H. v. J.*, 1890, H. 2707, subject to further order; And it is ordered that the auctioneer so employed be authorized to receive the deposit upon his undertaking to pay the same into Court to the credit aforesaid. Liberty for any of the parties to apply in Chambers for a vesting order or an order appointing a proper person to convey in respect of the infant Plt. W. H. and generally.—*S. C.*, 17 June, 1891; A. 819.

(3.) *Order on Further Consideration.*

THIS action coming on &c. for further consideration &c., tax costs; And it is ordered that the funds in Court be dealt with as directed by the schedule hereto.

PAYMENT SCHEDULE

(contains inter alia the directions below).

		£ s. d.
Carry over 2-15ths	Account of infant Plt W. H. as real estate.	
Carry over 1-16th	Account of S. J. H. entitled for life in respect of dower, with remainder to W. H. as real estate.	

—*S. C.*, 19 Dec. 1891, A. 2751. These orders were examined and approved in *Re Norton, N. v. N.*, (1900) 1 Ch. 101.

15. *Sale instead of Partition—Infant Plts entitled to one Undivided Third—Defts to remaining Two-thirds—Inquiries in such Case—Infant Plts declared Trustees for Purchaser—Partition Act, 1868, s. 4.*

THIS action &c.—And the infant Plts by J. I., their next friend, the Defts by their respective counsel, who claim to be interested &c. [*follow* Form 1, p. 1853, *down to word* interested); Let the following inquiries be made:—

1. An inquiry who are the persons interested in the hereditaments in

the pleadings mentioned, and for what estates and interests, and in what shares and proportions, and whether they are parties to this action.

2. An inquiry whether it will be for the benefit of such of the persons interested in the said hereditaments as are infants that the same should be sold, and if it shall be certified that all the persons interested are parties to this action, and either (1) that the parties desiring a sale (other than the infants) are interested to the extent of one moiety or upwards in the said hereditaments; or (2) that it will be for the benefit of the said infants that the said hereditaments should be sold, and that the parties desiring a sale (including the said infants) are interested to the extent aforesaid, It is ordered that the said hereditaments be sold with the approbation of the Judge; And it is ordered that the money to arise by such sale be paid into Court to the credit of this action (*D. v. I.*, 1896, D. 1854) to an account to be entitled "Proceeds of sale &c.," subject to further order. But if it shall appear that any of the parties interested are not parties to this action, then it is ordered that any of the persons interested, collectively or individually, to the extent of one moiety or upwards in the said hereditaments be at liberty, when it shall have been certified that the persons who ought to be served with notice of this judgment have been so served (or that service of such judgment has been dispensed with), to apply at Chambers for a sale of the said hereditaments, the said infants not to be at liberty to apply hereunder unless and until it shall have been certified that it will be for their benefit that the said hereditaments should be sold; And this Court doth Declare, that upon any such sale being made, such of the parties interested in the said hereditaments as are infants will be trustees for the purchaser or purchasers of their undivided share or shares of the said hereditaments within the meaning of the Trustee Act, 1893; And Let J. I., of &c., the next friend of the Plts, be appointed to convey such share or shares to the purchaser or purchasers of the said hereditaments; And Let the said J. I., upon lodgment in Court by any purchaser of the amount of his purchase-money, convey to such purchaser accordingly the property bought by him.—Liberty to bid and set-off, &c. (Form 17, p. 1864).—Adjourn further consideration, &c.—*Davis v. Ingram*, Kekewich, J., 16 Jan. 1897, A. 368; (1897) 1 Ch. 477.

16. *Undertaking to purchase Infant's Share—Valuation—*
Partition Act, 1868, s. 5.

UPON motion for (judgment) &c.; And it appearing by the evidence in this (action) that the Plts are entitled to three undivided fourth parts, and that the Deft (*infant*) is entitled to the remaining undivided fourth part of the messuages and premises known as &c., and the Deft by his guardian requesting a sale of the said messuages and premises instead of a partition, and the Plts by their counsel thereupon undertaking to purchase the Deft's undivided fourth part of the said

messuages and premises; Let a value be put upon the said undivided fourth part of the said messuages and premises upon the footing of the value of that fourth part being one-fourth of the value of the entirety; And Let the result of the valuation be certified; And Let the Plts G. &c., within twenty-one days after the date of the Master's certificate, lodge in Court to the credit of — &c., to an account to be entitled "Proceeds of Sale of Deft's undivided one-fourth share of the hereditaments (decreed to be sold)," what shall be certified to be the amount of such valuation as directed in the Lodgment Schedule hereto; And Let, upon such lodgment in Court, a proper conveyance of such share to the Plts be settled by the Judge; And Declare that upon such sale being made the Deft will be a trustee for the Plts of his undivided share of the said messuages and premises within the meaning of the Trustee Act, 1893; And this Court doth order that R. of &c. be appointed to convey such share to the Plts; And Let him, upon such lodgment in Court as aforesaid being made, convey the same accordingly; And Declare that the Deft's costs of this cause are a charge upon and payable out of his share of the property.—Liberty to apply in Chambers in respect of the costs, and as to the fund in Court.—Liberty to apply.—[*Add Lodgment Schedule directing Plts G. &c. to lodge "what shall be certified to be the amount of the valuation in the order mentioned."*—See *Gosling v. G.*, V.-C. M., 12 July, 1875, A. 2209.

17. *Liberty to bid, and to set off Purchase-money—Partition Act, 1868, s. 6.*

AN inquiry as to persons interested [Form 4, p. 1855], and subject thereto, direction for sale [Form 4, p. 1855]. And any of the persons interested in the said hereditaments, except the party having the conduct of the sale, are to be at liberty to bid at such sale and become the purchasers of the said hereditaments, or any part thereof, without payment of any deposit in respect thereof; And Let the purchase-money of any portion so purchased by any of the parties be set off against the shares to which they may be respectively entitled; And Let the money to arise by the sale of the hereditaments be, subject to such set-off as aforesaid, paid into Court &c. And if such money, or any part thereof, shall arise from hereditaments sold with the consent of incumbancers, the money so arising is to be applied in payment of what shall appear to be due to such incumbancers respectively according to their priorities.—Adjourn &c.—See *Beardmore v. B.*, V.-C. W., 13 Jan. 1872, A. 100.

For the like order, see *Wilkinson v. Joberns*, L. C. for M. R., 8 May, 1873, B. 1321; S. C., 16 Eq. 14.

By the Partition Act, 1868, s. 6, the Court may allow any of the parties interested in the property to bid at the sale on such terms as to non-payment of deposit, setting off, or accounting for the purchase-money or any part thereof, instead of paying the same, or as to other matters, as to the Court seem reasonable.

See on this section, Dan. 1109.

18. *Liberty to purchase, and bid at Sale.*

UPON the appeal of Plts from an order, dated &c.—The Court being of opinion, having regard to the nature of the property hereinafter mentioned, and to the number of persons interested therein, that a sale thereof and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, Let the freehold messuages, lands, and hereditaments mentioned in the schedule to the Master's certificate in *P. v. P.*, dated &c., in the Master's certificate in this action, dated &c., mentioned, be sold with the approbation of the Judge.—Let any of the parties not having the conduct of the sale be at liberty to lay proposals before the Judge at Chambers for the purchase of the said lands &c., or to bid and become the purchasers thereof without payment of any deposit; And Let the purchase-money of any portion so purchased by any of the parties be set off against the shares to which they may respectively be entitled; And Let the money to arise by such sale be, subject to such set-off as aforesaid, paid into Court &c.—*Gilbert v. Smith*, C. A., 31 Jan. 1879, A. 317; *S. C.*, affirmed by Dom. Proc. *sub nom. Pitt v. Jones*, 5 App. Ca. 651.

19. *Time fixed for Distribution of Proceeds of Sale and Advertisements directed—Partition Act, 1876. s. 4.*

THIS action coming on this day for further consideration &c., this Court doth fix the — day of — &c. as the time at the expiration of which the proceeds of sale of the hereditaments by the judgment, dated &c., directed to be sold, and which, pursuant to the order dated &c., have been sold to &c., will be distributed; And Let notice be given by advertisements, to be inserted once in the London Gazette and twice in the Times newspaper, for notifying to C. (on whom service of notice of the said judgment was by the said order, dated &c., dispensed with, and who has not hitherto come in and established his claim) the fact of the said sale, the time of the intended distribution, and the time within which a claim to participate in the proceeds must be made.—*Fortnam v. Hadlow*, Fry, J., 18 Nov. 1881, A. 3889; and see *Phillips v. Andrews*, 35 W. R. 266; 56 L. T. 108.

For order at Chambers fixing a time for distribution one month from date of service of notice of the order, see *Moger v. Bush*, Chitty, J., at Chambers, 29 Jan. 1883, B. 140.

For form of advertisement, see D. C. F. 764.

20. *Sale of Property of a Botanic Garden Company after Advertisements for Claimants.*

THIS action coming on for further consideration &c., in the presence of counsel for the Plts and the Defts &c., And it appearing by the chief clerk's certificate dated &c., that advertisements have been published

at the time and in the manner directed by the judgment, dated &c., calling upon all persons claiming to be interested in the H. Garden to come in and establish their claims by a day thereby limited, which has long since elapsed, and that the several persons whose names and addresses are set forth in the schedule to the said certificate have come in and established their claims to the number of shares in the said H. Garden set opposite their respective names in such schedule, and that all such persons have been served with notice of the said judgment, and that the Plts have also sent out circular letters to all persons on the register of the H. Garden, and to all persons believed to be interested in the said garden, stating the effect of such advertisements; And this Court, being of opinion that the agreement, dated &c., for the sale of the said H. Garden to A. B. for £— is a fit and proper agreement for carrying such sale into effect; Let the said agreement be carried into effect, notwithstanding that the said A. B. is a shareholder in the said garden, subject to the several provisions contained in the 4th section of the Partition Act, 1876.—Direct A. B. to pay purchase-money into Court, with usual directions as to payment off of mortgages, and on payment into Court, Let Defts execute conveyance.—Adjourn further consideration, with liberty to apply.—*Baxter v. Thompson*, M. R. 20 March, 1880, A. 996.

21. *Order dispensing with Service of Notice of Judgment, and directing Advertisements*—*Partition Act, 1876, s. 3.*

UPON motion &c. (or upon the application of &c.), and upon reading an affidavit of &c. [*stating the grounds*], Let service of notice of the judgment in this action, dated &c., on A., of &c., and B., of &c., be dispensed with; And Let, instead thereof, advertisements be published in &c. [*state the times and manner of advertising*], calling upon all persons claiming to be interested in the property to which this action relates, who have not been served with notice of this judgment, to come in and establish their respective claims in respect thereof before the Judge in Chambers within — days from the — day of —.

For order under Partition Act, 1868, s. 9, for advertisement of notice of the decree in such newspapers as the Judge in Chambers should direct, and to suspend the sale directed by the decree until the time limited by such advertisements should have expired, see *Peters v. Bacon*, M. R., 8 June, 1869, B. 1859; S. C., 8 Eq. 125.

For form of application, see D. C. F. 761.

22. *Subsequent Order for Sale*—*Partition Act, 1876, ss. 3, 4.*

UPON the application of &c., and upon reading the judgment, dated &c., and the Master's certificate, dated &c., whereby it appears that all persons interested in the property to which this action relates, who were not originally parties thereto, have been served with notice of the said judgment, dated &c.; [*or upon reading the judgment &c., dated &c., the order dated &c., dispensing with service of notice of the*

said judgment on A. and B., and directing instead thereof advertisements to be published at the times and in the manner therein mentioned, an affidavit of &c., filed &c., showing that &c., *state the effect of the affidavit showing that the advertisements have been published as directed by the previous order*; And no persons having come in and established their claims in respect of the said property]; Let the said property be sold with the approbation of the Judge [*If after order dispensing with service, add: subject to the several provisions contained in the 4th section of the Partition Act, 1876*]; And Let the money to arise by such sale be paid into Court to the credit of &c., subject to further order.

For form of summons, see D. C. F. 763.

23. *Judgment for Sale out of Court in Partition Action under O. LI, r. 1A, where Circumstances Special—Partition Act, 1868, s. 4.*

UPON motion for judgment &c., and upon reading the pleadings in this action (*enter evidence*), the Judge being of opinion that the legal estate in fee in the residuary real estate of the said testator D. S., deceased, is now vested in the Deft C. E. H. V. as the legal pers. represve of F. S., deceased, the last surviving trustee of the will of the said testator, and being satisfied that the Plts and the Defts C. E. H. V., H. J. H., A. B. C., E. M. S., and E. J. B. are beneficially interested in a moiety and upwards of such real estate, and the said Plts and the last named Defts by their counsel desiring a sale; This Court doth order that the said residuary real estate be sold out of Court, and that the money to arise from such sale be paid into Court to the credit of this action, *Re D. S.*, deceased, *C. v. V.*, 1887, S. 42, "Proceeds of sale of testator's real estate," subject to further order; And it is ordered that the reserve price at such sale, and the amount of the auctioneer's remuneration be fixed in Chambers.—Adjourn further consideration.—Liberty to apply.—*Re Stedman, Coombe v. Vincent*, Kay, J., 12 May, 1888, B. 620; *Pitt v. White*, 57 L. T. 650.

In the above case, *Re Stedman, Coombe v. Vincent*, and in the following case, *Haddock v. H.*, the Court made the order without the usual inquiries as to parties interested (in *Re Stedman*, without requiring strict evidence of title); but *semble*, the usual order is to direct inquiries as in Forms 1 or 4, *supra*, unless property small and title simple: *Hawkins v. Herbert*, 37 W. R. 300; *Wood v. Gregory*, 43 Ch. D. 82.

24. *Sale out of Court in Partition Action at the Request of Plaintiff and all the Defendants sui juris beneficially interested, with Consequent Directions—Partition Act, 1868, s. 8.*

AND it appearing that C. the testatrix &c. died seised and possessed of the freehold and leasehold hereditaments in the statement of claim mentioned, and that by virtue of her will the Plt is absolutely entitled to one equal undivided moiety of the said hereditaments, and that by

virtue of her will and the will and codicil of H. deceased &c. the Defts B. and N. are entitled to the other moiety of the said freehold and leasehold hereditaments upon the trusts therein contained for the benefit of the Defts K., L., &c.; And the Plt and the Defts K., L., &c., by their counsel requesting a sale of the said hereditaments and a distribution of the proceeds instead of a division of the said hereditaments among the parties interested therein, Let the said freehold and leasehold hereditaments be sold by the Plt by public auction in such way as he shall think fit, and the money to arise by such sale be received by the Plt and the Defts B. and N. the trustees of the will of the testator H.; And Declare that for the purposes of the sale the Deft W. (*non compos*) is a trustee &c. [See Form 13, *sup.* Chap. XLI., "Trustees," p. 1267]; And Let the costs of the Plt and the Defts of this action (as between solr and client), including therein the costs and expenses of the said sale, be taxed &c.; And Let the Plt and the said Defts B. and N., out of the money to arise by the said sale, pay the said costs when taxed, and pay one moiety of the residue of the said money after payment of such costs as aforesaid to the Plt, and pay the other moiety thereof to the said Defts B. and N. to be held by them upon the same trusts in all respects as are contained in the will of the testator H. concerning his undivided moiety of the said hereditaments.—Liberty to apply.—*Haddock v. H.*, V.-C. M., 19 April, 1873, A. 104.

N.B.—In this case the Court looked into the evidence itself without directing usual inquiries, as to which see note to last Form.

Solr and client costs will not be allowed except by consent of the parties: *Ball v. Kemp-Welch*, 14 Ch. D. 512, 513.

25. *The like, by Trustees—Costs—Distribution of Proceeds—*
Partition Act, 1868, s. 8.

THIS Court being of opinion that a sale of the hereditaments in the parish of &c., devised by the will of the testator &c., and a distribution of the proceeds will be more beneficial for the several persons now or who may hereafter become interested therein than a division of the said hereditaments among them, and the Plts and the Defts by their counsel respectively requesting such sale, Let the Defts L. and P. (*the trustees*) be at liberty to sell such hereditaments in such manner and subject to such particulars, conditions, and provisions as they may think fit; And Declare that upon such sale the Plts and the Deft P. (*out of the jurisdiction*), as one of the co-heirs of the testator, will be trustees &c. [See Form 11, p. 1266]; And Let the Defts L. and P. be appointed to convey &c.; And Let them receive the purchase-money to arise from the sale of the said hereditaments and execute the conveyances thereof accordingly.—Appoint L. and J. trustees of the Plts' moiety of the money to be produced by the sale of the said hereditaments and of such residue as hereinafter mentioned of the fifth share of the Deft D. in the other moiety of the said money; And Let the costs of the Plts and the Defts of this action and of the said L. and J. as such trustees of the Plts' moiety, including the costs of the said L.

and P. of the sale hereby directed, be taxed &c. (as between solr and client); And Let the Defts L. and P. retain their own costs when taxed, and pay to the Plts and the remaining Defts their costs when taxed out of the purchase-money to be received by them as aforesaid; And Let the Defts L. and P. pay one moiety of the net residue of the said purchase-money to the said L. and J. as such trustees as aforesaid, to be held by them upon trust to apply the same to some one or more of the purposes mentioned in the 34th section of the Settled Estates Act, 1877, without any application to this Court, and in the meantime to invest the same in or upon any stocks, funds, or securities in or upon which, pursuant to the general orders of this Court, cash under the control of the Court may be invested; And Let the said trustees pay the income of the said moiety and of the investments thereof to the Plt. C. during her life, and subject thereto hold the same moiety and the investments and income thereof for the benefit of the other persons interested under the limitations in the testator's will contained of and concerning that moiety of the said hereditaments which by the said will was devised to the Plt C. for her life; And Let the Defts L. and P. pay one equal fifth part of the remaining moiety of the residue of the said purchase-money to the Deft L. to be held by him upon the trusts of the indenture dated &c. in the pleadings mentioned.—Like direction as to another fifth; and for payment of one other equal fifth part thereof to the Defts A. and L.; “And Let the Defts L. and P., out of one other equal fifth part of the said moiety, pay to the Deft A. the amount due to him on his securities in the pleadings mentioned, and pay to the Deft L. the amount due to him on his security dated the &c. in the pleadings mentioned, and pay the net residue, if any, of the same fifth share to the said L. and J., to be held by them upon trust to apply the same to some one or more of the purposes mentioned &c. (see *sup.*); And Let the Defts L. and P. pay the remaining equal fifth share of the said moiety to the Deft. L., to be held by him upon the trusts of the indenture dated &c. in the pleadings mentioned.”—Liberty to apply.—See *Chubb v. Pettipher*, V.-C. M., 25 June, 1870, A. 1778.

For similar order where there were infant trustees, see *Harrison v. Ashton*, 10 July, 1869, A. 2519.

For order, after declaration of rights and request by parties *sui juris* for a sale, and the Court being of opinion &c., that trustees be at liberty to sell and dispose of the property by public auction, in such lot or lots &c., and subject to such conditions &c., as they might think fit, and to convey and surrender to purchasers, and receive the purchase-money, and thereout, after paying taxed costs, to pay one-third of the residue of the proceeds to the Plt, and hold the remaining two-thirds upon trust to apply the same to some one or more of the purposes mentioned in the 23rd section of the Settled Estates Act, 1856 (now Settled Estates Act, 1877, s. 34), without any application to the Court, with special directions following the trusts of the will of which they were trustees, with power of sale, see *Hayward v. Smith*, V.-C. M., 20 March, 1869, A. 678; S. C., 20 L. T. 70.

26. *Sale of Part, and Partition of Part, on Further Consideration.*

DECLARE that the Plt and her incumbrancers, the Deft A. and her incumbrancers, and C. and T., the trustees of the settlement dated &c.,

are entitled to the freehold, copyhold, and leasehold estates particularised in the Schedule to the certificate in equal sixth shares; And this Court being of opinion that it is unnecessary to sell the whole of such freehold, copyhold, and leasehold hereditaments and premises, and the Plt by her counsel requesting a sale of such portion as is set forth in the schedule hereto, Let such portions of the said freehold, copyhold, and leasehold hereditaments as are set forth in the schedule hereto, and such other parts of the said hereditaments as shall appear impracticable to be partitioned as hereinafter directed, be sold with the approbation of the Judge; And Let the money to arise from such sale be paid into Court &c.; And Let, notwithstanding it is in the said certificate certified that a sale of the whole of the hereditaments would be more beneficial for the parties interested than a division thereof between or among them (having regard to the declaration hereinbefore contained), a partition be made by the Judge in Chambers, so far as may be practicable, of such portion of the said freehold, copyhold, and leasehold hereditaments described in the said schedule to the Chief Clerk's said certificate as is not set forth in the schedule hereto; And Let the same be divided into six equal parts; And Let one sixth part thereof be allotted as the share of the Plt and her incumbrancers, and one other sixth part thereof &c.; And Let the respective parties hold and enjoy their respective shares in severalty according to such allotments, and execute mutual conveyances to each other according to their respective interests therein, such conveyances to be settled by the Judge, &c.—Liberty to apply.—*Allen v. A.*, V.-C. W., 14 July, 1873, A. 2006; *S. C.*, 21 W. R. 842; 42 L. J. Ch. 839.

For similar decree, see *Roebuck v. Chadebet*, M. R., 11 June, 1869, B. 1551; *S. C.*, 8 Eq. 127; and for a like order when there was an agreement to partition part of the property, see *Re Worrall*, *Gurney v. Clare*, V.-C. M., 19 Jan. 1877, B. 875.

For order, subject to inquiries, for the sale of the whole or such portions of which the sale shall be approved by the Judge, with liberty for the Plts and Defts, if the property or any part thereof shall not be sold, to lay proposals before the Judge in Chambers for a partition, having regard to the rights of the Plts and Defts therein; liberty to lay proposals before the Judge in Chambers for allotting the purchase-moneys, or the residue thereof, to any one or more of the persons interested in the property, in entire or partial satisfaction of his, her, or their shares or share in such property, and for allotting or charging a sum in gross by way of equality of partition when expedient, see *Pennington v. Dalbiac*, V.-C. M., 23 April, 1870, B. 1105; *S. C.*, 18 W. R. 684.

27. *Alternative Order for Sale or for Partition on Result of Inquiries—Partition Act, 1868, s. 4.*

“LET the following &c.: 1. An inquiry what real estate (if any), other than the estate called — in the will of N., the testator &c., was devised by the said testator in fourths as therein mentioned, and of what particulars the said estate called — consists.”—2. Inquiry as to persons interested [Form 4, p. 1855].—“And if it shall be certified that all the persons interested in the said hereditaments and premises

are parties to this action or have been served with notice of this judgment, and the persons interested in not less than one moiety shall request a sale, and the persons interested in the remainder of the said hereditaments and premises shall not show good reason to the contrary, Let the said hereditaments and premises be sold with the approbation of the Judge; And Let the money to arise by the said sale be paid into Court to the credit of this action &c.; And if a sale shall not be requested by the persons interested in not less than one moiety, Let a partition be made of the said hereditaments and premises by the Judge in Chambers amongst the persons entitled according to their respective rights and interests therein."—Adjourn &c.—Liberty to apply.—See *Nicholls v. Winn*, L. C. for M. R., 2 Aug. 1873, B. 2500.

28. *Short Form of Judgment where Plaintiffs admit that all Persons interested are not Parties to Action—Partition Act, 1868, s. 4.*

UPON motion for judgment &c. [*enter pleadings and evidence*]; And the Plt [*if so*, and the Defts X. and Y.], who claim to be interested in a moiety or upwards of the freehold hereditaments in the pleadings mentioned by their counsel requesting a sale of the hereditaments and a distribution of the proceeds instead of a division of the same between or among the persons interested; This Court doth order that: 1. An inquiry be made of what particulars such hereditaments now consist. 2. An inquiry who are the persons interested in the said hereditaments, and for what estates and interests and in what shares and proportions.—And the Plt and Defts by their counsel admitting that all the persons interested are not parties to this action; It is ordered that any persons interested, collectively or individually, to the extent of one moiety or upwards in the said hereditaments be at liberty to apply in Chambers for a sale of the said hereditaments when it shall have been certified that all the persons interested who are not parties and who ought to be served with notice of this judgment have been so served; or that service of notice of such judgment has been dispensed with, and that the parties or party interested, collectively or individually, to the extent of one moiety or upwards in the said hereditaments request a sale as they may be advised.—Adjourn further consideration.—Liberty to apply.—See *Pocock v. Kennedy*, V.-C. H., 2 June, 1877, B. 1241.

29. *Costs of Action to recover Title Deeds.*

THIS action coming on for further consideration &c., Declare that the Plts are entitled absolutely to one sixth part of the hereditaments in the pleadings mentioned, and to a charge upon two other sixth parts thereof for £— and interest &c.; that A. B., by virtue of his sub-mortgage dated &c., and C. D., by virtue of the mortgage dated &c., were entitled equally (subject to the said charge) to the said two sixths;

that the Deft E. F. is entitled to two other sixth parts of the said hereditaments, and that she and the Deft G. H. are entitled to the remaining one sixth part thereof. Refer to the taxing master to tax the Plts and the Defts and parties attending their costs of this action, including in the costs of the Plts their costs properly incurred in the action of X. v. Y., brought by the Plts to recover the title deeds of part of the said hereditaments, and not paid by the Defts thereto; And Let the funds in Court be dealt with as directed in the schedule hereto.—[*Add payment schedule directing payment of the costs out of the whole fund before division in the above proportions: v. inf. p. 1881*].—*Belcher v. Williams*, North, J., 2 Aug. 1890, A. 2111; *S. C.*, 45 Ch. D. 510.

NOTES.

RIGHT TO PARTITION.

The Common Law right of coparceners to partition (see Litt. s. 247) was extended by 31 H. VIII. c. 1, and 32 H. VIII. c. 32; and before the Partition Act, 1868 (which confers upon persons who would have been entitled to sue for partition the right, subject to certain limitations, of enforcing a sale), every joint tenant, or tenant in common in possession, whether in tail (*Brook v. Hertford*, 2 P. Wms. 518); for life (*Gaskell v. G.*, 6 Sim. 643); for years (*Baring v. Nash*, 1 V. & B. 551); or for an estate determinable on marriage (*Hobson v. Sherwood*, 4 Beav. 184), had the right to sue for partition, the decree being binding upon those in remainder: *Gaskell v. G.*, *sup.*

But the right is confined to persons having estates in possession; and joint tenants, or tenants in common, in reversion or remainder, could not file a bill for partition: *Evans v. Bagshaw*, 5 Ch. 340; 8 Eq. 469; nor can there be partition or sale where there is an overriding trust for management and division of profits which the *cs. q. t.* have no power to determine: *Taylor v. Grange*, 15 Ch. D. 165, C. A.; 13 Ch. D. 223; *Swaine v. Denby*, 14 Ch. D. 326; or a subsisting trust for sale, and the *cs. q. t.*, though *sui juris*, cannot agree: *Biggs v. Peacock*, 22 Ch. D. 284, C. A.

Partition of lands may also be effected by deed of partition, which is a valid exercise of a power of exchange: *Re Frith and Osborne*, 3 Ch. D. 618; and for such deeds, see Dav. Conv. vol. v., pt. 2, pp. 13—70; and under the Inclosure Acts, 1845—1876, *inf. p. 1892*.

As to the powers of tenants for life under the Settled Land Acts to effect partitions, see Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 3, 4 and 19, and Settled Land Act, 1890 (53 & 54 V. c. 69) s. 5.

Since the 8 & 9 W. III. c. 31 (made perpetual by 3 & 4 Anne, c. 18, but now repealed by the Statute Law Revision Act, 1867, 30 & 31 V. c. 59), which was passed “for the easier obtaining partition of lands in co-parcenary, joint tenancy and tenancy in common,” the old Common Law mode of proceeding by writ of partition directed to the sheriff had become practically superseded, and by 3 & 4 W. IV. c. 27, s. 36, the writ, except as to dower, was abolished.

Under the concurrent, and since 1833 exclusive, jurisdiction in Equity, which arose, as has been stated, from the extreme difficulty attending the process of partition at law (see *Agar v. Fairfax*, 1 L. C. Eq. 181; *Manners v. Charlesworth*, 1 My. & K. 330), a partition has been decreed of:—

Manors.]—See *Hanbury v. Hussey*, 14 Beav. 153; *Ley v. Cox*, *Ib.* 157; *Cattley v. Arnold*, 4 K. & J. 595; *Sparrow v. Fiend*, 1 Dick. 348.

Advowsons.]—See *Johnstone v. Baber*, 6 D. M. & G. 439; 22 Beav. 562; *Bodicoate v. Steers*, 1 Dick. 69, *inf. Sect. II.*, Form 6, p. 1887; the right of presentation after the first, which in the case of tenants in common was settled by lot, being made alternate, and capable of being enforced against the

bishop: see *Matthews v. Bp. Bath and Wells*, 2 Dick. 652; *Seymour v. Bennett*, 2 Atk. 483.

And by the Sale of Advowsons Act, 1856 (19 & 20 V. c. 50), power was given to the owners of advowsons therein mentioned, forming a numerous class, and deriving no pecuniary advantage from their right, to direct a sale for the purposes therein mentioned.

By the Benefices Act, 1898 (61 & 62 V. c. 48), s. 1, sub-s. 2, it is made unlawful to offer for sale by public auction any right of patronage, save in the case of an advowson to be sold in conjunction with any manor, or with an estate of not less than 100 acres situate in the parish in which the benefice is situate, or in an adjoining parish, and belonging to the same owner as the advowson.

Rent-charges.—See Co. Litt. 164 b; *Rivis v. Watson*, 5 M. & W. 255.

Leaseholds for years (as to which the right to obtain partition was extended by 32 H. VIII. c. 32)].—See *Ames v. Cumyns*, 16 W. R. 74; 17 L. T. 163; though in *North v. Guinan*, Beat. 342, partition of a leasehold house was refused, as not warranted by the nature of the property and the interest of the parties.

Copyholds.—Before the Copyhold Enfranchisement Act, 1841 (4 & 5 V. c. 35), Courts of Equity had no jurisdiction to decree partition of copyholds or customary freeholds: *Horncastle v. Charlesworth*, 11 Sim. 315; *Jope v. Morshead*, 6 Beav. 213; though specific performance might be decreed of an agreement to divide copyholds: *Bolton v. Wurd*, 4 Ha. 530; and in the case of freeholds and copyholds intermixed, the freeholds might be allotted to one and the copyholds to another: see *Dillon v. Coppin*, 6 Beav. 217, n.; but by that Act a partition of lands of copyhold or customary tenure might be made: *Bowles v. Rump*, 9 W. R. 370; *Clarke v. Clayton*, 2 Giff. 333; and now, by the Copyhold Act, 1894 (57 & 58 V. c. 46), s. 84, "in an action for the partition of land of copyhold or customary tenure, the like order may be made as may be made with respect to land of freehold tenure."

Party Wall.—*Mayfair Property Co. v. Johnston*, (1894) 1 Ch. 508.

TITLE.

The title of the Plt to an interest in the property of which he seeks partition must be clearly shown: *Jope v. Morshead*, 6 Beav. 213; *Parker v. Gerard*, Amb. 236.

Under colour of a prayer for partition, the Court would not entertain a bill for the purpose of trying legal questions, establishing title to, or recovering possession of, land: *Slade v. Barlow*, 7 Eq. 296; *Bolton v. B.*, *Ib.* 298, n.; *Giffard v. Williams*, 5 Ch. 546; *Moore v. Kempston*, 1 R. 4 Eq. 306; 18 W. R. 803; and see *Ward v. W.*, 18 W. R. 87; though in *Burt v. Hellyar*, 14 Eq. 160, disputed questions of legal construction were decided at the hearing of a partition suit at the desire of all parties other than an infant, the decree being prefaced by a statement to that effect.

And *semble*, that under 25 & 26 V. c. 42 (Rolt's Act), the Court had jurisdiction to decide incidental legal questions, but not legal questions to which the claim for partition was subordinate, or which did not form merely the substantial ground of the action: see Walker on Partition, 36, 37.

But the Jud. Act, 1873, s. 24 (7), enables and directs the High Court of Justice and Court of Appeal to grant "all such remedies whatsoever as any of the parties may appear to be entitled to in respect of any and every legal or equitable claim properly brought by them respectively in such cause or matter, &c."

By O. XVIII, 2, no cause of action shall, unless by leave, be joined with an action for the recovery of land, except claims for mesne profits or arrears of rent or double value in respect of the premises claimed or any part thereof, and damages for breach of any contract under which the same or any part thereof are he'd, or for any wrong or injury to the premises claimed. But this is not to prevent the Plt in a foreclosure or redemption action from asking for an order for delivery of possession.

As to the effect of this rule, *v. sup.* Vol. I. p. 2.

An action for partition is not an action for the recovery of land: *Gledhill v. Hunter*, 14 Ch. D. 492 (not following the intimation of opinion given in *Whetstone v. Dewis*, 1 Ch. D. 99).

Where no statement of defence had been delivered in a partition action, it was required that the statement of claim should be concisely verified by affidavit: *Senior v. Hereford*, 4 Ch. D. 494; but see *contra*, *Ripley v. Sawyer*, 31 Ch. D. 494, where, on motion for judgment in default of pleading by Plts in a partition action, some of the Defts being infants, it was held to be not necessary that there should be such an affidavit.

In *Willis v. W.*, 38 W. R. 7; 61 L. T. 610, where infants were interested, an affidavit was required, having regard to O. LI, 1a, notwithstanding the admission of the Deft; and in *Crook v. C.*, W. N. (90) 26, this case was followed, but with an intimation that it was not to be regarded as a general precedent.

Where the interests of the parties were not ascertained, inquiries were directed for the purpose of ascertaining such interests before the issue of a commission of partition: *Calmady v. C.*, *Duncan v. Howell*, cited in *Agar v. Fairfax*, 1 L. C. Eq. 181; *Jope v. Morshead*, 6 Beav. 213; but a Deft in a partition suit was not entitled of right as against his co-Deft to an inquiry as to title: *Backhouse v. Paddon*, 14 W. R. 273; 13 L. T. 625. An inquiry would not be granted to enable a Plt to supply material omissions in proof of his own title: *Jope v. Morshead*, 6 Beav. 213; and the existence of a will under which he claims must be proved before commencing a partition action, which will be directed to stand over to take proceedings for that purpose in the Probate Division: *Pinney v. Hunt*, 6 Ch. D. 98.

Where the action is in the district registry, the usual inquiries may be made there, but the application for a sale should be made in the Chambers of the Judge of the Chancery Division to whom the action is attached: *Sykes v. Schofield*, 14 Ch. D. 629.

Where a testator has given the trustees of his will a discretionary power of sale, which is still subsisting (*Biggs v. Peacock*, 22 Ch. D. 284, C. A.), or himself fixed the period for a sale (*Swaine v. Denby*, 14 Ch. D. 326), or given them active powers of managing the estate, the Court will not direct a sale or partition, so as to anticipate the period or interfere with the discretion or powers given to the trustees: *Taylor v. Grange*, 13 Ch. D. 223; 15 Ch. D. 165, C. A.

Only in exceptional cases can the title be proved in Court; the rule is to send a reference to Chambers as to the title: *Hawkins v. Herbert*, 37 W. R. 300; 60 L. T. 610.

PARTITION ACTS, 1868, 1876 (31 & 32 V. c. 40; 39 & 40 V. c. 17).

Mere difficulty or inconvenience, as in the case of a single house or hereditament, was no ground for refusing a partition, there having been no power in the Court, except by the consent of all parties, to decree a sale: see *Turner v. Morgan*, 8 Ves. 143; *Warner v. Baynes*, Amb. 589; Lawrence on Part. 5, 6; Dan. 1102.

And to meet the difficulty often arising when one of several persons interested refused to consent to a sale of property, not easily capable of division, the Partition Act, 1868 (31 & 32 V. c. 40), was passed, which gives power to the Court, subject to the conditions contained in sects. 3, 4, 5, in a suit for partition, where, if the Act had not been passed, a decree for partition might have been made, to direct a sale and distribution of the proceeds instead of a division of the property.

As to the transfer of proceedings from the County Court to the High Court, and *vice versa*, see *Thomson v. Flinn*, 17 Eq. 415; *Rawlinson v. Miller*, 1 Ch. D. 52; and Vol. I., Chap. XXXIV., p. 843.

The Court has exercised discretion to direct a partition instead of a sale, under the Act: *Dicks v. Batten*, W. N. (70) 173, *inf.* Sect. II. Form 2; to make the order for sale or partition conditional upon the result of the inquiries: *Nichols v. Winn*, *sup.* Form 27, p. 1870; and to direct a partition in opposition to the chief clerk's certificate: *Allen v. A.*, 21 W. R. 842; 42 L. J. Ch. 839.

A judgment may be made in the same action for partition of part and sale of part of an estate: *Roebuck v. Chadebet*, 8 Eq. 127; *Allen v. A.*, 21

W. R. 842; 42 L. J. Ch. 839; *sup.* Form 26; and *Pennington v. Dalbiac*, 18 W. R. 684, *sup.* p. 1870, where the parts to be dealt with in either manner were left to be settled in Chambers, and the party having the conduct of the sale was allowed to bid.

Under the Act of 1868, s. 3, even where the object of the suit was a sale only, a partition must have been prayed for: *Teall v. Watts*, 11 Eq. 213; *Holland v. H.*, 13 Eq. 406; *contra*, *Aston v. Meredith*, 11 Eq. 601.

But by the Partition Act, 1876, s. 7, an action for partition "shall include an action for sale and distribution of the proceeds, and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and shall not be necessary to claim a partition."

A judgment for sale in a partition action operates as a conversion of the shares of the parties interested (not under disability): *Arnold v. Dixon*, 19 Eq. 113; *Steed v. Preece*, 18 Eq. 192; *Re Pickard*, *Turner v. Nicholson*, 56 L. T. 293; *Re Beamish's Estate*, 27 L. R. Ir. 326.

But in the case of persons under disability, an equity for reconversion arises by force of the Partition Act, 1868, s. 8, which incorporates the Settled Estates Act, 1856, ss. 23—25 (now Settled Estates Act, 1877, ss. 34—36).

Accordingly the proceeds of an infant's share of real estate sold under the Partition Act, 1868, will be treated as realty: *Foster v. F.*, 1 Ch. D. 588; and on his death descends to his heir-at-law, who will take it as realty or personalty, according to its actual state of investment: *Mordaunt v. Benwell*, 19 Ch. D. 302; and so in the case of a person of unsound mind: *Grimwood v. Bartels*, 25 W. R. 843; 46 L. J. Ch. 788; *Re Barker*, 17 Ch. D. 241, C. A.; and it would seem that the law laid down by *Foster v. F.*, *sup.*, still holds good, notwithstanding the Partition Act, 1876 (39 & 40 V. c. 17), s. 6 (*v. inf.* p. 1877), and the dicta of Jessel, M. R., in *Wallace v. Greenwood*, 16 Ch. D. 362; and where an infant by a next friend is one of several Plts by counsel requesting a sale, and a sale is ordered upon this request, the proceeds of the infant's share ought to be earmarked as real estate: *Re Norton, N. v. N.*, (1900) 1 Ch. 101; examining and approving *Howard v. Jalland*, W. N. (91) 210, Form No. 14, p. 1861.

And where, under an order made in a partition action in the presence of trustees and tenant for life, proceeds of sale were paid to the trustees (who had a power of sale with the consent of the tenant for life, and were "persons absolutely entitled" within the principle of *Re Hobson's Trusts*, 7 Ch. D. 708, *v. inf.* p. 2445), the interest of a reversioner in the fund, dying intestate, devolved as personalty: *Re Morgan, Smith v. May*, (1900) 2 Ch. 474.

The mere request for a sale by solrs or counsel for an infant does not operate as an election by him to take as personalty: *Howard v. Jalland*, W. N. (91) 210; *v. sup.* Vol. I. p. 232.

So also the share of a married woman who has died without electing to treat the property as converted (as to which, see *Fowler v. Scott*, 19 W. R. 972), or having done any act to affect her equity to a reconversion under the Settled Estates Act (*Mildmay v. Quicke*, 46 L. J. Ch. 667; 6 Ch. D. 553), has been held to be real estate; but since the Act of 1876, s. 6 (*v. inf.* p. 1877), if an order be made for sale of a married woman's share in realty, with her consent or at her request, it will operate as a conversion: *Wallace v. Greenwood*, 16 Ch. D. 362; but see *Re Norton, N. v. N.*, *sup.*

A married woman electing on her examination in Court to take as personal estate the proceeds of sale of real estate devised to her in fee, they were paid to her husband: *Standerling v. Hall*, 11 Ch. D. 652.

For the effect and operation of the Trustee Act, 1893, s. 31, see *sup.* Chap. XLI., "TRUSTEES," pp. 1272 *seq.*, and *inf.* Sect. II., pp. 1890, 1891.

SALE IN LIEU OF PARTITION—REQUEST FOR SALE.

Partition Act, 1868, s. 3.—This section gives the Court power, in any partition suit (see *Pryor v. P.*, 19 Eq. 595, and the Partition Act, 1876, s. 7), to direct a sale and distribution of the proceeds instead of partition at the request of any party interested, notwithstanding the dissent or disability of the majority, if the Court is satisfied that a sale, &c. will be more beneficial.

for the parties interested than a division of the property, having regard to the nature of the property, the number of parties interested, the absence or disability of some of the parties interested, or any other circumstance.

Persons requesting a sale under this section must satisfy the Court that it is, under the circumstances, the most beneficial course for all parties: see *Drinkwater v. Ratcliffe*, 20 Eq. 528; *Allen v. A.*, 21 W. R. 842; 42 L. J. Ch. 839; *Lawrence on Partition*, 34; *Walker*, 14; *Dan*, 1107; and see *Re Dyer*, *D. v. Paynter*, 33 W. R. 806.

And in the absence of express averment the Court will not infer from the mere description of the property that a sale will be more beneficial than a partition: *Evans v. E.*, W. N. (83) 48; 52 L. J. Ch. 304.

Incumbrancers upon the shares of tenants in common are "parties interested" in the property under sects. 3, 4: *Davenport v. King*, 31 W. R. 911; 49 L. T. 92; W. N. (83) 133.

A tenant in common who has mortgaged his share to another tenant in common cannot enforce a partition or sale of the whole property against the will of the mortgagee except upon the terms of paying off the mortgage; but the right of a tenant in common who has mortgaged his share to obtain a partition or sale of the whole property is unaffected by sub-sect. 2 of sect. 25 of the Conveyancing Act, 1881: *Gilbs v. Haydon*, 30 W. R. 726; 47 L. T. 184.

Sect. 4.—Under sect. 4, which gives parties interested to the extent of one moiety the right to a sale, unless, having regard to the nature of the property, the Court sees good reason to the contrary, the burthen of showing that a partition will be more beneficial than a sale is thrown upon the parties resisting a sale: *Drinkwater v. Ratcliffe*, 20 Eq. 528; *Rowe v. Gray*, 5 Ch. D. 263; *Lys v. L.*, 7 Eq. 126; *Pemberton v. Barnes*, 6 Ch. 685; *Porter v. Lopes*, 7 Ch. D. 358.

Mere inconvenience to a party resisting a sale, *e.g.*, by turning him out of premises occupied for business purposes, is no sufficient reason to the contrary: *Wilkinson v. Joberns*, 16 Eq. 14; *Roughton v. Gibson*, 25 W. R. 265; 46 L. J. Ch. 366; 36 L. T. 93; nor is a possible loss of income to an infant Deft: *Rowe v. Gray*, *sup.*

But under sect. 4 a sale has been refused when clearly injurious to the Defts opposing, and with no countervailing advantage to the Plt whose request, in the opinion of the Court, proceeded from feelings of family hostility: *Saxton v. Bartley*, 27 W. R. 615; 48 L. J. Ch. 519.

Although this section is retrospective (*Lys v. L.*, 7 Eq. 126), it did not enable a decree for partition, with liberty to carry in proposals for a sale, made before the Act but not carried out, to be varied by directing a sale: *Pryor v. P.*, 19 Eq. 595; 10 Ch. 469.

Sect. 5.—By sect. 5 it is provided in effect that in every case of an action for partition, whether a sale would or would not be more beneficial to the parties than a partition, if any party, whether owning more or less than a moiety, requests a sale, the Court shall have a discretion to order a sale, "unless the parties opposing the sale are willing to take his share at a valuation."

This section is for the benefit of those parties who want a sale, but who, from not being interested to the extent of a moiety, have not the *prima facie* right under sect. 4, and may not be able to show that a sale is more beneficial than a partition within sect. 3. And the section does not qualify or control sect. 3, nor operate as a proviso upon it, so that a party asking for a sale cannot be compelled to part with his share on a valuation: *Pitt v. Jones*, 5 App. Ca. 651; affirming *Gilbert v. Smith*, 11 Ch. D. 78, C. A. And though he has requested a sale, he may afterwards withdraw his request (and ask for a partition): *Williams v. Games*, 10 Ch. 204; *Drinkwater v. Ratcliffe*, 20 Eq. 528.

The meaning is, that "The Court may order a sale, unless the other parties agree to take the share at a valuation, in which case the party requesting a sale may either accept a valuation or not. If he does not choose to accept a valuation he cannot be forced to do so, but will then have his common law right of partition": *Pitt v. Jones*, *sup.*, per Lord Blackburn.

Where Plts entitled to three-sixteenths desired a sale, which was opposed by the Defts, who were entitled to the rest of the property, and were willing

to buy out the Plts at a valuation, the Court being of opinion that, owing to the nature of the property and the number of the parties interested, a sale would be beneficial to all parties, directed a sale, with liberty to all parties, other than those having the conduct of it, to bid: *Gilbert v. Smith*, 11 Ch. D. 78, C. A.; affirmed, 5 App. Ca. 651, *nom. Pitt v. Jones*.

On an application for a sale under sect. 5 by the owner of less than a moiety the Court will not direct a sale, even though none of the other persons interested undertake to purchase the applicant's share, unless the applicant shows some good reason for a sale: *Richardson v. Feary*, 39 Ch. D. 45.

Where a sale is asked for, the Plts should show in their statement of claim under which section of the Act they wish to proceed, and a sale will not be ordered under sect. 3 unless it is shown that it would be more beneficial. If a case is made out under sect. 3, the Deft will be given the right of purchasing under sect. 5, unless the Plts accept a partition instead of a sale: *Evans v. E.*, 31 W. R. 495.

Partition Act, 1876, s. 6.—The power of a married woman (see *Higgs v. Dorkis*, 13 Eq. 280) and of an infant (see *Grove v. Comyn*, 18 Eq. 387; *Davey v. Wiedlisbach*, 15 Eq. 269) to request a sale was extended by the Partition Act, 1876 (39 & 40 V. c. 17), s. 6, which provides that in an action for partition a request for sale may be made, or an undertaking to purchase given, on the part of a married woman (previously incapable of giving such an undertaking, see *Drinkwater v. Ratcliffe*, 20 Eq. 528), "infant, person of unsound mind, or person under any other disability, by the next friend, &c., guardian, committee in lunacy (if so authorized by order in lunacy), or other person authorized to act on behalf of the person under such disability, but the Court shall not be bound to comply with any such request or undertaking on the part of an infant, unless it appear that the sale or purchase will be for his benefit."

As regards the capacity of women married since the Married Women's Property Act, 1882, to sue and be sued, *v. sup.* Chap. XXXVII., pp. 887 *et seq.*

Where a request for a sale on the part of a married woman is necessary, it should be made by a person specially authorized to act on her behalf in the action; a request by her counsel is not sufficient. Where her share is under 200*l.*, the Court will dispense with a married woman's separate examination as to her election to take the money as personal estate, and will pay it to her on her separate receipt: *Wallace v. Greenwood*, 16 Ch. D. 362; see also *Grange v. White*, 18 Ch. D. 612.

The word "guardian" in sect. 6 of the Act of 1876 includes the guardian *ad litem* of an infant, and a request for sale may be made by the next friend or guardian *ad litem* as being the person "authorized to act" on his behalf, but the request will not be granted unless the Court is satisfied that to do so is for the infant's benefit: *Rimington v. Hartley*, 14 Ch. D. 630.

By the Lunacy Act, 1890, s. 120, the Judge in lunacy may authorize the committee of the estate of a lunatic to sell any property belonging to the lunatic, or make exchange or partition of any property belonging to the lunatic, or in which he is interested, and give or receive any money for equality of exchange or partition.

SALE OUT OF COURT.

For the provisions of O. LI, 1A, as to sales out of Court, *v. sup.* Vol. I., p. 343. Before the making of these rules there was no jurisdiction under sect. 8 of the Partition Act, 1868, to direct a sale out of Court when there were infants interested, and the trustees had no power of sale: *Strugnell v. S.*, 27 Ch. D. 258.

An immediate sale out of Court has been ordered under special circumstances: *Re Stedman*, *Coombe v. Vincent*, W. N. (88) 119; 58 L. T. 709 (Form 23, *sup.* p. 1867); *Willis v. W.*, 38 W. R. 7; 61 L. T. 610; *Wood v. Gregory*, 43 Ch. D. 82; and see Form 24, *sup.* p. 1867.

The order should contain directions that the reserve price and the auctioneer's remuneration should be fixed in Chambers, and that the conditions of sale should require the purchaser to pay his purchase-money into

Court: *Pitt v. White*, W. N. (87) 127; 57 L. T. 650 (Form 23, *sup.* p. 1867); *Willis v. W.*, 38 W. R. 7; 61 L. T. 610; *Crook v. C.*, W. N. (90) 26; *sup.* Vol. I., p. 333, Form 3.

PARTIES TO ACTIONS FOR PARTITION—SERVICE—FURTHER CONSIDERATION.

Before the Partition Acts inquiries were directed previously to the issue of a commission to ascertain the interests of the parties in the property; and a sale will not now be directed, unless all persons interested are before the Court, or their absence has been satisfactorily accounted for: see Dan. 1114.

Parties under Partition Act, 1868.—The Partition Act, 1868, s. 9, as amended and extended by the Partition Act, 1876, s. 3, provides in effect:—

(1.) That a sale will not be directed at the hearing unless all persons interested in the property are parties to the action, and the title is then proved: see *Lees v. Coulton*, 20 Eq. 20; *Mildmay v. Quicke*, 20 Eq. 537; *Rawlinson v. Miller*, 1 Ch. D. 52.

(2.) That a sale will not be ordered, even on further consideration, unless every person interested in the property is a party to the action: *Dodds v. Gronow*, 17 W. R. 511; 20 L. T. 104; or has been served with notice of the judgment on the hearing: *Peters v. Bacon*, 8 Eq. 125; *Teall v. Watts*, 11 Eq. 213; *Hurry v. H.*, 10 Eq. 346; or the Court dispenses with such service upon the absent person (see Partition Act, 1876, s. 3); or he may be presumed to be dead: *Jackson v. Lomas*, 23 W. R. 744; *Rawlinson v. Miller*, 1 Ch. D. 52; and see Walker on Partition, 25, 29.

The grounds specified in the Partition Act, 1876 (39 & 40 V. c. 17), s. 3, for dispensing with service of notice of the judgment on the hearing are, the impossibility of effecting service on all the persons required to be served by the Partition Act, 1868, or of serving them except at an expense disproportionate to the value of the property.

The Court has no jurisdiction to dispense with service of notice of the judgment, except on the terms of publishing advertisements, and where no advertisement had been published the distribution of the estate was, upon further consideration postponed: *Hacking v. Whalley*, 51 L. J. Ch. 944; *Phillips v. Andrews*, 56 L. T. 108; 35 W. R. 266; W. N. (87) 15; but sect. 4, sub-sect. 3, of the Act of 1876 applies only to persons beneficially interested, and in the case of bare trustees advertisements are unnecessary: *Crosseman v. Richards*, W. N. (88) 167.

In an action for partition of leaseholds, the interest of persons beneficially interested under the will is sufficiently represented by the exors and trustees for sale: *Stace v. Gage*, 8 Ch. D. 451; *Re Strutt's Trusts*, 16 Eq. 629; *Re Pott's Estate*, *ib.* 631, n.; and under O. xvi, 7, devisees in trust will be treated as sufficiently representing persons beneficially interested: *Simpson v. Denny*, 10 Ch. D. 28.

Incumbrancers upon the entirety (or separate parts of the entirety, see Form 5, *sup.* p. 1856) ought not to be made parties, nor the mortgagees of undivided shares unless it is sought to redeem them: *Sinclair v. James*, (1894) 3 Ch. 554.

A partition action may be brought by a person of unsound mind not so found by a next friend: *Porter v. P.*, 37 Ch. D. 420, C. A.

A solr instructed by the children of a person of unsound mind will not be authorized to sue as a next friend: *Hodgson v. Kent and Surrey Building Society*, W. N. (88) 90.

Inquiries as to parties.—If all persons interested are not parties to the action, then, according to the Partition Act, 1868, s. 9, inquiries must first be directed at the hearing "with a view to an order for partition or sale being made on further consideration." It was held in the earlier cases under this Act that when inquiries have been directed at the hearing under sect. 9 as to persons interested in the property, or the propriety of the proposed sale, the Court would not direct a sale at the same time, but that such direction would be postponed until further consideration, when the result of the inquiries had been certified: *Buckingham v. Sellick*, 22 L. T. 370; *Fleet v. Gladish*, V.-C. M., 20 April, 1872; and see *Harper v. Bird*, 23 W. R. 646; *Lawe v. Stoney*, W. N. (76) 141. But according to the more recent practice it is not abso-

lutely necessary to postpone the sale until further consideration, but a sale may be directed subject to the result of the inquiries as to persons interested and the propriety of the proposed sale.

As a general rule, when a request for sale is made at the trial by alleged owners of a moiety, an inquiry in Chambers will be directed to ascertain the persons interested; but in simple cases, where the value is small, an immediate sale may be ordered on evidence showing the persons interested: *Wood v. Gregory*, 43 Ch. D. 82, explaining *Re Stedman*, W. N. (88) 119; 58 L. T. 709.

And upon admission of title, and the Deft not objecting, an immediate sale may be directed on motion for judgment: *Burnell v. B.*, 11 Ch. D. 213.

In a partition action commenced in a district registry the usual inquiries may be made in the district registry, but the order for sale should be applied for in Chambers: *Sykes v. Schofield*, 14 Ch. D. 629; Form 3, p. 1855.

For form of Master's certificate as to persons interested, see D. C. F. 760.

Declaration that sale beneficial.—The declaration that a sale will be more beneficial than a partition ought not to be inserted in the absence of the parties interested (but only when the Court is satisfied that all persons interested are before it): *Re Hurdiman, Pragnell v. Batten*, 16 Ch. D. 360; Form 1, *sup.* p. 1853.

Sale on further consideration.—The words "further consideration" have been construed in a popular, and not in a strictly technical sense, *i.e.*, the sale may be directed on a subsequent application in Chambers without formally setting down the action for hearing on further consideration, after it has been certified that all persons interested have been made parties to the action, or, if not parties, have been served with notice of the judgment: *Mildmay v. Quicke*, 20 Eq. 537; *Powell v. P.*, 10 Ch. 130; and see Form 1, *sup.* p. 1853; or after the expiration of the time limited by advertisement for parties interested who cannot be served to come in and establish their claims after an order dispensing with service and directing such advertisement has been obtained under the Partition Act, 1876, s. 3, which provides that thereupon the Court may, if it shall think fit, direct a sale and give all necessary and consequential directions.

Any sale, however, which takes place before the certificate has been made is irregular, and the purchaser is entitled to be discharged: *Powell v. P.*, 10 Ch. 130; unless all parties interested were in fact before the Court, or satisfactorily accounted for at the hearing, and a good title could be made independently of the Act: see *Rawlinson v. Miller*, 1 Ch. D. 52.

Judgment and notice thereof.—A decree for sale in a partition action binds not only the interests of persons not in existence, but also of those who, though in existence, are persons not yet ascertained (*e.g.*, the right heirs of a living person), and therefore cannot be made parties: *Barnett v. Moxon*, 20 Eq. 182; and see *Lees v. Coulton*, *Id.* 20; *sup.* p. 1858.

By the Partition Act, 1876, s. 4, where an order is made dispensing with service of notice on any person or class of persons, and property is sold by order of the Court:—

- (1.) The proceeds of sale shall be paid into Court to abide further order.
- (2.) The Court shall by order fix a time at the expiration of which the proceeds will be distributed, and such time may from time to time be extended.
- (3.) The Court shall direct such notices to be given, by advertisements or otherwise, as it thinks best adapted for notifying to any persons on whom service is dispensed with, who may not have previously come in and established their claims, the fact of the sale, the time of the intended distribution, and the time within which a claim to participate in the proceeds must be made.

Under this sub-section, and O. LV, 35, the Court has no jurisdiction to dispense with service, except on the imperative terms of publishing advertisements: *Phillips v. Andrews*, 56 L. T. 108; 35 W. R. 266; and see *Hacking v. Whalley*, 61 L. J. Ch. 944; W. N. (82) 135.

- (4.) If at the expiration of the time so fixed or extended, the interests of all the persons interested have been ascertained, the Court shall

distribute the proceeds in accordance with the rights of those persons.

- (5.) If at the expiration of the time so fixed or extended, the interests of all the persons interested have not been ascertained, and it appears to the Court that they cannot be ascertained, or cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the Court shall distribute the proceeds in such manner as appears to the Court to be most in accordance with the rights of the persons whose claims to participate in the proceeds have been established, whether all those persons are or are not before the Court, and with such reservation (if any) as to the Court may seem fit in favour of any other persons (whether ascertained or not) who may appear from the evidence before the Court to have any *primâ facie* rights which ought to be so provided for, although such rights may not have been fully established, but to the exclusion of all other persons; and thereupon all such other persons shall, by virtue of the Act, be excluded from participation in those proceeds on the distribution thereof, but notwithstanding the distribution, any excluded person may recover from any participating person any portion received by him of the share of the excluded person.

By sect. 5, "Where in an action for partition two or more sales are made, if any person who has by virtue of this Act been excluded from participation in the proceeds of any of those sales establishes his claim to participate in the proceeds of a subsequent sale, the shares of the other persons interested in the proceeds of the subsequent sale shall abate to the extent (if any) to which they were increased by the non-participation of the excluded person in the proceeds of the previous sale, and shall to that extent be applied in or towards payment to that person of the share to which he would have been entitled in the proceeds of the previous sale if his claim thereto had been established in due time."

An application for division of proceeds of sale, in accordance with the Master's certificate, should be made in Chambers where the amount is small: *Shutt v. S.*, W. N. (86) 56.

For forms of advertisements, &c., see D. C. F. 762 *et seq.*

ACCOUNT OF RENTS.

If a Deft, one of several tenants in common, has been in possession and received more than his share of the rents, the relief is not limited to partition (or sale), but an account will be directed of rents and profits received by him: *Lorimer v. L.*, 5 Madd. 363; *Hyde v. Hindly*, 2 Cox, 408; and see *Turner v. Morgan*, 8 Ves. 145.

A Deft may also be charged an occupation rent, but will be allowed all sums properly expended by him in substantial repairs and improvements: *Pascoe v. Swan*, 27 Beav. 508; and see *Watson v. Gass*, 51 L. J. Ch. 480; 45 L. T. 582; 30 W. R. 286; *Rowley v. Ginnever*, (1897) 2 Ch. 503; or laid out on the property with the Plt's concurrence: *Swan v. S.*, 8 Pri. 518; or that of his predecessor in title: *Re Jones, Farrington v. Forrester*, (1893) 2 Ch. 461; and in the absence of special circumstances, the amount allowed will be the present value of the improvements due to the expenditure not exceeding the amount actually expended: *Re Cook, Tyndall v. Lawledge*, (1896) 1 Ch. 923; *Williams v. W.*, W. N. (99) 66; 68 L. J. Ch. 528; 81 L. T. 163; *v. sup.* Form 10, p. 1860.

The accounts are, however, reciprocal, and an allowance for repairs will not be made, unless an occupation rent is "paid or allowed in account": *Teasdale v. Sanderson*, 33 Beav. 534; *Re Jones, Farrington v. Forrester*, (1893) 2 Ch. 461, 477.

In charging a Deft with the balance of the account (of occupation rent and repairs), the amount may be set off against his share: see *Graham v. Cole*, V.-C. B., 3 June, 1873, A. 1769; but not as against a mortgagee of his share: *Hill v. Hickin*, (1897) 2 Ch. 579.

A Deft in occupation may be restrained, after judgment in a partition action, from acts of destructive waste: *Wright v. Atkins*, 1 V. & B. 313; but

not from acts contrary to the custom of the country, as between landlord and tenant: *Bailey v. Hobson*, 5 Ch. 180.

One tenant in common of a house, who expends money in ordinary repairs, has no right of action against his co-tenant for contribution: *Leigh v. Dickenson*, 15 Q. B. D. 60, C. A.

COSTS.

Before the Partition Act, 1868, the rule was, as at law, not to give costs on either side until the issue of the commission; and that the costs of issuing, executing, and confirming the commission should be borne by the parties in proportion to the value of their respective interests, without any costs of the subsequent proceedings: *Agar v. Fairfax*, 17 Ves. 542, 547; 1 L. C. Eq. 181; *Calmdady v. C.*, 2 Ves. jun. 568; *Elton v. E.*, 27 Beav. 632; and the practice was the same in Ireland: *Balfe v. Redington*, 2 Ir. Ch. 324.

By the Partition Act, 1868, s. 10, the Court, in partition actions, "may make such order as it thinks just respecting costs up to the time of hearing;" and having regard to this section, the Court is no longer bound by the former rule, but has absolute discretion in the matter: *Simpson v. Ritchie*, 16 Eq. 103; and the entire costs up to, as well as subsequent to, the hearing will, unless under special circumstances (see *Wilkinson v. Joberns*, 16 Eq. 14; *Richardson v. Feary*, 39 Ch. D. 45), come out of the estate rateably in proportion to the respective interests of the parties: *Cannon v. Johnson*, 11 Eq. 90; *Leach v. Westall*, 17 W. R. 313; *Thompson v. Richardson*, I. R. 6 Eq. 596; *Miller v. Marriott*, 7 Eq. 1 (not following *Landell v. Baker*, 6 Eq. 268, where it was held that the Act was not intended to alter the practice as to costs); *Ball v. Kemp-Welch*, 14 Ch. D. 512; i.e., when the estate is sold, out of the proceeds of sale: *Belcher v. Williams*, 45 Ch. D. 510; *Graham v. Clinton*, 81 L. T. 717; the shares for this purpose being ascertained at the date of the certificate. And in *Osborn v. O.*, 6 Eq. 338, the costs of all parties were declared to be a lien on the proceeds of the sale. O. LXV, 14A (sup. p. 1435), may be applicable to such costs: see *Graham v. Clinton*, sup.

In *Richardson v. Feary*, 39 Ch. D. 45, North, J., gave no costs up to the date of the inquiry as to persons interested, and directed the subsequent costs to be borne rateably.

There is no fixed rule in partition, as in admon actions, that only one set of costs should be allowed in respect of each share: *Belcher v. Williams*, 45 Ch. D. 510; in which case the Plt's moiety being mortgaged, and Deft's not, North, J., ordered the costs of all parties, including those of the mortgagees, to be paid first out of the proceeds of sale; but in *Catton v. Banks*, (1893) 2 Ch. 186, Kekewich, J., declined to follow this decision, and held, in a similar case, that only one set of costs in respect of each share should be allowed out of the fund in Court; and this has since been followed: *Ancell v. Rolfe*, W. N. (96) 9; *Re Vase*, 84 L. T. 761.

When the relief claimed is partition and not sale, the old rule that the costs are to be borne by the parties rateably and in proportion to their shares applies: *Bowes v. M. Bute*, 27 W. R. 750.

A D. ft who had improperly disputed the Plt's title in a partition suit, or by his conduct rendered the suit necessary, might be ordered to pay so much of the costs as had been thereby occasioned, or his own costs: *Wilkinson v. Castle*, 16 W. R. 501; 37 L. J. Ch. 467; 18 L. T. 100; *Hill v. Fulbrook*, Jac. 574; and this course has been followed since the Partition Act, 1868: see *Graham v. Cole*, V.-C. B., 3 June, 1873, A. 1769; *S. C.*, L. J. Notes of Cases (73), 102.

And in *Mildmay v. Quicke*, 46 L. J. Ch. 667, the costs occasioned by the severance, as Defts to a partition action, of husband and wife, were ordered to be borne by her share.

The costs can be taxed as between solr and client only by the consent of parties, otherwise they must be as between party and party: *Ball v. Kemp-Welch*, 14 Ch. D. 512.

SECTION II.—PARTITION.

1. *Partition in Chambers subject to Inquiries directed, with special Inquiries as to Moneys laid out in Improvements.*

THIS action coming on &c., and upon hearing [*enter pleadings and evidence*] read what was alleged by counsel on both sides, this Court doth order that the following inquiries and account be made and taken, that is to say:—1. An inquiry of what particulars the real estates and hereditaments of which G. C., deceased, in the pleadings mentioned, was seised of or entitled to at the time of his death then consisted, and of what the same now consist. 2. An inquiry who are the persons interested in the said real estates and hereditaments, and for what estates and interests, and in what shares and proportions, and whether they are parties to this action. 3. An inquiry what incumbrances affect the entirety of the said real estates and hereditaments, or any and what parts thereof. 4. An account of the moneys (if any) expended by any and which of the persons interested in the said real estates and hereditaments in permanent improvements to the said estates and hereditaments since the death of the said G. C. 5. An inquiry to what extent (if any) the present value of the said estates and hereditaments has been increased by such expenditure. And if it shall appear that all the persons entitled to or interested in undivided shares in the said hereditaments are parties to this action, or have been duly served with notice of this judgment, it is ordered that a partition be made of the said hereditaments by the Judge in Chambers, with liberty to charge sums in gross by way of equality of partition. And it is ordered that the said hereditaments be partitioned, allotted, and divided into as many shares as the same shall appear to be divisible into [but in making such partition regard is to be had to the moneys (if any) which, under the said account, No. 4, shall be found to have been expended by any or either of the parties in permanent improvements, and to the extent (if any) to which, under inquiry No. 5, the present value of the said hereditaments and premises has been increased thereby]. And it is ordered that such shares be allotted to the persons to whom the same shall appear to belong in such proportions and for such estates and interests as shall be certified. And such parties are to hold and enjoy their respective shares and proportions of the said hereditaments in severalty according to such allotments, and to their respective estates and interests therein. And it is ordered that proper conveyances and assurances to vest the allotted shares in severalty in the respective persons to whom the same shall be severally allotted, according to their respective estates and interests therein, be executed by all proper parties, such assurances to be settled by the Judge. And it is ordered that all deeds and writings relating to the said hereditaments in the custody or power of any of the

parties be upon oath brought before the Judge as he shall direct. And it is ordered that such of the same as belong exclusively to the premises that shall be allotted to each or either of the said parties be delivered to or be retained by them respectively. And any of the parties are to be at liberty to apply at Chambers as to any of the deeds or writings belonging to the premises as shall be allotted to two or more of them. And it is ordered that the costs and charges of the said partition be borne by the parties rateably and in proportion to their respective shares.—Liberty to apply.—*Kenrick v. Mountstevens*, Cozens-Hardy, J., 10 Nov. 1899, A. 4241; *Hicks v. Bound*, M. R., 1 March, 1862, A. 490.

In *Kerly v. Blaine*, Kekewich, J., 22 March, 1900, where the property was freehold ground rents, and one of the parties entitled to a share was R. H. T., a person of unsound mind, not so found, who appeared by his guardian *ad litem*, the order followed the above form, with the following variations:—After the direction as to conveyances and assurances the following declaration was inserted, “And Declare that after such partition shall have been made and confirmed the Deft, R. H. T., will be a trustee within the meaning of the Trustee Act, 1893, of such shares of the said hereditaments vested in him as shall be allotted to the said other parties”; and after the direction as to costs the following direction was added, “The costs and charges directed to be borne by the Deft, R. H. T., to be a charge on the share to be allotted to him.”

By the Conveyancing Act, 1881 (44 & 45 V. c. 41), s. 9 (8), an acknowledgment given under that Act satisfies any liability to give a covenant for production and delivery of copies of or extracts from documents, and (sub-sect. 11) an undertaking for safe custody satisfies any liability to give a covenant for safe custody of documents.

2. Partition in Chambers on Further Consideration, with Directions as to Deeds and Costs where Infant interested.

“DECLARE that the Plt is absolutely entitled in fee simple to five undivided eighth parts of the hereditaments in the said judgment dated &c. mentioned, subject to two charges thereon for £— and £— respectively, making together £—, now vested in W.; and that one other undivided eighth part is now vested in —, and that one other undivided eighth part is now vested in —, and that the remaining undivided eighth part of the said hereditaments is legally vested in the Deft J. B. in fee simple as to one undivided fourth part thereof for his own benefit, as to one other undivided fourth part thereof for his own benefit, subject to a liability to account for the value thereof to the said H. B., and as to one other undivided fourth part thereof in trust for E. B. [*an infant*], subject to the title by the curtesy of B. his father, and as to one other undivided fourth part thereof in trust for C. B.; And Let, having regard to the declaration hereinbefore contained, a partition be made of the said hereditaments by the Judge in Chambers; And Let the same be divided into — equal parts; And Let — of such parts be allotted as the share of &c.”—Directions for allotment in accordance with the declaration.—“And Let the Plt and the Deft and the said C. B. &c. hold and enjoy their respective shares in severalty according to such allotments, but subject as aforesaid; And Let the Plt and the Deft and the said C. B. &c. execute all such con-

veyances as shall be necessary for effectually vesting the said shares in the parties aforesaid according to their respective interests therein, such conveyances to be settled by the Judge; And Let the deeds and writings (surveys and muniments or other evidences of title) relating to the said hereditaments in the custody or power of any of the parties be produced upon oath before the Judge, as he shall direct; And Let such of the deeds &c. as relate exclusively to the premises that shall be allotted to any of the parties other than the said E. B. [*the infant*] be delivered over to them respectively, and such of the deeds &c. as relate as well to the premises that shall be allotted to any of the said parties as to the premises that shall be allotted to any others or other of them be delivered over to the Plt upon oath, he by his counsel submitting to produce the same on necessary occasions, and to [enter into a covenant for that purpose (such covenant to be settled by the Judge), and to deliver attested copies thereof at the expense of any other or others of the said parties requiring the same;] or [give an acknowledgment and undertaking for safe custody of the same as provided by the 9th section of the Conveyancing and Law of Property Act, 1881, *v. sup.* p. 1883]; And such of the deeds as relate exclusively to the premises that shall be allotted to the said infant E. B. are to be deposited with the Central Office for safe custody on behalf of the said infant until further order; and any of the parties are to be at liberty to lay proposals for a partition before the Judge in Chambers."—Costs to be borne by the several parties rateably and in proportion to the value of their respective shares.—Direction to tax and certify, having regard to the direction last aforesaid, the amounts (if any) due from any of the said parties to any others or other of them, as the case may be, in respect of costs, and for payment of the amounts so certified; except as regards the infant, whose costs are to be a charge on the share allotted to him.—Liberty to apply &c.—See *Dicks v. Batten*, V.-C. S., 2 June, 1870, A. 1987; *S. C.*, W. N. (70) 173.

For the like decree, with declaration that an infant Deft was a trustee within the Trustee Act, and that it was for his benefit that the hereditaments should be partitioned, &c. without commission or reference as to title, see *Collinson v. C.*, V.-C. S., 31 May, 1856, A. 1085.

For decree declaring that Plts and Defts were entitled to the hereditaments in moieties, and having regard to such declaration a direction for partition by the Judge in Chambers, see *Evans v. Hughes*, M. R., 14 Jan. 1861, A. 157; *Atkinson v. Barton*, M. R., 6 June, 1861, A. 1201.

For decree for partition without commission, but with liberty to lay proposals for that purpose before the Judge in Chambers, see *Clarke v. Clayton*, 2 Giff. 335; *Ley v. Wolston*, V.-C. S., 2 May, 1857, B. 1073; 30 July, 1858, B. 1871.

For decree for partition of freehold, copyhold, and leasehold estates, but any of the parties to be at liberty before the commission should be issued to carry in a scheme for the partition in Chambers, see *Beloe v. Braure*, V.-C. S., 4 July, 1857, A. 1347.

For decree for performance of an agreement for partition of copyholds between joint tenants, and for mutual surrenders, see *Bolton v. Ward*, 4 Ha. 530.

With respect to the direction as to title deeds, see *inf.* p. 1891.

For partition by commission with inquiries and special directions, see *Seton*, 5th edition, Form 3, p. 1561.

3. *Partition by Commissioners named of Lands in a Colony subject to Rent-Charges.*

“LET a partition be made by A., B., and C., all of —, in Tasmania, or any two of them, of the real estate devised by the will of D. the testator &c., subject to the two annuities or rent-charges in the pleadings mentioned into equal third parts; And Let the said A., B., and C., or any two of them, and they are hereby authorized to, meet together at certain proper and convenient times and places to be for that purpose appointed by them, or any two of them, and thence go and enter upon and walk over and survey the real estates devised by D. the testator &c., and according to the best of their skill, knowledge, and judgment, make a fair partition, division, and allotment of the said real estates into three equal parts or shares, having due regard to the values of the respective parts, and subject as to each third part to one-third part of the said two annuities or rent-charges; And for the better making of such partition, division, and allotment, they, the said A., B., and C., or any two of them, are hereby authorized and empowered to cause all such witnesses as they or any two of them shall see occasion for to come before them, and then examine each and every of them apart on their respective oaths before them, or any two of them, upon such interrogatories as they shall see occasion for, to discover and make out the truth, and to take the depositions of such witnesses in writing, and to cause the same to be plainly and fairly engrossed or written on parchment; And Let thereupon the said A., B., and C., or any two of them, allot one of such third parts or shares, distinguishing the same by proper metes and bounds, to be held in severalty in trust for the Plt for her life for her separate use, with such remainders over as in the said will of the said D. mentioned.”—Like directions as to the two other third parts.—“Subject as to each of the said third parts to a liability to exonerate the other two-third parts thereof from one-third part of the said two annuities or rent-charges, and subject as to each of the said third parts to any moneys or rent-charges which may happen to be charged thereon for equality of partition; And Let the said A., B., and C., or any two of them, after they shall have done and performed the several things which they are hereby ordered and empowered to do, certify and return unto this Court the facts and proceedings in the premises by their certificate fairly written on parchment, together with the said examinations and interrogatories (if any) under their hands and seals; And the Plt and the said N. and W. respectively, and those interested under the said will respectively, in the said third parts respectively in remainder are respectively to hold and enjoy their said respective shares in severalty according to such allotments; And the Plt and the said N. and W. and all other proper parties are to execute such mutual conveyances to each other of such respective third parts according to their respective interests therein for the purpose of carrying such partition into effect as this Court shall

hereafter direct."—Adjourn &c.—Liberty to apply.—*Galloway v. Mackersey*, M. B., 26 July, 1861, A. 1748.

For orders (1) naming commissioners, (2) for commissioners to make their return, (3, for order *nisi* to confirm commissioners' certificate, (4) for order absolute, and (5) for order to quash commissioners' certificate, see Seton, 5th ed., Forms 5, 6, 7, 8, and 9, pp. 1563—1564.

4. *Special Inquiries as to Shares—Occupation Rents—Timber cut, and Stone, &c. quarried—Repairs—Accounts—Commission of Partition to issue.*

"LET the following &c.:—1. An inquiry what estates, honours, manors, lands, tenements, hereditaments, and fisheries were devised by the testator D. to A., the grandfather of the Plt C. and F. deceased, as tenants in common in fee simple; 2. An inquiry what shares and interests the Defts respectively are entitled to in the moiety of the said estates &c., devised by the will of the said F.; 3. An inquiry whether the said Defts respectively, or any and which of them, have or has, during any and what time or times since they respectively became entitled as tenants in common to such shares and interests, been in receipt of the rents and profits of the said estates and premises, or of any and which of them, or of any and what parts thereof; and whether the said Defts respectively, or any of them, have or has during any and what time or times since they respectively became entitled as aforesaid, been in the occupation of any and what parts of the said estates and premises, and whether or not as tenants or tenant under any and what lease or agreement entered into with the Plt B., as committee of the estate of the Plt C., and whether such lease or agreement was entered into with the approbation of the Master to whom the matter of the lunacy of the said C. has from time to time been referred; 4. An inquiry whether the said Defts respectively, or any and which of them, have or has cut or felled, or appropriated any and what timber or other trees upon any parts or part of the said estates, and what was the value of the timber or other trees so cut and felled, or appropriated; and whether the said Defts respectively, or any and which of them, have or has dug and raised upon or from any parts of the said estates any and what quantities or quantity of building stones, or other stones, or building stone or other stone, and what were or was the value of the said building stones or other stone; 5. An account of all and every sum or sums of money received by the said Defts respectively, or by any of them, or by any other &c., for or on account of the said rents and profits of the said estates and premises, or for or in respect of the timber or other trees so cut and felled or appropriated, and for or in respect of the stones or stone so dug and raised as aforesaid upon or from the said estates; 6. An inquiry what would have been a proper occupation rent or proper occupation rents in respect of such parts of the said estates and premises as have been in the occupation of any and which of the said Defts respectively, or in the possession or receipt

of the rents and profits of which it shall appear they or any of them have been, under any such lease or agreement for a lease with the Plt B., and such Defts are respectively to be charged with such occupation rents respectively during the times they were respectively in such occupation or possession, having regard to any account settled; 7. An inquiry whether any and which of the said Defts have or has properly laid out or expended any and what sums of money in substantial repairs or lasting improvements upon the said estate and premises or any part thereof, and under what circumstances, and whether anything, and what, has been properly expended by the said Defts respectively, or any and which of them, and to whom, for quit rents in respect of the said estates."—*Partition in Chambers*, Forms 1 and 2, *sup.*, with usual directions [or commission to issue, Form 3; *Seton*, 5th ed. p. 1561].—*Adjourn &c.*, and reserve the subsequent costs of this action, except the costs of the said partition.—*Cooper v. Fisher*, V.-C. E., 19 March, 1841, A. 1159.

For partition of manor and declaration that Plt was entitled to two undivided third parts or shares of and in the manor of X. and other the hereditaments and premises in the certificate, &c. mentioned, and that Deft was entitled to the remaining third part or share and other hereditaments, &c. subject to the annuity or rent of £—, and to the legacy of £— vested in Defts G. and L. as trustees; directions for commission, &c., and allotment according to declaration—the trustees and the annuitant to join in the conveyance to Plt of his two-thirds free from the annuity and legacy, see *Hanbury v. Hussey*, M. R., 29 June, 1855, A. 1454; S. C., 14 Beav. 152.

5. *Partition in accordance with Agreement—Allowance for Equality of Partition.*

THIS action coming on for trial &c.; Let the freehold and leasehold properties to which the Plts and Defts are jointly entitled be partitioned in accordance with the agreement, dated &c.; And Let the Deft A. B., the surviving trustee of the indenture of settlement, dated &c., hold the freehold hereditaments in the schedule hereto mentioned upon the trusts of the said settlement, dated &c.; And Let the Deft C. D. for equality of partition pay to E. F. £—.—*Watson v. Guss*, Fry, J., 10 Dec. 1881, B. 2097; S. C., 51 L. J. Ch. 480.

6. *Partition of Advowson—Presentation to be alternate—Persons under whom Defendant claimed having presented, Plaintiff to have next Turn.*

"DECLARE that the Plt is entitled to have a partition of the advowson of the vicarage of the parish church of W., in the county of K., into moieties, to present by alternate turns; And Let a partition be made thereof accordingly between the Plt and the Deft S., devisee in the will of J. S.; And for the making such partition, the Plt and the Deft S.

are mutually to execute conveyances to each other, so that the Plt may hold one moiety of the said advowson to him and his heirs, and the Deft S. the other moiety thereof to her and her heirs, as tenants thereof in severalty respectively; And Let in such conveyance a clause be inserted, that the Plt and his heirs, and the Deft S. and her heirs, shall present to the said vicarage by alternate turns; And Let the conveyances be settled by the (Judge) in case the parties differ; And Let the charges of the conveyances be borne equally between the Plt and the Deft S.; And it appearing that J. S., under whom the Deft S. claims, hath since the agreement for a partition or division of the premises, presented upon the last avoidance of the said vicarage, Let the Plt present on the next avoidance, being the first turn from this time."—Dismiss action as against the heir of J. S. with costs; And give no costs as between the Plt and the Deft S.—See *Bodicoate v. Steers*, L. C., 18 July, 1737, A. 613; 1 Dick. 69.

*7. Next Presentation to be by Lot, and after Presentation
Advowson to be sold.*

"DECLARE that the right of presentation to the rectory of C., mentioned in the will of J., the testator &c., upon the avoidance thereof by the death of the testator's son W., the last incumbent thereof, passed by the will of the testator J., and that such right of presentation is now vested in the Deft J. L., the surviving exor of the will, and devisee of trust estates of the Deft L. deceased, the last surviving trustee of the will of the testator J., for the benefit of the following seven persons, that is to say:—The Defts C. &c., as tenants in common; And such persons not agreeing upon the clerk to be nominated for presentation to the said living by the said J. L., Let such seven persons, or their respective solrs on their behalf, draw lots, before the Judge, which of them shall nominate a clerk to be presented to the said living; And Let the said J. L. present to the said living, upon the said avoidance, such clerk as shall be nominated by such one of the said seven persons as shall be named in the certificate of the Master, as the person by lot entitled to nominate such clerk; And as soon as may be after such presentation shall have been made, Let the advowson of the said rectory of C., and the testator's messuages, lands, and hereditaments, situate &c., be sold with the approbation of the Judge."—Money to be paid into Court.—Directions as to costs.—*Johnstone v. Baber*, L. C. and L. JJ., 6 Aug. 1856, A. 1364; 6 D. M. & G. 439.

This decree follows in form *Seymour v. Bennett*, L. C., 15 Dec. 1742, B. 96; 2 Atk. 483, declaring the right of Plt and Deft as grantees of a public office to nominate by turns to a vacant clerkship, as in the case of an advowson between tenants in common.

For partition of manor and advowson, where the advowson could be included in one share, thereby avoiding the necessity of providing for alternate presentations, see *Brooke v. Browne*, V.-C. W., 8 July, 1854, A. 1564.

8. Costs payable by Parties under Disability charged on their Shares.

Costs of partition to be borne according to the respective shares; And Let such costs of the Defts C. and wife, and G. and wife, and B. the lunatic, and also their costs of this action up to this hearing, to be taxed &c., be a charge on the fourth part allotted to the said Defts.—*Singleton v. Hopkins*, V.-C. S., 22 Nov. 1855, B. 238; 4 W. R. 107; and see *Hubbard v. H.*, V.-C. W., 19 Dec. 1863, A. 2542.

Costs of infants in partition suit, both before and after the issuing of the commission, were charged upon and ordered to be raised out of the shares allotted to such infants in severalty: *Cox v. C.*, 3 K. & J. 554; following *Singleton v. Hopkins*, *sup.*; and this course has been adopted for the purpose of selling, in a partition suit, property in which infants were interested: see *France v. F.*, *Young v. Y.*, 13 Eq. 173, 175, n., and cases cited *sup.* p. 1024. But in *Grove v. Comyn*, 18 Eq. 387, Chap. XXXVIII., Sect. 3, Form 5, *sup.* p. 985, the Court, having declared that it was beneficial for all parties, gave effect to the infant's request for a sale; and this course is now sanctioned by the Partition Act, 1876, s. 6.

NOTES.

PARTITION BY COMMISSION, OR IN CHAMBERS.

The proceeding by commission of partition is now not often adopted, the more usual, satisfactory, and less expensive course, since the Court of Chancery Acts, 1852 (15 & 16 V. cc. 80, 87), being to direct the partition to be made by the Judge at Chambers: *Clarke v. Clayton*, 2 Giff. 333; *Bowles v. Rump*, 9 W. R. 370; *Greenwood v. Percy*, 26 Beav. 572, in which case the Court, on sufficient evidence of fairness, decreed an immediate partition, without commission, of an estate in which infants were interested; and see *Stanley v. Wrigley*, 3 Sm. & G. 18; but in *Bull v. B.*, 18 L. T. 870, the decree was made for a commission with liberty for any of the parties to lay proposals before the Judge in Chambers for a partition. For forms, see D. C. F. 758 *et seq.*

For the practice as to issuing the commission, and the powers and duties of the commrs, see Lord Redesdale's opinion on the form and course of this proceeding, in *Curzon v. Lyster*, Seton, 1st ed. 189; Dan. 6th ed. 1336—1344.

The proper course on a summons to appoint commrs for a partition is, where the parties cannot agree, for each side to name a certain number (generally two) and for a portion of these to be struck out, and if necessary in order to secure an uneven number, for one commr to be appointed by the Court: *Howard v. Barnwell*, 2 N. R. 414.

Having made their allotment, the commrs must prepare a certificate showing what has been done under the commission. The commission and certificate, with the depositions and schedule annexed and engrossed, are transmitted to the Central Office, and filed: *Jones v. Totty*, 2 Sim. & St. 219. An order *nisi* may then be obtained on motion of course to confirm the certificate: *A. G. v. Hamilton*, 1 Madd. 215; *Allen v. A.*, Seton, 5th ed., Form 7, p. 1564; and if no cause is shown against the confirmation within the time limited, the order to confirm will, upon motion of course, be made absolute.

If there is any ground for objecting to the certificate, a motion should be made on notice, supported by affidavits, to suppress or quash the certificate: *Watson v. D. Northumberland*, 11 Ves. 155; *Peers v. Needham*, 19 Beav. 316; or otherwise that the certificate may be reconsidered and varied: see *Ames v. Comyns*, 16 W. R. 74; 17 L. T. 163.

The circumstances of the parties and the property should be taken into consideration by the commrs. It is not necessary that every part of the estate should be divided if by so doing the value would be lessened; it being

sufficient if each party has his share in value of the whole: *E. Clarendon v. Hornby*, 1 P. Wms. 446.

If the commrs cannot agree they should, it seems, make separate certificates, or, as a last resource, draw lots: *Canning v. C.*, 2 Dr. 434; *Curzon v. Lyster* (Lord Redesdale's opinion), Seton, 1st ed. 189, 191; though where two commrs make a return one way, and two others make a return directly the contrary way, there is no validity in either; and a new commission (directed to an uneven number) will, it seems, be awarded: see *Watson v. D. Northumberland*, 11 Ves. 153; *Corbet v. Davenant*, 2 Bro. C. C. 252; *Canning v. C.*, *sup.*

The return of the commrs being looked upon as in the nature of an award, will not be set aside on slight grounds, or for mere unequal value, if honestly made: *Peers v. Needham*, 19 Beav. 31; *Ames v. Comyns*, 16 W. R. 74; 17 L. T. 163; nor except on proof of misconduct, excess of authority, gross error of judgment, or clear mistake: *Jones v. Totty*, 1 Sim. 136; *Story v. Johnson*, 1 Y. & C. Ex. 538; *Manners v. Charlesworth*, 1 My. & K. 330.

Unless so directed by the judgment, commrs cannot award sums for "owelty" (i.e. equality) of partition: *Mole v. Mansfield*, 15 Sim. 41; *Peers v. Needham*, 19 Beav. 316.

But where they certified that they could not divide the estate equally, and so allotted money in equivalent, an inquiry was directed whether it was fit and proper and for the benefit of the parties (one being an infant) that the sums awarded should be accepted: *Mole v. Mansfield*, 15 Sim. 41; *Miles v. Davidson*, V.-C. E., 5 June, 1840, A. 834.

In adjusting the amount to be paid for owelty, the Court allowed sums expended by beneficiaries in possession in improvements so far as the value of the property had been increased thereby: *Watson v. Gass*, 51 L. J. Ch. 480; 45 L. T. 582; 30 W. R. 286; and *v. sup.* p. 1880.

In the case of a partition or exchange of lands under the authority of the Inclosure Act, 20 & 21 V. c. 31, by ss. 6—11, inequality in value may be compensated by a rent-charge where the deficiency does not exceed one-eighth of the actual value.

In partition actions, where all persons interested are shown to be before the Court, and the rights are therefore declared by the judgment, and upon evidence of the fairness of the proposed division, partition may be at once directed, although some of the persons interested are infants, without reserving further consideration: see *Stanley v. Wrigley*, 3 Sm. & G. 18; *Greenwood v. Percy*, 26 Beav. 572, *sup.* p. 1889.

CONVEYANCES—PARTIES UNDER DISABILITY.

By partition at law the legal estate was vested, and as the decree in equity vested the equitable right only, it went on to direct the execution of mutual conveyances by the parties to effect a transfer of the legal estate: see *Whaley v. Dawson*, 2 Sc. & Lef. 372; *Miller v. Warrington*, 1 Jac. & W. 493.

Such conveyances will be settled by the Judge in Chambers if any of the parties are under disability, or if the parties differ.

One of three parties interested in a partition cannot, it seems, refuse to execute a conveyance to another, until conveyances have been executed by both the other parties: see *Orger v. Sparke*, 9 W. R. 180.

By the Trustee Act, 1893 (56 & 57 V. c. 53), s. 31 (*v. sup.* p. 1272), replacing sect. 7 of the Partition Act, 1868, the Court may declare that a party is, or on coming into existence will be, a trustee within the Act of any legal right, whether vested or contingent, and under the other provisions of the Act may vest or convey their interests or discharge their contingent rights.

The usual course is by the judgment to declare that upon partition the infant will be a trustee within the Act of the parts allotted in severalty to the other parties, and by the same, or a subsequent, order to appoint a person (generally one of the other conveying parties) to convey on behalf of the infant, or to vest in such person the share of the infant for the purpose of carrying the judgment into effect: see *Lees v. Coulton*, *sup.* p. 1858; *S. C.*, 20 Eq. 20; see also *sup.* p. 1267.

In *Stanley v. Wrigley*, 3 Sm. & G. 18, an immediate decree being made for



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